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THE  
FEDERAL REPORTER.

VOLUME 118.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

DECEMBER, 1902—JANUARY, 1903.

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## FEDERAL REPORTER, VOLUME 118.

# JUDGES

OF THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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<sup>1</sup> Resigned December 17, 1902.





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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**UNITED STATES CIRCUIT COURTS OF APPEALS AND THE**  
**CIRCUIT AND DISTRICT COURTS.**

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CANFIELD et al. v. CANFIELD.

(Circuit Court of Appeals, Sixth Circuit. October 7, 1902.)

No. 1,043.

**1. WILLS—RULES OF CONSTRUCTION.**

The construction of a will being for the purpose of ascertaining the intention of the testator, the language used must be read in the light of the circumstances of the particular case.

**2. SAME—PRESUMPTION AGAINST PARTIAL INTESACY.**

A testator, having his attention upon his entire estate, will not be presumed, in the absence of a clear expression to the contrary, to die intestate as to any part of it.

**3. SAME—TESTAMENTARY TRUST—VESTING OF ESTATE IN BENEFICIARY.**

A testator, who was a young man, unmarried, and possessed of a considerable estate, had no near relatives except a younger brother, not then of age, who had become somewhat dissipated. After making minor bequests, he devised and bequeathed all the residue of his estate to an uncle "in trust for the use and benefit of my brother." The will provided that the uncle should control and manage the property, paying to the testator's brother such sums from time to time as he should deem best, until the latter became of age, when, if "my said uncle shall think it best, in his judgment and discretion, to pay over and deliver to my said brother all my bequests to my brother, \* \* \* I hereby authorize and direct him to do so." If the uncle did not then think it best to turn over the property, he was to continue to manage and control it until such time as, in his judgment and discretion, he should "deem it prudent and proper to put the same under the management and control of my said brother." No provision was made for disposition of the property in the contingency of its not being turned over to the testator's brother. *Held* that, reading the will in the light of the existing circumstances, it was clearly the intention of the testator to vest the estate in his brother, subject to the right of the trustee, under the discretion given, to withhold the use and enjoyment of it, and that on the death of the brother the property, which had not been turned over to him, vested in his heirs, and did not revert to the estate of the testator.

**4. SAME—EFFECT OF STATUTE ON CONSTRUCTION.**

2 Comp. Laws Mich. 1871, §§ 4129, 4131, which provide that a trust estate shall vest in the trustee, leaving to the beneficiary only the right to enforce the trust, and that the estate and interest not included in the trust on the termination thereof vest in the person creating the same,

or his heirs, cannot operate to enlarge the estate in a trustee under a testamentary trust beyond that intended by the testator, as determined from a proper construction of the will itself.

**5. JURISDICTION OF PROBATE COURTS—MICHIGAN STATUTES—SETTLEMENT OF TRUST ESTATES.**

The jurisdiction conferred on the probate courts by the statutes of Michigan to settle estates, and distribute the funds thereof in the hands of an executor, does not extend to the settlement of the accounts of a trustee under a will, and the distribution of the trust fund on the termination of the trust, which jurisdiction belongs to a court of chancery; and where an executor paid all the debts and specific bequests of his testator, leaving in his hands only the residuary estate, of which he was made trustee under the will, but neglected for many years, and until after the death of the cestui que trust, to settle his accounts as executor when he filed his report, including therein the trust property, a decree of the probate court made thereon, distributing the trust property and funds as property of the estate, is void as against an heir of the cestui que trust who was the real owner of the property, but who, although known to the executor, was not made a party to the proceedings, and whose rights were not considered or adjudicated.

**6. TRUST—ACCOUNTING BY TRUSTEE—INTEREST.**

A trustee, not shown to have wasted the estate or to have derived a profit therefrom, should be charged only with simple interest at the legal rate on funds remaining in his hands from time to time uninvested.

**7. SAME—LIABILITY OF TRUSTEE FOR CONVERSION—UNAUTHORIZED CONVEYANCE OF REAL ESTATE.**

Where a trustee under a will undertook to convey real estate to which he had no title, as appeared from the will and proceedings thereon, which were matters of record, but it did not appear that he acted fraudulently, having made the conveyances without receiving any payment therefor, pursuant to a decree of distribution made by the probate court, which was, however, void as against the real owner for want of jurisdiction, he should not be charged, in favor of such owner, with the value of the real estate, as for a conversion, unless it should be determined in litigation instituted for the purpose that the lands are not recoverable.

**8. JUDGMENT—ALLOWANCE BY PROBATE COURT TO EXECUTOR—COLLATERAL REVIEW.**

An allowance of a lump sum made by a probate court to an executor and trustee under a will as compensation for his services rendered in both capacities cannot be set aside in a collateral proceeding, although the court was without jurisdiction to allow compensation for the services as trustee.

Cross-Appeals from the Circuit Court of the United States for the Western District of Michigan.

A. J. Dovel and Benton Hanchett, for appellants.

Jackson B. Kemper, for appellee.

Before LURTON and DAY, Circuit Judges, and SWAN, District Judge.

DAY, Circuit Judge. This was a bill for an accounting against John Canfield, who died pending the action, for moneys and property alleged to be in his hands as trustee of Edward W. Canfield, deceased, belonging to Hattie H. Canfield, the complainant. The case

† 5. Probate jurisdiction, see note to Quarries Co. v. Thomlinson, 36 C. C. A. 276.

turns principally on the proper construction to be given the will of Henry R. Canfield, who died at Racine, Wis., September 3, 1871. The will was probated in the probate court of Manistee county, Mich., where the deceased had left very considerable property interests. After giving \$5,000 to his aunt Clara E. Marsh, \$1,000 to Cyrus W. Babcock, a friend, his interest in his father's homestead to his step-mother for life, and a watch to his brother in case he had none, the testator, in the sixth clause of his will, disposes of all the rest of his estate as follows (sixth):

"All the rest and residue of my estate, real and personal, I give and bequeath to my uncle, John Canfield, in trust for the use and benefit of my brother, Edward W. Canfield, and leave the management and control of the property hereby given under the sixth bequest of this, my last will and testament, to my said uncle, John Canfield, in trust for the use and benefit of my brother, Edward W. Canfield, according to the best judgment and discretion of my said uncle, John Canfield, and that my said uncle shall pay to my said brother such sums of money from time to time as my said uncle shall, in his judgment and discretion, deem best; and also, when my said brother shall arrive at his majority (that is, shall arrive at the age of twenty-one years), and my said uncle shall think it best, in his judgment and discretion, to pay over and deliver to my said brother all my bequests to my brother, Edward W. Canfield, I hereby authorize and direct him to do so. But it is expressly my will and earnest desire that my said uncle will exercise a sound discretion and judgment in paying over any money or conveying to my said brother any real estate to my said brother, under the sixth bequest of this my last will and testament, and expressly request my said uncle not to do so until my said brother shall, in his (my said uncle's) discretion and judgment, be satisfied that my said brother will manage and make prudent use of the same. And in case my said brother, Edward W. Canfield, shall become dissipated, or in any manner and from any cause, in the judgment and discretion of my said uncle, John Canfield, unfit to hold, control, or manage any of the property, real or personal, lying and bequeathed, under the sixth provision of this my last will and testament, in trust to my said uncle, John Canfield, for the use and benefit of my said brother, Edward, then I do authorize and direct my said uncle, John Canfield, to hold, manage, and control all the real and personal estate given and bequeathed under the sixth provision of this, my last will and testament, till such time as, in the judgment and discretion of my said uncle, John Canfield, may deem it prudent and proper to put the same under the management and control of my said brother, Edward W. Canfield, and not till then."

The testator, Henry R. Canfield, and Edward W. Canfield were the sons of Edmund Canfield and nephews of John Canfield. Edmund died in the year 1871. He left a considerable estate to Henry R. and Edward W. Canfield. Henry R. survived his father only about 6 months. Henry R. was 22 or 23 years old at the time of his death, and Edward W. was about 18 or 19 years of age. Henry's property consisted of real estate in Manistee, Mich., Chicago, Ill., and Elmira, N. Y., about \$20,000 in notes, and a quarter interest in Canfield's Wrecking & Towing Line of Manistee. Edward W. Canfield was a young man of dissipated habits, subject to speers. He became of age in the spring of 1873. John Canfield did not then turn over the estate to him. In fact, he never did so, but gave Edward sums of money from time to time. Edward did not reform, but continued dissipated until his death, which occurred in Idaho in 1893. On September 21, 1871, the will of Henry R. Canfield was probated in the probate court of Manistee county, Mich. This will was admitted to

probate, and letters issued to John Canfield, as executor, on October 16, 1871. On December 18, 1871, John Canfield filed the inventory of the estate. No accounts were filed or other proceedings had until the filing of the petition for an order of distribution of the estate on October 10, 1893. On January 27, 1884, Edward W. Canfield married Hattie H. Canfield, the complainant. This marriage took place in Milwaukee, Wis., where the parties resided for a short time, removing thence to Kansas City, Mo. The complainant shortly afterwards returned to Milwaukee, where Edward promised to join his wife, but in fact never did so. John Canfield knew of this marriage, and sent at least one check payable in whole, or jointly with her husband, Edward, to the complainant. After Edward's death, and on the 10th day of October, 1893, John Canfield filed his petition in the probate court of Manistee county, Mich., setting forth, in substance, that he had paid the specific legacies mentioned in Henry's will; that the funeral expenses and debts of the deceased had been paid; that the residue of the estate had been devised to the petitioner in trust; that, in the exercise of the discretion conferred in the will, he did not pay over the residue of the estate to Edward, but had paid out certain sums for his use and benefit; that there remained in his hands \$31,283.05, and certain unsold real estate in Manistee and Chicago. Hattie H. Canfield was not made a party to this proceeding, or her possible interest in the estate, as the widow of Edward, in any manner referred to. The petition averred that upon Edward's death all the property and estate remaining in the hands of the petitioner, undisposed of, by the provisions of chapter 214 of Howell's Annotated Statutes of Michigan, reverted to the heirs or next of kin of Henry R. Canfield, deceased, who are entitled to the same. It is further averred that all of said estate, real and personal, came to Henry R. Canfield through his father, Edmund Canfield, and that the following named persons, as the petitioner is informed and believes, are the sole next of kin, and entitled to share in the residue of said estate equally, to wit: Maria D. Smith, of the age of 70 years, Clara E. Marsh, of the age of 68 years, paternal aunts, and petitioner, paternal uncle, of the age of 63 years, of Manistee, Mich. The petitioner prays an allowance for services; that a day may be fixed for hearing of the petition and accounting, and notice given to all persons interested, as the court shall direct and the law require. The court is asked to adjudicate who are the next of kin of Henry R. Canfield, entitled to said estate, real and personal, and the share of each person, and that the residue of the estate may duly be assigned to Maria D. Smith, Clara E. Marsh, and the petitioner, in equal portions. Thereupon the probate court made an order requiring the petitioner to give notice to the persons interested in the estate of the pendency of said account, and the hearing thereof, by publication for four weeks in the Manistee Advocate, a newspaper printed and circulated in said county, which order was duly published. On November 13, 1893, an order was entered in the probate court finding that the property remaining in the hands of petitioner reverted to the heirs or next of kin of the deceased, who were found to be said Maria D. Smith and Clara E. Marsh, aunts, and petitioner, uncle, of said Henry, next of kin, and entitled to share

in said residue of said estate equally. Ten thousand dollars was allowed as compensation to said John Canfield as executor and trustee, and he was directed to distribute such residue equally among said Clara E. Marsh, Maria D. Smith, and John Canfield. Afterward, on February 7, 1894, John Canfield filed a report showing that he had distributed the property pursuant to such order, and made deeds for the real estate. John Canfield subsequently turned over his share of the estate, including his compensation, to Maria D. Smith and Clara E. Marsh. Hattie H. Canfield had no notice of these proceedings until May, 1896. Upon trial the circuit court found the complainant entitled to the property remaining in the hands of John Canfield which belonged to Edward W. under the sixth clause of the will, and to all the property of Edward W. which came into his hands from any source, belonging to Edward W. in his lifetime; that the proceedings in the probate court of Manistee county, Mich., were, after Edward's death, null and void as to the complainant. An account was decreed, and reference made to a master for that purpose. After an account before the master, a final decree was entered in the circuit court adjudging John Canfield not to be entitled to any compensation as trustee or executor, "by reason of not giving actual notice to the plaintiff of his application in the probate court in the matter of the estate of Henry R. Canfield, deceased, for an order of distribution of said estate; thereby attempting to convert said estate to his own use, and deprive the plaintiff thereof." John Canfield's estate (he having died pending the suit) is charged with simple interest at the legal rate in Michigan on amounts remaining in his hands from time to time uninvested for the trust estate up to January 16, 1894, when he is found to have converted said estate to his own use, and a decree bearing interest from that date was rendered against his estate. From this decree both parties appealed, raising the questions which we shall proceed to consider.

The purpose of construction is to ascertain the intention of the testator, as expressed in his will, and, if possible, to carry that intention into effect. Precedents are numerous, and, as usual in such cases, many are cited on either side of the controversy. The construction of a will, however, depends upon the language used, read in the light of the circumstances of the particular case. No two wills are alike, and the situation of each testator, as to persons and property, is peculiarly his own. We are to ascertain, if possible, from the language used, what Henry R. Canfield intended in framing the sixth clause of his will. He had a considerable estate. Before reaching the sixth clause, we find him making minor bequests to relatives. He then comes to deal with the major portion of his estate in the residuary clause. Here he has in mind provision for his brother, Edward W., and gives the property to his uncle, John Canfield, "in trust for the use and benefit of my brother." This is the first and leading purpose of the testator,—to dedicate the property to the use and benefit of Edward. In view of the fact that Edward, although then a very young man, had fallen into practices and habits of dissipation, which, if persisted in, would render him unfit to control and manage property, the estate is not to be turned over to Edward, except in such sums as the



trustee shall deem best, until he arrives at the age of 21, and not then except the trustee shall think it best, in his judgment, to pay over and deliver to the brother "all my bequests" to him. Furthermore, the testator contemplated the contingency that Edward might not reform at 21, in which event, so long as he continued unfit to hold, control, or manage the property given under the sixth clause of the will, as a final direction, the trustee is to hold, manage, and control the property till such time as, in his judgment and discretion, he "may deem it prudent and proper to put the same under the management and control of my said brother, Edward W. Canfield, and not till then."

Did the testator contemplate that Edward might add to the follies of extreme youth the dissipation of more advanced years, and thus never become fit to use and control the property intended for him? If so, it would seem the most natural thing for the testator to meet that contingency by making other disposition of the estate. In this clause he was dealing with the bulk of his estate. He had no near kin to whom it might revert in the contingency of Edward's permanent unfitness or incapacity from dissipation or other cause. He was making, it is to be presumed, a testamentary disposition of his entire estate. A testator having his attention upon his entire estate will not be presumed, in the absence of a clear expression to the contrary, to die intestate as to any part of it. *Given v. Hilton*, 95 U. S. 591, 24 L. Ed. 458. If he had in contemplation that his intended bounty for Edward might fail because of his habits, it would have been consonant with the common course of events, as well as the presumption of law, that he should make some other disposition by will of his estate. This he did not do. We think it a fair inference that he did not contemplate such a contingency, but intended the estate to be Edward's at once; postponing its enjoyment first until Edward became 21 years of age, and further until such time as, in the judgment of the trustee, he had reformed sufficiently to warrant his control of the property. It is true that the sixth clause contains language which seems to indicate the necessity of conveying the property from the trustee to Edward. This language, standing alone, gives color to the claim that the estate vested in the trustee until he saw fit to convey it to Edward. But it does not overcome the purpose evident from the whole clause, read in the light of all the language used, and the things the testator has done and refrained from doing in the premises. It seems to us that the testator contemplated his brother as a wayward youth. He was the only one close to him by the ties of blood, and, until age and discipline had corrected his youthful follies, he did not wish him to control the property, which he intended for him only. He did not contemplate that his purpose might fail because of Edward's conduct, and leave the estate at sea, so far as testamentary disposition thereof is concerned. When he was disposing of small parts of his estate in other parts of the will, Henry selected the persons he wished to profit by his estate. It is reasonable to suppose he would have selected for himself the recipients of his larger bounty, had he supposed that it would never be available to his brother because of the conditions imposed. This view is in harmony, also, with the rule of law which favors the immediate vesting of estates unless the testator has clearly indicated a contrary intent.

McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015. This being the proper construction of the will, upon the death of Edward the trust in John Canfield would terminate, and the property vest absolutely in the heirs or legal successor of Edward, which in this case, it is admitted, is his widow; he having died intestate and without issue. We have examined the sections of the Michigan Revised Statutes cited by appellants which are claimed to be controlling in favor of the construction contended for by the appellants. Under section 4129, 2 Comp. Laws 1871, it seems clear that a trust estate is vested in the trustee for the purpose of executing the trust, leaving to the cestui que trust only the right to enforce the performance of the trust in equity. Under section 4131, the estate and interest not included in the trust upon the termination thereof vest in the person creating the trust, or his heirs, as a legal estate. If we concede the construction of the will contended for by appellants, the application of these sections will operate to vest the estate in Henry Canfield's heirs upon the termination of the trust. But all depends upon the proper construction of the will. If we are correct in construing the will to vest the estate in Edward Canfield, subject to the right of the trustee to withhold the use and enjoyment of it, these sections cannot operate to enlarge the estate in the trustee beyond that intended by the testator. *Toms v. Williams*, 41 Mich. 552-567, 2 N. W. 814.

It is claimed for the appellants that the adjudication in the probate court of Manistee county, Mich., is final as to all parties in interest, and determines conclusively the distribution of the estate in the hands of John Canfield as executor. The record shows that John Canfield was appointed executor and qualified as such in October, 1871. It was his duty to have paid the debts and legacies and settle the estate. He filed no account of his doings as such executor, and no further steps were taken in court in the premises until October 1, 1893, after the death of Edward, which occurred on April 16, 1893. In this petition John Canfield sets out that he paid the debts of Henry R. Canfield and the specific legacies as mentioned in the will; that he also paid the funeral expenses and all claims against the estate. The residue of the estate, it is stated in this petition, was devised to the petitioner in trust for the benefit of Edward upon the conditions named in the will. The petitioner then recites that he did not make over the trust estate to Edward, but made certain payments, which are set forth in detail in an account attached to the petition. After stating the death of Edward, the petition recites that all the remaining property in the hands of the petitioner, by the provisions of the Michigan statutes, reverted to the heirs and next of kin of Henry R. Canfield, who are entitled thereto under the laws of the state. It is alleged that Maria D. Smith and Clara E. Marsh, aunts, and the petitioner, uncle, are the sole next of kin of Henry, and entitled to the estate. To this proceeding Hattie Canfield was not made a party, and her relation to Edward is in no wise referred to.

It is claimed by appellants that the proceeding is in rem; that the statutory requirements of the laws of Michigan as to notice of the pendency of the proceedings have been fully complied with, and all persons interested, whether parties or not, are concluded by the order of

the probate court determining the persons entitled to the fund, and ordering the distribution thereof, in the hands of the trustee. How far such proceedings would be conclusive as to the settlement of the estate and the distribution of the funds of the estate in the hands of the executor, in a proper proceeding, we need not stop to inquire. It may be that the executor, who acted in good faith, bringing all the facts before the court, would be protected from subsequent demands after he had complied with the order of distribution made in the probate court. We are now dealing with the trust fund, which passed to John Canfield under the sixth clause of the will. We do not perceive that it makes any difference in the solution of the problem that he did not file his account as executor after paying the debts and legacies, as he should have done. He paid these obligations, and took the residue of the estate into his hands as trustee, and dealt with it as a trust estate. This appears from the recitals of his petition in the probate court. In such case, we think there is no room for the application of the doctrine which protects an executor obeying an order of distribution in a probate court. As a trustee, he was liable to be called to account in a court of chancery. This well-settled branch of equity jurisdiction does not seem to have been interfered with. On the other hand, the supreme court of that state has recognized the chancery jurisdiction as unimpaired by the statutes regulating probate practice. In *Wooden v. Kerr*, 91 Mich. 188, 51 N. W. 937, the supreme court, in dealing with the liability of one who was both executor and trustee under a will, held the power of the probate court alone could settle the executor's accounts and discharge his bond. The *cestui que trust* could alone settle with him for his actions as trustee. See, also, *Weaver v. Van Akin*, 77 Mich. 588, 43 N. W. 1081. After the death of Edward, John Canfield held the estate, constructively, at least, in trust for the widow of Edward, the complainant herein. In the proceeding in the probate court no mention is made of her, or any reference had to her possible rights in the estate. Certainly no principle of equity will permit a trustee to thus summarily dispose of the rights of the beneficiary. John Canfield knew of the marriage, and had sent at least one check to the complainant, as the wife of Edward. In his presentation of the rights of parties to the probate court, he declares that the estate has reverted to himself and the aunts surviving Henry. So far as the record discloses, the rights of the complainant were not in any way brought to the attention of the court. To permit the trustee to thus dispose of the rights of the real beneficiary would be to defraud her of the rights secured to her by the will. The Michigan statutes (sections 5964, 5965, How. Ann. St.) which have been held to give the probate court the jurisdiction and power to construe wills, in determining the distribution of estates in the hands of executors, contemplate notice in some form to persons interested (How. Ann. St. § 5969). The Michigan cases in which it has been held that an executor is protected in the distribution of a fund in his hands, as against all interested persons, even where the construction of the will is involved, by the order of a probate court, are to be distinguished from the case in hand. In the present case John Canfield, after the death of Edward, held the estate in trust for the real owner, who was

the widow of Edward. The question of the interest of any successor to Edward in the trust estate was not involved in the case made in the probate court, and therefore was not concluded by the adjudication. It is elementary law that a judgment, to be an estoppel, must decide the very question in controversy in a court of competent jurisdiction, where the party alleged to be estopped was duly in court, by himself or those with whom he is in privity.

It is further contended for the complainant that the court erred in not charging the account of John Canfield with compound interest upon funds in his hands belonging to the trust estate. The decree charges the estate of John Canfield with interest at the legal rate in Michigan on sums uninvested in the hands of John Canfield from time to time. This seems to be equitable. While the executor did not file his report and account seasonably with the probate court, it does not appear that he wasted the estate or derived profits therefrom for which he should be accountable. He seems to have made judicious investments of considerable portions of the estate. The terms of his trust gave no specific directions as to the investment of funds, and, when the trustee is charged with interest at the legal rate on funds uninvested, it seems that substantial justice is done.

It is further claimed that the real estate conveyed under the order of the probate court should be treated as a conversion, and the trustee held to account for the value of the same to the complainant. The circuit court held that, the order and judgment of the probate court being a nullity as to the complainant, she could still pursue the lands in the hands of those to whom John Canfield had conveyed them by direct conveyance, or grantees in subsequent conveyances from the same source of title. We have not found that John Canfield was guilty of actual fraud in conveying the premises. He was disqualified by sickness from giving his testimony, and died pending the suit. He may have been advised by counsel that it was unnecessary to make the complainant a party. Nevertheless, the proceedings, without her presence, were nugatory as to her. She never had her day in court. The will was of record in the probate court, and its construction involved in the proceeding which resulted in the order of distribution. The title was vested in Edward subject to the trust. When he died the title descended to the complainant as his legal representative. There was no adjudication that Edward died intestate or without heirs. Purchasers would be bound to take notice of the rights of his heirs, if he left any, who were not made parties. In this attitude of the case, we see nothing to prevent the complainant from recovering the lands. The decree refusing to include the value of the lands should be modified so as to show no prejudice to the complainant's right to pursue John Canfield's estate for the value of the lands, if it shall be hereafter adjudicated between her and purchasers thereof that the lands have been lost to her because of any wrongful conversion thereof by him.

In another respect we think the circuit court erred. Finding that John Canfield, by reason of not giving actual notice to the complainant of his application in the probate court for an order of distribution, had attempted to convert the estate to his own use, and to deprive the complainant thereof, he was deprived of all compensation

as executor and trustee. The probate court had fixed the compensation of John Canfield at \$10,000 in both capacities. Over the accounts and compensation of Canfield, as executor, the probate court had plenary jurisdiction. We do not perceive on what principle a court, other than one having power to review the action of the court of probate, could review the order of that court, so far as the executor's account is concerned, and the order fixing compensation in that court should not be disturbed.

In the respects stated as to reserving complainant's rights as to the real estate and compensation to the trustee, the decree is modified, otherwise affirmed, with costs one-third to appellee, two-thirds to appellants, executors, etc.

DONNELL et al. v. AMOSKEAG MFG. CO.

AMOSKEAG MFG. CO. v. DONNELL et al.

(Circuit Court of Appeals, First Circuit. September 4, 1902.)

Nos. 412, 413.

1. SHIPPING—CONSTRUCTION OF CHARTER—DEMURRAGE.

The erasure, before execution, from a printed form of a charter party, of the clauses fixing the number of lay days and the rate per day for demurrage, or the failure to fill the blanks therein, leaves the rights of the parties with respect to demurrage or damages for detention to be determined by the general rule as to reasonable dispatch.

2. SAME—TIME FOR LOADING—USAGE OF PORT.

In determining what constitutes reasonable dispatch, the usages of the ports must be taken into consideration, both parties being presumed to have knowledge of such usages, whether having actual knowledge or not; and where a charter provided that the vessel should report to a certain coal company in Baltimore, and "be loaded by them in turn," the agreed place of loading was, by implication, the docks or piers of such company, and the time required for loading, where not specified in the charter, must ordinarily be determined with reference to its usual facilities.

3. SAME—VESSEL TO BE LOADED "IN TURN."

A provision of a charter that the vessel should be loaded by a coal company "in turn" must be strictly construed, and it shuts out a practice of the company to give preference to its own vessels, or to sell coal to local customers from the supply which would otherwise have been available for loading at its docks, to the delay of the chartered vessel.

4. COSTS ON APPEAL.

Both parties having appealed, the rule as to costs in *The North Star*, 1 Sup. Ct. 41, 106 U. S. 17, 29, 27 L. Ed. 91, is applied in preference to that in *McComb v. Frink*, 13 Sup. Ct. 993, 149 U. S. 629, 644, 37 L. Ed. 876.

Appeal from the District Court of the United States for the District of New Hampshire.

Benjamin Thompson, for Donnell and others.

Edward W. Hutchins and Henry Wheeler, for Amoskeag Mfg. Co.

Before COLT and PUTNAM, Circuit Judges.

PUTNAM, Circuit Judge. These appeals arose out of a libel in behalf of the schooner *Alice M. Colburn* against a cargo of coal at the

¶ 1. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

port of discharge for the purpose of collecting damages for improper detention of the vessel at the port of loading. The charter names no lay days, and therefore no stipulated amount for detention; so that, strictly speaking, there could be no demurrage. The vessel urges the obligation which the law imposes on a charterer to pay reasonable damages for an unauthorized or unreasonable detention at the port of loading or discharge. There is, of course, no lien imposed by the law on a cargo for demurrage, or improper or unreasonable detention, at the former port. In this case, therefore, the vessel necessarily relies on the following clause in the charter: "Vessels to have lien on cargo for freight and demurrage." Inasmuch as, in popular use, demurrage covers not only what is strictly known to the law as such, but also damages for detention when such damages are recoverable, and as this instrument is a mercantile one, it is reasonable that we should hold that this clause gives the vessel a lien for the damages claimed, if she is entitled to them; and no proposition has been made to the contrary by either party.

The first question arises from the fact that the printed form on which the charter party was executed originally contained the following: "It is agreed that the lay days for loading and discharging shall be as follows: Commencing from the time the captain reports himself ready to receive or discharge cargo." These were stricken out before the charter party was executed. It also contained the following: "And that for each and every day's detention by default of said party of the second part, or agent, ——— dollars per day shall be paid by said party of the second part, or agent, to said party of the first part, or agent." As printed, a blank was left before the word "dollars." This was never filled.

Also the charter party, although it was executed between Mr. William T. Donnell, representing the vessel, and the Garfield & Proctor Coal Company as charterer, contained the following, not in the original printed blank, but written in: "Vessel to report to the Consolidation Coal Co., Baltimore, for orders, it being understood vessel shall be loaded by them in turn."

The claimant of the cargo maintains that when the charter party was executed the parties thereto anticipated unusual delay in loading; that thereupon the Garfield & Proctor Coal Company refused to hire the vessel with any liability for demurrage at Baltimore, and that finally a bargain was struck, whereby an enhanced rate of freight was agreed on, with the understanding that there should be no liability for detention resulting from the inability of the charterer to load. It offered some parol evidence to sustain these propositions, but, on fundamental rules, there is nothing which justifies us in giving any weight to that class of proofs. By consigning the vessel to the Consolidation Coal Company, the Garfield & Proctor Coal Company, in whose shoes the claimant stands, made itself responsible for the acts or omissions of the consignee, and in that respect it stands the same as though the stipulation had been that the vessel should report to itself, subject to whatever limitations arise from the fact that the charter party provided that the vessel should be loaded by the Consolidation Coal Company in turn. So that the customary facilities

which the Consolidation Coal Company had at Baltimore for furnishing coal and loading it must be included among the elements which are to be considered in determining whether the vessel was loaded with reasonable dispatch. Nevertheless, the Garfield & Proctor Coal Company, which the claimant succeeds, is not excused in the event reasonable dispatch was not used, having in view all the circumstances which properly may be considered in that connection, including such weight as should be given to the customary facilities which the Consolidation Coal Company possessed. In other words, the erasure of the clause which was erased, and the omission to fill the blank before the word "dollars," have no effect on the construction or application of the charter party other than would have resulted if the blank, as originally printed, contained none of the clauses which were thus nullified.

It is a settled rule of law that, where there is no stipulation as to demurrage, or damages for detention, a vessel must be loaded or discharged with reasonable dispatch according to the customs of the agreed place of loading, its physical conditions, and the peculiar contingencies of the weather, and some other contingencies which are occasionally taken into account. This rule has been stated such an infinite number of times that it is not necessary to enlarge on the authorities where it can be found; but it is well expressed in Scrutton, Charter Parties (4th Ed.) 74, 244. We cite only from page 244, as follows:

"If no fixed time for loading or unloading is stipulated in the charter, the law implies an agreement on the part of the charterer to load or discharge the cargo within a reasonable time, and, so far as there is a joint duty in loading or unloading, that the merchant and shipowner should each use reasonable diligence in performing his part."

This rule has been so often reiterated, and is so essential for working out practical results, that it must be accepted as applicable to any charter party where there is no express provision for lay days, unless there are explicit terms which require otherwise. It is so thoroughly settled that it has almost the force of a statute; and certainly it cannot be rejected by reason of any feeble presumption or hypothesis arising from the mere annulling of the paragraphs which were annulled in the instrument at bar. Therefore we start with the general proposition that this charter party was subject to the usual obligation of reasonable diligence in the matter of loading, and that on that point the charterer must stand for the acts and omissions of the Consolidation Coal Company, to which it consigned the vessel, subject to the qualification which we have already suggested.

As for all charter parties, certain usages at the place of loading must be taken account of. This is independent of any questions whether the usages are known, or whether a party is chargeable with knowledge of them, because it has no connection with those classes of usages which control the construction of contracts or the relations of the parties to each other. Chit. Cont. (11th Am. Ed.) 116, note "u"; 2 Pars. Cont. (8th Ed.) \*537, \*544, \*545; 3 Pars. Cont. (8th Ed.) \*239, \*240; Poll. Pr. Cont. (7th Ed.) 253 et seq.; Robinson v. Mollett L. R. 7 H. L. 802, 838. The topic of the usages of a port with reference

to the mere matter of loading and unloading vessels relates to the application of the charter party or the bill of lading, and not to its construction. It concerns and regulates practical dealings in such manner that, aside from it, infinite confusion would prevail. Such usages fall into the same class as those which relate to the places of anchorage in ports, or the methods of navigating them, to the determination whether, in traveling the highways on a continuous journey between different states or adjoining countries, the right hand or the left hand side of the road should be taken, and to the fact that, although any agreement of transit ordinarily names only the termini of a voyage, the voyage, nevertheless, is the usual voyage, so that nothing which conforms to the usual voyage can be held a deviation. Phil. Ins. §§ 980, 981. The distinction was clearly made in the opinion of Lord Blackburn in *Postlethwaite v. Freeland*, 5 App. Cas. 599, 616. Indeed, with reference to such usages the rule is too well settled that any shipowner sending his vessel to a foreign port must abide by them, whether he knows them or not, or is to be charged with knowing them, to need any citation of authorities; but it is sufficiently stated in *Scrutton, Charter Parties* (4th Ed.) 20, as follows:

"The fact that a person who has contracted to load at a certain port is ignorant of how loading is conducted at that port cannot save him from being bound by the ordinary method of loading there."

The author, on the same page, makes the distinction in this respect which we have already stated with reference to customs of a general character. He also states the rule succinctly at page 106, and it is also found in *Hudson v. Ede L. R. 3 Q. B. 412, 415*, a case elsewhere referred to by us.

We have, then, as the result of this investigation, a charter party by which the vessel in question was to be loaded by the Consolidation Coal Company "in turn," subject to the fact implied by the law that, in the absence of any fixed number of lay days, the vessel was to be loaded with reasonable diligence according to certain usages of the place of loading. Having ascertained these propositions, the general rules of construction of the charter party are sufficiently expressed in *Cargo of 1,755 tons of Cumberland Coal*, in which the opinion was passed down by us on March 4, 1902, found, under the title of *Evans v. Blair* (C. C. A.) 114 Fed. 616, 623. These rules have been settled for a long period of time as applicable to charter parties, and are stated by us at page 619; one of them being a rule of close technical construction, and the other one broad and liberal. The first is that "where, in maritime contracts, parties have seen fit to choose fixed forms of expression, the great variety of contingencies incidental to maritime transactions disenable the courts from establishing any safe theory by which the letter can be modified to meet any supposed intent." This has nothing to do with the other underlying principles that in commercial instruments trade expressions are to be interpreted as understood by merchants, and that, where the real intent can clearly be gathered from the entire instrument, it should be upheld. *Carv. Carr. at Sea* (3d Ed.) § 163 et seq.; *Abb. Shipp.* (5th Ed.) 188; *Scrutton, Charter Parties* (4th Ed.) 11 et seq. The other rule is:



"When the law itself attaches to a contract conditions beyond those expressed by the parties, and attaches them because some conditions beyond those expressed are essential to practically work out what the parties have undertaken to accomplish, the conditions thus attached will be just and reasonable."

We will find, therefore, that, so far as the expression "in turn" is concerned, we must follow a strict construction; but as to any question of usage at the place of loading we must apply just and reasonable rules.

The parties have proceeded very much on the hypothesis that, so far as local usages are concerned, they are governed by those general to the port of Baltimore. Applying a reasonable and just rule, we will find this is true only in a limited sense, because we will find that, although the charter party did not in terms specify any particular place in that port at which the vessel was to be loaded, yet the notorious facts are such that, in view of the stipulation that the vessel should report to the Consolidation Coal Company, and, as the charter party says, be "loaded by them," the agreed place of loading was, by implication, at its docks or piers, and the time required for loading must be justly and reasonably determined with reference to the usual facilities of that corporation in that respect. Scrutton, in continuing the topic of reasonable time (at page 244), says:

"It means reasonable under the circumstances then existing, other than self-imposed disabilities of either shipowner or charterer, and should be estimated with reference to the means and facilities then available at the port, the course of business at the port, and the character of the port with regard to tides and otherwise."

We illustrated this proposition practically in *Randall v. Sprague*, in our opinion passed down on May 1, 1896 (21 C. C. A. 334, 74 Fed. 247, 248), where we referred to charter parties providing generally for loading at Baltimore as follows:

"It is evident that the vessel was chargeable with notice that, by the usage of the port coal was not stored at Baltimore, but was to be loaded from the cars, so that the usual strict obligation to have the cargo on hand prior to commencing loading did not exist in all its particulars."

A similar qualification is referred to by the circuit court of appeals for the Seventh circuit in *Corrigan v. Furnace Co.*, 41 C. C. A. 102, 100 Fed. 870, 882, where the court alluded to the fact that the parties were compelled to "rely for a supply of ore upon the operation of the mines, and its transportation by rail, over neither of which it had or could exercise control." It was also applied by a decision in the exchequer chamber, by judges of very high ability and experience, in *Hudson v. Ede*, L. R. 3 Q. B. 412, with reference to a cargo of grain, which, according to the usage, was loaded into ships from steam lighters which necessarily made a river voyage of 110 miles. These citations illustrate the character of the "means and facilities" referred to by Mr. Scrutton, and which are to be taken into consideration in the case at bar; but an examination of the facts and the authorities applicable to the peculiar provision in this charter party that the vessel was to be loaded by a particular corporation, brings the case down to somewhat closer propositions and a narrower line than if the agreement had been general to load at the port of Baltimore.

The Consolidation Coal Company owned coal mines, situated about 180 miles from Baltimore, producing from 3,000 tons to 5,500 tons per day, a part of which they customarily shipped by rail to Baltimore to be in part loaded aboard vessels for delivery to New England ports, in part sold to steamers in the harbor for their own use, and in part sold for local purposes. The rest of the output of the mines was customarily sent directly from them to other ports than Baltimore. The total output seems to have been from approximately 93,000 tons per calendar month as a minimum to approximately 141,000 tons as a maximum. The amount shipped to Baltimore ran from about 18,000 tons each month as a minimum to about 50,000 tons as a maximum. The total output of the mines in October, November, and December, 1899,—being the only months which concern us,—and the amounts shipped to Baltimore in each of those months, were relatively as follows: In October 135,069.11 tons and 50,558 tons, November 140,933.08 tons and 37,190 tons, December 125,495.10 tons and 38,958 tons. There is nothing to show that for these three months the output of the mines of the Consolidation Coal Company, or its pro rata distribution to the port of Baltimore, was unusual, or afforded anything of which this vessel can complain.

The propositions we have already submitted, therefore, lead to the conclusion that the vessel must be held to have stipulated that reasonable diligence in loading was satisfied by a reasonable exercise of the usual facilities of the Consolidation Coal Company during the months we have named, and that there can be no just ground of complaint as to any lack on the part of the Consolidation Coal Company in availing itself of those facilities, according to what was usual, unless there was some disregard of the stipulation "loaded in turn," or unless the Consolidation Coal Company failed to load with reasonable diligence its coal as it arrived at the port. There is no evidence that it did so fail, and therefore we must conclude that the vessel not only stipulated to submit itself, with reference to being loaded, to the customary facilities of the Consolidation Coal Company at Baltimore, but that it received the benefit of those facilities, unless on account of the words "in turn." That the law justifies this conclusion, based on these facts, is the inevitable result of every just and reasonable construction which can be put on this charter party as applied to the circumstances of the case. This flows out of what we said in *Randall v. Sprague*, *ubi supra*, and of *Corrigan v. Furnace Co.*, *ubi supra*.

Very few cases, if any, have arisen in the federal courts which bear directly on the facts before us. In the English courts there have been many decisions which bear on them, either closely or remotely; but it is not of much value to attempt to apply them, when it generally happens that there is some particular fact which distinguishes every demurrage suit from every other, so that the court, after all, is compelled to go back to the underlying rules, which easily solve the case before us. One late English case, however, is worthy of explanation, not only because it proceeds on the rules which govern us, although under different circumstances, but also because it considers the earlier cases in such way that it is not necessary for us to observe on them. We refer to *Lyle Shipping Co. v. Corporation of Cardiff* [1900] 2

**Q. B. 638.** It is true that that case related to a question of discharging a vessel where the cargo-owner is frequently relieved with reference to unloading by circumstances which would not relieve him as to loading. Notwithstanding this distinction, the case comes out precisely on the same principle as that at bar. It appeared that the vessel was to be "discharged with all reasonable dispatch, as customary." First of all, at page 643, Lord Justice A. L. Smith, very properly, we think, lays aside the words "as customary" on the ground that, if they were not in the charter party, they would be implied. Thus, notwithstanding these words, the charter party in the case cited and that at bar appear to conform; that is to say, in each case the cargo was to be handled with reasonable dispatch according to the custom of the place of loading or discharging. It appeared in the case cited that by the custom of the port of Cardiff the cargo was to be delivered into the wagons of certain specified railway companies, and in no other way; and that the cargo owners were not personally guilty of any negligence in discharging the cargo, but did their best to get the wagons customarily used; and they were held not liable for demurrage which arose from the fact that there was, owing to the stress of work at the port, a deficient number of wagons available. Now, if, in the case at bar, the charter had simply stipulated for loading the vessel at the port of Baltimore, without naming any particular person or corporation by whom she was to be loaded, the charterer might have been liable in any event for demurrage, because it would have been its duty, subject to the possible qualification stated by us in *Randall v. Sprague*, to have had the cargo ready for the vessel when her turn came; but, having stipulated that she was to be loaded by the Consolidation Coal Company, the charterer is brought exactly within the same obligation as to loading that the charterers were in *Lyle Shipping Co. v. Corporation of Cardiff* as to discharging. In the one case the stipulation as to the party by which the vessel was to be loaded limited the particular liability of the charterer with reference to loading, precisely as in the other the charterer's liability was limited in discharging by the usage giving the control thereof to a single railway company. In neither case could there be any liability so long as the customary and usual facilities of the corporation which was to load or the corporation which was to discharge were brought into full effect and operation; and the facts of the case at bar fail to show, as we have seen, and as it will further appear, that there was any deficiency in this particular. The observation of Lord Blackburn in *Dahl v. Nelson*, 6 App. Cas. 38, 44, is to the same effect, where, although under different circumstances, he says, in substance, that, when the dock for discharging a vessel is named by both parties, neither is at fault when, owing to the exigencies of traffic, the vessel is for some time refused admittance to the place of discharge.

The peculiarity of this charter party, in its reference to the Consolidation Coal Company, entirely distinguishes this case from *Adams v. Packet Co.*, 5 C. B. (N. S.) 492, so much relied on by the vessel, where the strict rule is applied that, when a ship is to be loaded at a coal port named generally, the charterer cannot ordinarily excuse himself for not having a cargo in readiness. Indeed, that case was

expressly distinguished from *Harris v. Dreesman*, there cited, in which, as at bar, it was stipulated that the vessel should be loaded from a particular colliery.

We will return to some phases of this topic which we have discussed when we come to consider certain particular propositions made in behalf of the vessel with reference to the claim that there was a lack on the part of the Consolidation Coal Company from what was usual with regard to vessels to be loaded from that particular colliery; but we will now proceed to look at the effect of the expression "in turn." The learned judge who disposed of the case in the district court found that this stipulation had been violated in two particulars: By giving precedence, first, to two steamers belonging to the Consolidation Coal Company, and, second, to certain local demand for steamers for bunker consumption, for street railways, and perhaps other local purposes. On this branch of the case, we are met by an express stipulation in the charter party which is not to be lightly put aside. If it were intended that preferences of these kinds should be given, it was easy to so stipulate in the charter party, and it should have been done. It was apparently usual for the Consolidation Coal Company to give priorities of this character; but this does not relieve the position. On the other hand, the case illustrates in a striking manner what we have already said, that "where, in maritime contracts, parties have seen fit to choose fixed forms of expression, the great variety of contingencies incidental to maritime transactions disenable the courts from establishing any safe theory by which the letter can be modified to meet any supposed intent." The usages alleged are of such an indefinite character that they might permit the loading into the steamers of the Consolidation Coal Company, and the diversion for local uses of the entire output at Baltimore in any one month, or even for more than one month. From the very nature of the usage, no limit can be put on it; so that to refuse this vessel the full benefit of the expression "in turn" would expose her to an indefinite detention at the port of loading, without any rule by which the detention could be measured in advance, and without any relief. The authorities cited by one party or the other which are supposed to bear directly on this question are contradictory. None are of conclusive weight, and they are differently understood by different writers. *Scrutton, Charter Parties* (4th Ed.) 96, 97; *Carv. Carr. at Sea* (3d Ed.) 708, 709; *Abb. Merchant Ships & Seamen* (14th Ed.) 410, 411. In *Evans v. Blair* (C. C. A.) 114 Fed. 616, 620, we pointed out under what limitations some of the expressions in the cases thus cited may be safely applied. On the whole nothing would be gained by our undertaking to discuss them. What we have already said, however, is in the line of what was well observed by Martin, B., in *Lawson v. Burness*, 1 Hurl. & C. 396, 402. In that case it was claimed that the expression "regular turn" in a charter party was to be construed as subject to the custom of the colliery where the vessel was to be loaded, by virtue of which custom vessels were loaded in the order in which they were entered on the books of the colliery, and not in the order in which they reported. Martin, B., observed:

"I cannot conceive anything more unreasonable than that, where two persons enter into a charter party by which a vessel is to load in regular turn, vessels which come in after it should load before it, because, by the practice of the colliery, vessels which are entered first in the book, though not ready to load, are loaded before those which are ready."

As well observed in *Scrutton, Charter Parties* (4th Ed.) 16, such usages "may control the mode of performance of a contract, but cannot change its intrinsic character"; and to submit this vessel, which had stipulated for a specific right as to the order of being loaded, to usages which leave her no definite rights whatsoever, would be a change of that class. We think the conclusions of the learned judge of the district court in reference thereto correct.

The district court allowed demurrage only so far as the vessel was detained by not receiving her turn, as we have explained. She, however, complains that, aside from this, the delay was unreasonable, so that she is entitled to additional demurrage. The facts bearing on her propositions in this respect are so doubtfully exhibited in the record that, if we should attempt to revise the conclusion of the district court in reference thereto, we would have no reasonable expectation of reaching any better result than that court accomplished.

There is a complaint that the charterer had not in force any contract with the Consolidation Coal Company which entitled it to a cargo; but we think the record shows clearly that there was a contract for sufficient coal to be loaded in turn, and to be loaded in turn was all that the vessel was entitled to. It is also complained that the charterer had dispatched to the Consolidation Coal Company an unreasonable number of vessels for loading, thus itself contributing towards obstructing reasonable expedition in loading. It is quite probable that, so far as this represents a proposition of law, it might, under some circumstances, lay a basis for a contention to the effect that the charterer had so accumulated vessels as to prevent reasonable dispatch. The facts, so far as we can ascertain them, do not sustain this complaint. All we can find in reference thereto is to the effect that the tonnage engaged by the charterer was larger than it had been earlier in the year. This signifies nothing, because this might have been expected for the autumnal months. The record shows only 10,300 tons under charter by it, which, in proportion to the traffic of the Consolidation Coal Company, cannot be presumed to be unusual. The vessel reported on November 4, 1899, and her lading was completed on December 15th, this covering 38 working days. The demurrage given her by the district court was for 11 days, leaving 27; so that the vessel, in order to maintain a claim of general lack of diligence, must show that this period of 27 days was unreasonable. There had reported ahead of her 30,200 tons, which, with her, made 32,600 tons to be loaded in 27 days. As we have seen, the coal shipped to Baltimore in November was 37,190 tons, and in December a little in excess of that, and this was not an unusual amount, either with reference to the maximum or the minimum shipments to Baltimore; so that the entire amount to be loaded, according to the usual facilities of the Consolidation Coal Company, for a period of 27 working days, could have been but very little, if any, in excess of 32,600

tons. There is a conflict of evidence as to the amount which the Consolidation Coal Company could load at Baltimore, but the only authoritative testimony is that about 2,000 tons per day was the maximum. The parties fail to show us exactly how much coal was diverted as representing the 11 days' demurrage allowed the vessel by the district court. If this had been stated, we would have had before us the finding of that court as to the reasonable amount of coal to be loaded each working day. On the whole, as the record stands, we can find no justification for revising the determination of the district court in any particular. As both parties have appealed, and neither has maintained its appeal, we can see no occasion for awarding costs to either. This was the rule in *The North Star*, 106 U. S. 17, 29, 1 Sup. Ct. 41, 27 L. Ed. 91, and, though departed from in *McComb v. Frink*, 149 U. S. 629, 644, 13 Sup. Ct. 993, 37 L. Ed. 876, we think it altogether the better practice, unless in exceptional cases.

On each appeal there will be a judgment as follows: The decree of the district court is affirmed, with interest, and without costs.

WEBB, J., sat at the hearing of these appeals, but resigned before they were decided.

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#### CHICAGO TERMINAL TRANSFER R. CO. v. STONE.

(Circuit Court of Appeals, Seventh Circuit. June 12, 1902.)

No. 836.

#### 1. INJURY TO SERVANTS—CAR REPAIRERS—NEGLIGENCE—QUESTION FOR JURY.

3 Burns' Rev. St. Ind. 1894, § 7083, declares that railroad corporations shall be liable for injuries suffered by employes while in its service, such employe being in the exercise of due care, where such injury was caused by the negligence of any person in the service of such corporation, who had charge of any locomotive, engine, or train, or where such injury was caused by the negligence of any person, co-employe, or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf. *Held*, that where an engine was sent out in charge of a young "hostler" to switch certain cars, with no helper in the cab, and with a workman from the shops to serve as a switchman, and the train was backed to a switch where certain cars to be repaired had been left standing, bearing a red flag in plain view, which denoted that repairers were at work on the cars, and, though the engineer noticed that the cars were "pretty close" to his track, and brought the train to a stop within a short distance of the danger point, he continued to back in response to a signal from such switchman, without looking to ascertain the safety of his act, by reason of which the cars on the repair track were put in motion, and plaintiff's intestate, a car repairer at work under the cars, was killed, there was no error in refusing to direct a verdict for the defendant and submitting the case to the jury.

#### 2. APPEAL—INSTRUCTIONS—EXCEPTIONS AT TRIAL.

Where no exceptions were taken to instructions given at the trial, and no instructions were requested, the instructions so given cannot be reviewed on appeal.

#### 3. INJURY TO EMPLOYEE—CONTRIBUTORY NEGLIGENCE.

Plaintiff's decedent, a car repairer, was ordered to repair certain cars which had been placed on a repair track by the company's yard foreman, and a red flag was placed on the end car to indicate that car repairers were at work under the cars. The cars were struck by another train

on another track, by reason of their being too close to the switch to clear, and deceased was killed. *Held*, that deceased was not guilty of contributory negligence.

4. EVIDENCE—VARIANCE—VERDICT.

Where testimony is received without objection, a verdict founded upon it will not be disturbed, though the evidence is not strictly within the allegations of the complaint, since the pleading could be amended to conform to the proof.

5. APPEAL—OBJECTIONS TO EVIDENCE.

The admission of evidence at the trial cannot be reviewed on appeal, in the absence of objections interposed at the time the evidence is offered.

6. EVIDENCE—RES GESTÆ.

In an action for the death of a car repairer, caused by the alleged negligence of a roundhouse "hostler," sent out in charge of a switch engine, without a fireman, an interrogatory, on cross-examination, as to who sent the witness out without a fireman, was admissible as part of the *res gestæ*.

In Error to the Circuit Court of the United States for the District of Indiana.

The defendant in error was the plaintiff below, and recovered judgment upon a verdict against Chicago Terminal Transfer Railroad Company, plaintiff in error and defendant below (hereinafter mentioned as the defendant), in an action founded upon the alleged negligence of the defendant in switching operations, whereby the decedent, Leonard Vanderhere, received injuries which caused his death. The complaint alleges that the decedent was a car repairer in the service of the defendant, and that his injuries were received while "actually engaged in repairing cars upon said company's yard tracks, under the direction and orders of said defendant's foreman, then and there in charge of said yards and roundhouse," and thus states the cause of injury: "That upon said 28th day of March, 1900, while said decedent was then and there under one of said cars, and was then and there engaged in repairing the same, the said defendant company, by and through its servants, who were then and there in the service of said defendant corporation, and then and there had charge of and control of a locomotive engine and train upon said railroad, carelessly and negligently ran said locomotive engine and train of cars against the line or string of cars then and there located upon said side track or repair track, one of which string or line of cars was then and there being repaired by said decedent as aforesaid, and then and there and thereby carelessly and negligently pushed and knocked said car, under which said decedent was then and there at work, down upon said decedent, and then and there wounded, bruised, lacerated, and injured the head, trunk, and limbs, and the bones, muscles, flesh, tendons, ligaments, veins, arteries, nerves, and organs, of said decedent's body, to such an extent and in such manner as then and there to kill and cause the death of said decedent. That the said engineer and the said Leonard Vanderhere, decedent, were then and there both acting in the line of their respective duties as employes of said defendant company." An amended complaint was tendered before the close of the trial, alleging negligence on the part of the switchman in conformity with the evidence, but was disallowed by the court on the ground that the original "allegations were broad enough to cover it."

A statute of Indiana (section 7083, 3 Burns' Ann. St. 1894) provides that such corporations "shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence," in certain cases stated, including the following: "(4) Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employé or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation,

the said person, co-employé, or fellow servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

Jesse B. Barton, for plaintiff in error.

James W. Noel and A. F. Knotts, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge (after stating the facts as above). The assignment of errors, though varied in form, presents two questions only for review: Whether the trial court erred (1) in refusing to direct a verdict for the defendant, or (2) in overruling an objection to testimony brought out on the cross-examination of the witness Larson, called by the defendant.

1. The fact that Leonard Vanderhere, the decedent, received the injury from which he died while engaged in the line of duty as car repairer in the defendant's service, and the circumstances under which such injury occurred, are substantially undisputed. The injury arose in Indiana, and was caused by the alleged negligence of one or more "persons in the service of such corporation,"—that is, by failure to exercise the care and skill which the circumstances and nature of the service demanded,—and the case is subject to the provisions of the Indiana statute above stated. If the alleged cause of action is established by competent testimony and within the terms of this statute, it is plain that the peremptory instruction requested on behalf of the defendant was rightly denied. The injury in question occurred under the following circumstances:

The foreman of yards and repairs had set out a string of eight gondola cars to be repaired, on an east and west track used for that purpose, called in the testimony the "Sand-House Track." At the east end of this track was the switch which connected with the track adjoining on the south, referred to as a "Repair Track." Directed by this foreman, Vanderhere, the decedent,—who is designated by the foreman as "helper," because he had served with the company two weeks only,—proceeded with Stone, another car repairer, to repair these cars, commencing at the eastern end of the string. For this purpose Stone was ordered to separate the four eastmost cars, and he pushed them with a pinch bar eastward so that the first car was placed too near the switch for clearance, as the result proved. Such location was examined by the foreman, and if he did not give his approval in terms, as stated by Stone, the foreman testified that he was satisfied it would not foul with cars switching to the "repair track," and so left it. No measurements were taken, nor were the customary tests made to assure that fact. Vanderhere was not present when the cars were separated or moved, and neither observed their location with reference to the switch nor overheard any remarks thereon, but assisted only in the repair work. A red flag was in place on the east car to give the customary notice that car repairers were working on or under the cars. With the cars so standing on the track, and



the danger signal well displayed, both car repairers were at work under or between the third and fourth cars, out of view of the approaching danger, when the first car was struck on its corner by a train backing through the switch westward to the "repair track"; and this in broad daylight, with no obstruction to the view from the east except that made by the on-coming train. Impetus was thus given to the standing cars, without warning to the workmen, and caused the fatal injury of Vanderhere; Stone being thrown under the car, but escaping serious hurt.

The train so striking the standing car consisted of a backing engine, pushing a steam shovel car and a flat car loaded with a derrick and other material, and was moving in compliance with a signal given by one Williams, who was sent by the roundhouse foreman to serve as switchman with the acting engineer, Larson, in moving these cars and equipments to the "repair track." Williams was a boiler maker, but had some experience in switching; Larson, whom the foreman sent in charge of the engine, was not an engineer, but an employé in the roundhouse, known as "hostler," and had frequently served in taking out engines and moving cars, though only 20 years of age. On the occasion in question no fireman or helper was furnished Larson, who was alone on the engine. To reach the "repair track," after taking up the cars and their equipments, the train backed westward in the direction of the switch, Williams throwing the switch and signaling the movement. Both Williams and Larson observed the cars standing on the "sandhouse track," and, while Larson is uncertain in his testimony whether he noticed the flag, he says:

"I saw it [the standing car] was pretty close, but I was sure, if the switchman would see that the cars wasn't going to clear," he would "signal to come out."

Williams was on the ground, but was uncertain of clearing,—the difficulty of estimating the safety of movement being increased by a slight curve in the track,—and gave the signal to stop, and the train was stopped within about three car lengths of the standing car. Another examination seems to have satisfied Williams that the train could pass, and he signaled to start; but the movement thereupon quickly indicated danger, and he made confused effort to so signal, but not in time to avert the disaster. Larson testifies that he did not observe that the car fouled his track when he resumed backing in obedience to the signal, for the reason that his station as engineer was on the right-hand (south) side of the engine, and his train intercepted the view, though an unobstructed view was obtainable, as he states, from the north side. Undoubtedly, with a fireman or helper in the cab, to serve as lookout on the other side, as customary in switching operations, the engineer would attend only to that duty on his side, and when left alone on the engine he could not perform for both while running. But the question whether reasonable care is exercised depends for solution in each case on the circumstances, and in the present instance involves these special conditions: That the engine was sent out to switch the cars in charge of a young "hostler," with no helper in the cab, and a workman from the shops to serve as switchman; that the train was backed to the switch when the

standing cars bearing a red flag were in plain view, and when the engineer had noticed that the first "car was pretty close" to his track; that, brought to a stop within a short distance of the danger point, with the acting switchman evidently hesitating as to safe clearance, he obeyed the signal to resume backing, under no stress of emergency, and without looking to ascertain the safety of such move from a viewpoint which was seemingly equal, if not superior, to that of the switchman.

On this state of facts we are of opinion that no tenable ground was presented for directing a verdict in favor of the defendant, and that the only issues arising thereupon were issues of fact,—including legitimate inference of fact from the undisputed circumstances,—and were for the jury to determine, under proper instructions defining the negligence for which liability was imposed by the statute, and the rule and burden of proof in respect of contributory negligence or "the exercise of due care and diligence" on the part of the injured person. Instructions which were given in submitting the case to the jury are preserved in the bill of exceptions; but they are not reviewable, in whole or in part, for the reason that no exceptions thereto were taken on behalf of the defendant, nor were any instructions requested other than the request to direct a verdict for the defendant. The contention that contributory negligence appears on the part of the decedent is wholly unsupported by the testimony. On the main issue of negligence in backing the train which caused the injury, the testimony is undisputed, and, to say the least, clearly tends to establish negligence therein. It was properly left to the jury to ascertain whether any person in charge of the locomotive or train, who thus became the representative of the defendant within the terms of the statute, caused the injury "by carelessness and negligence in running and operating," one or both, and their finding is, in effect, that there was negligence on the part of a servant so in charge.

Upon the assumption that the issue was narrowed by the allegations of the original complaint to negligence on the part of the engineer, as contended on behalf of the defendant, the verdict is supported by testimony from which it is fairly inferable. But it is not necessary to rest the finding on negligence alone of the young man acting as engineer, nor is it just to leave it so implied, in the light of the testimony concerning the relation of the acting switchman to the train and his mistake in giving the signal to move. This testimony was received without objection, and, if not strictly within the allegations of negligence in the complaint, an amendment was proper to conform the pleading to the proof so received; but without an amendment "a verdict founded upon it will be sustained." *Graves v. State*, 121 Ind. 357, 23 N. E. 155, and authorities cited; *Railway Co. v. Shanks*, 132 Ind. 395, 31 N. E. 1111. See *Roberts v. Graham*, 6 Wall. 578, 581, 18 L. Ed. 791; *Railroad Co. v. O'Reilly*, 158 U. S. 334, 335, 15 Sup. Ct. 830, 39 L. Ed. 1006. In the present case, however, an amended complaint was duly tendered for that purpose, and was ruled out by the trial court on the ground that the original allegations were sufficient. Assuming (but not intimating) that this ruling was erroneous, it was in no sense harmful to the defendant, and cannot affect the judgment.

In any aspect of the testimony, no error was committed in refusing to direct a verdict for the defendant.

2. The remaining assignment of error, based on the cross-examination of the witness Larson, the engineer, called on behalf of the defendant, is without merit. The assignment recites several questions and answers as objectionable matter; but it appears from the bill of exceptions that all were admitted without objection, except in a single instance. It thus appears that no objections were interposed to the following portions of the testimony thus set forth: That he had no fireman on the engine; that he was sent out without one; that it was not customary to send an engine out without a fireman; that if a fireman had been in place on the left-hand side of the engine, "I suppose he could" have "seen out of that side of the train," and "whether they would strike or not"; that such duty on the part of the fireman is customary and usual; that from his position a fireman, if he had looked out, he "could have seen whether they were going to clear or not." The only objection made throughout the cross-examination was to this question, "Who sent you out without a fireman?" And the objection was placed on the ground that "there is no charge that this injury resulted on account of negligence in not furnishing a fireman." In ruling thereupon, the court remarked that there was no such charge, but that the inquiry was admissible on the issue of negligence on the part of the engineer; and the answer was allowed, that Mr. Snyder (the roundhouse foreman) so sent him. The question and answer were admissible as part of the *res gestæ*, for the purpose stated, and the instructions clearly limited the testimony to that issue.

Finding no reversible error in the record, the judgment is affirmed.

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### MORGAN v. BARNHILL et al.

(Circuit Court of Appeals, Fifth Circuit. October 13, 1902.)

No. 1,136.

#### 1. EVIDENCE OF GOOD CHARACTER—CIVIL ACTION FOR HOMICIDE.

In a civil action to recover damages for a homicide, which defendant alleges was committed in self-defense, evidence of his good character is not admissible in support of such defense.

#### 2. WRONGFUL DEATH—EXEMPLARY DAMAGES FOR WILLFUL HOMICIDE—LAWS OF TEXAS.

Under Const. Tex. 1876, art. 16, § 26, which provides that any person or corporation which may commit a willful homicide shall be responsible in exemplary damages to the surviving husband, wife, or children of the deceased, and Rev. St. Tex. art. 3019, which authorizes the recovery of both actual and exemplary damages in such case, where the evidence in such an action justifies the direction of a verdict for plaintiff it is not error to instruct the jury as matter of law to award exemplary as well as actual damages.

#### 3. SAME—ISSUE OF SELF-DEFENSE—SUFFICIENCY OF EVIDENCE.

In a civil action to recover damages for a willful homicide, defendant's own testimony showed that he brought on the difficulty, used the first

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† 2. Punitive damages for wrongful death, see note to *McGhee v. McCarley*, 44 C. C. A. 259.

offensive language, and struck the first blow, and that he pursued and shot the deceased while the latter was trying to escape. *Held*, that it was not error for the court to refuse to submit the issue of self-defense to the jury.

In Error to the Circuit Court of the United States for the Western District of Texas.

This is an action for damages brought by Libbie Barnhill, L. Howard Barnhill, and William P. Barnhill against L. T. Morgan. The first plaintiff is the widow, and the other two plaintiffs are the minor children, of Charles Barnhill. It is alleged in the petition that in December, 1900, the defendant, L. T. Morgan, without just cause or provocation, and with malice aforethought, killed Charles Barnhill by shooting him with a pistol. The petition shows the particulars of the killing, showing that the deceased was unarmed, and that the defendant pursued and killed him while he was begging for his life. The plaintiffs claim actual damages in the sum of \$15,000, and exemplary damages in the sum of \$15,000. The defendant, L. T. Morgan, answered, denying all the allegations of the petition, giving his version of the difficulty and killing, and alleging that he acted in self-defense. The case was tried on these pleas.

The defendant testified as follows: "My name is L. T. Morgan. I am forty-five years old, and my residence is Plum, Texas. I have been in Texas twenty years. I have been farming, ran a gin, saloon, and merchandising. I was a member of the firm of Morgan & Barnhill. This co-partnership consisted of William Barnhill, Charles Barnhill, J. L. Morgan, W. A. Morgan, and myself. These parties went into partnership about the 10th day of January, 1900. Some time in the spring of 1900—I think it was in the month of February—Richard Ligon came to Will Barnhill and myself and stated that he had been fined \$33.50. The firm of Morgan & Barnhill had been selling Ligon on account, so that he might be enabled to put in his crop. He told us that unless we paid this fine for him he would be compelled to go to jail and on the county road, and thus to abandon his crop. I suggested to Will Barnhill that we had better pay the fine and protect ourselves, and to this he agreed. I told him to go ahead and pay it. Some time after that Ligon brought me a receipt, to which I paid no attention, and put it in my vest pocket. Soon afterwards I laid the garment aside, and did not put it on again until cool weather, and in November I happened to go through the pockets and found this receipt, and then, for the first time, I noticed that it was to L. T. Morgan instead of Morgan & Barnhill. The fine and costs of Ligon should have been paid by Morgan & Barnhill, because the firm of Morgan & Barnhill were running him in the store for the year, and it was to the firm's interest to pay his fine, so he could work his crop. When I discovered that Will Barnhill had drawn the check against me alone by the receipt Ligon gave me, which was from the justice of the peace, I went to Will Barnhill in the store and showed him the receipt, and asked him how this was, and whether he had drawn the check against me, Morgan Brothers, or Morgan & Barnhill. He said: 'I do not know. Charlie drew the check. I will go look on the books, and see how it is charged'; and we then went to the books and looked, and it was not charged to Richard Ligon, nor entered on the books anywhere; and Will said, 'When Charlie comes back we will fix it up.' About two weeks afterwards I thought of it, and went to the store and asked Will if he and Charles had fixed that Richard Ligon matter up. He said, 'You told me to draw the check on you.' I told him he was a liar, and Richard Ligon would bear me out in it. I asked Will where Charlie was, and he said Charlie had not come down yet. I went back to the saloon and waited about one-half of an hour or three-quarters of an hour for Charlie to come down. I then went back to the store to see if Charlie had come, and I saw him sitting on a box at the end of a counter in the back end of the store. I walked to where Charlie was sitting, and sat down on the end of the box where he was, and we were both sticking our knives in the box, and I said: 'Charlie, Will says you wrote the Richard Ligon check, and I want to know if you drew it on

me, Morgan Brothers, or Morgan & Barnhill? He said he knew nothing about it; that he did not write it. Then I got up off the box, closed my knife, put both hands in my pocket, and went upstairs into the office where Will was. I leaned on the end of the desk, and I said to Will, 'What are you and Charles going to do about this check?' 'It looks like you fellows are working for yourselves, and selves alone,' and I understood him to say they were, or something to that effect. And then I struck or slapped him, and he clinched me, and pushed me back a few feet, and I knocked myself loose from him. He then started down the steps, and I came on behind him. As Will left the office and went down the steps Charles Barnhill passed him at the top of the steps. As Charles was going up the steps he passed Will. Charles had a knife in his hand, and struck at me with it, with a hard blow, and I jumped back, and struck at him with my fist. He dodged and became overbalanced, and had to partly run and jump down the steps to the floor to keep from falling. Then he grabbed an ax handle, and started back up the steps, and started to strike at me, and I said, 'Damn you, stop, or I will kill you!' And he didn't stop, and I pulled out my pistol and shot at him. He dropped the ax handle, and ran out the side door, and I followed him. He ran into the cellar from the back door. The cellar was located under the office. I followed right behind him,—in a few feet of him. He ran into the cellar and stopped just to the right of the door. In this cellar was a meat stand, on which we kept bacon, and with this bacon there were always kept two large butcher knives. When I got to the cellar Charles Barnhill was standing by this meat stand, three or four feet from the back door, and a little to the right of the door, and the oil tank was between him and me, and he was about a foot or a foot and a half from the oil tank. I was expecting him to get one of the large butcher knives off of the meat stand and stab me with it, when I first saw his position at the meat stand, and I fired. I did not know which way Will Barnhill had gone, after he left the steps leading from the office. I did not know where he was when Charlie went into the cellar, nor did I know where he was when I came to the back cellar door. The last I had seen of Will, he ran down the steps. There were shot-guns kept on sale in the front part of the store. When he started down the steps he was going in the direction of where the guns were kept. There had never been any kind of unpleasant relations between Will and Charlie Barnhill and myself prior to the time of this difficulty. My object in going to the store was to get this check matter straightened up, and nothing else. Charles and Will Barnhill kept a 45-caliber Colt's pistol in a drawer in the desk in the office. I knew that fact. I did not, after the difficulty in which Charles Barnhill was killed, in the presence of Earl Karnes, Fred Hood, and Mr. McWilliams, on the evening of the killing, or at any other time, say that 'when I came to the cellar door the deceased said, "Crit, don't shoot me;" and that I said, "God damn you, what did you try to cut me for?" and then I pulled the trigger.' I said, 'After I shot Charles Barnhill he said, "Crit, don't shoot me;" and I said, "Damn you, what did you cut me for?"' At no time during the difficulty did I have a knife in my hand."

Cross-examination: "Will Barnhill did not at my direction draw a check to pay Richard Ligon's fine and costs. Will or Charles Barnhill gave Ligon the check, and Ligon went to Le Grange and paid his fine, and brought the receipt back to me, and it showed that the fine and costs were paid by me, but I never noticed it at that time. I noticed it for the first time the next fall, when I put on my winter clothes again, and found it in my pocket. The receipt was in my pocket during all the time, or rather from the time I got it until some time in November, but I was wearing the clothes very little during that time. No, I did not say a word about it to either of the Barnhills until about two weeks before the difficulty, because I had not noticed that the receipt was given in my name. It was about two weeks before the killing before I spoke to them about it. I spoke to Will Barnhill about the matter about two weeks before the killing. I spoke to Will Barnhill about it, and we looked at the books and found that it was not charged upon the books, and he said as soon as Charlie came back we would straighten it up, and I said, 'All right.' I did see Will Barnhill on the day of the killing about a half or three-quarters of an hour prior thereto, and asked him if he had

charged the Richard Ligon fine and costs in the account of Morgan & Barnhill with Richard Ligon, and he remarked that I told him to draw the check on me to pay Richard Ligon's fine, and I told him it was a lie, and I could prove it by Richard Ligon. I do not remember if he was waiting on some ladies in the store at the time. I returned to the store in about a half or three-quarters of an hour. I wasn't mad, but I was a little bothered about it, and, as Will claimed that Charlie wrote the check, I still thought that Charlie would do what was right about it. I did have a six-shooter on when I went to the store, and had it on all that day. When I came to the store the second time I saw Charles Barnhill first. I showed him the receipt of the Richard Ligon fine, and he said he did not write the check and didn't know anything about it. He did not tell me that Will Barnhill was keeping the books, but I knew as a fact that Charles Barnhill kept the books. I then started to the office where Will Barnhill was. After I left Charles Barnhill I did not stop and turn to him and say, 'By God, the Barnhills seem to be looking out for their own interests.' But when I got up in the office where Will was I said: 'Will, what are you going to do about this check? It looks like you boys are working for yourselves, and selves only;' and when I said this I was angry, and was talking only to Will Barnhill, and I was mad when I said it. When I got to the office, where Will Barnhill was, I did not ask him if he had charged that item up to Richard Ligon's account. He had not told me that he had not done so, and I did not then strike him with my fists two or three times. I asked him: 'What are you going to do about this check? It looks like you boys are working for yourselves, and selves only;' and I understood him to say he was. I then struck him with my fist or hand only once. I was then between Will Barnhill and the only exit from the office. He then grabbed me and pushed me back two or three feet, and I knocked him loose from me, and he got by me and went down the steps out of the office. The fuss was stopped, and we were both going downstairs, and I met Charles Barnhill, and was stopped by him. When Will Barnhill and myself were going out of the office I met Charles Barnhill at the top of the steps, and he struck at me with a knife, and I jumped back and struck at him with my fist, and he dodged my lick, and he partly jumped and ran down the steps to the floor to keep from falling. When he dodged my lick, and jumped and ran down the steps, he picked up an ax handle and started back up the steps towards me, and I then drew my pistol and said, 'Stop, or I will kill you,' and I then shot at him. I shot at no particular part of his body. I intended to kill him or make him stop. When he jumped down the steps to pick up the ax handle, I think he put the knife in his pocket. I do not know if he had the knife in his hands when he started up the steps with the ax handle. After Charles Barnhill's dead body was brought out of the cellar, and was lying on the floor, I did not feel in his pockets, or of his pockets, to see if he had a knife in his pockets. When I shot at Charles Barnhill I was up on the office floor, and this floor is five or six feet higher than the store floor, and Charles Barnhill was about half way up the office steps, coming to me. I was not afraid of the Barnhills. Charles Barnhill weighed from 135 to 145 pounds, and I weighed about 195 pounds, and I am a strong and active man. I could not take Charles Barnhill and tie him. When I shot at Charles Barnhill he dropped the ax handle and ran down the steps, and ran out the side door, and I did not see a knife in either of his hands when he ran out of the back or side door, and I followed him with my pistol in my hand, and he was running from me, and he ran into the cellar at the outside door, at the rear of the store. When I got to the cellar door, I looked in and saw Charles Barnhill, but he was not crouching behind a large oil can, as if to hide from me. He was standing up by the meat stand, where two six-inch blade butcher knives were always kept. He was not leaning up against the wall, with his hands upon it. After he was shot he said, 'Crit, don't shoot me;' and I then said, 'Damn you, what did you cut me for?' When I accused him of cutting me I did not accuse him falsely, because I honestly thought he had cut me. After I shot Charles Barnhill he said, 'Crit, don't shoot me;' and I said, 'Damn you, what did you cut me for?' He was standing up by the meat stand, a little bent, as if he was going to pick up something, or had picked up some-

thing. He was standing with his side to me, and looked at me. When I shot him I intended to kill him, because I thought he was fixing to stab me with a butcher knife. After I shot Charles Barnhill I stepped into the cellar. After I walked halfway across the cellar I saw Will Barnhill, and said to him, 'You are the cause of all this trouble,' and struck him twice with my pistol. He had a barrel augur in his hand, but I do not know whether he had it before I struck him or not. He was not going to his dead brother. When I struck him with my pistol I did not knock him down, and do not think I broke his skull. He did not come near dying from the effects of the blows. I had quit striking him when my brothers took the pistol away from me. When I killed Charles Barnhill and assaulted Will Barnhill I did it in self-defense, as I thought they were trying to kill me, and I regret that I had to do it. When Will Barnhill left the office I do not know where he went. The firearms that were in the store of Morgan & Barnhill were kept there for sale, and were located in the forward part of the store. My brother John Morgan was in the storehouse while the difficulty was going on, and he and my brother Will took my pistol away from me after I had quit striking Will Barnhill. I have not called on my brother John Morgan to testify for me in this case nor in the case of murder, because he doesn't know any material facts in the case. Will Barnhill had authority to draw checks for Morgan & Barnhill, but not for L. T. Morgan or Morgan Brothers, only when we told him so. I followed Charles Barnhill about twenty feet to where I killed him, thinking he was going to get something to attack me with."

The court instructed the jury to return a verdict in favor of the plaintiffs for both actual and exemplary damages. The defendant duly excepted to this charge. The jury returned a verdict for \$10,000 actual damages and \$10,000 as exemplary damages. This judgment, amounting in the aggregate to \$20,000, was reduced by remittitur to \$15,000. Judgment being entered, Morgan sued out this writ of error.

The material assignments of error are that the court erred (1) in rejecting evidence of the defendant's good character; (2) in instructing the jury to find a verdict for exemplary damages; and (3) in refusing to submit the question of self-defense to the jury.

H. M. Garwood, Brown, Lane & Garwood, and Wolters, Lane & Lenert, for plaintiff in error.

J. T. Duncan, Miller & Fiset, and Robson & Duncan, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

1. In criminal cases good character may be proved by the defendant as tending to sustain the plea of not guilty, but in civil cases such evidence is, as a general rule, held irrelevant. This is a civil suit between private parties. We find no reason for departing from the general rule which makes evidence of the character of the parties inadmissible. 1 Whart. Ev. § 47, and cases there cited. The rule would, of course, be different in a civil case where the character of a party was at issue. Id. § 48. The circuit court ruled correctly in excluding the evidence offered as to the character of the defendant. *Givens v. Bradley*, 3 Bibb, 192, 6 Am. Dec. 646.

2. It is assigned as error that the trial court instructed the jury to find a verdict against the defendant for exemplary damages. The contention is that exemplary damages are never a matter of right, but are always in the discretion of the jury. Many cases are cited as tending to sustain this view, but we need not comment on them, the question here being controlled by the constitution and statutes of

Texas. Section 26 of article 16 of the constitution of 1876 is as follows:

"Every person, corporation, or company that may commit a homicide through any willful act or omission or gross neglect, shall be responsible in exemplary damages to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

Articles 3017 to 3019 of the Revised Statutes of Texas are as follows:

"An action for actual damages on account of injuries causing the death of any person, may be brought in the following cases: \* \* \* (2) When the death of any person is caused by the wrongful act or negligence, neglectfulness or default of another.

"Art. 3018. The wrongful act, negligence, carelessness, neglectfulness or default mentioned in the preceding article, must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury.

"Art. 3019. When the death is caused by the wilful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered."

The express statutory law which authorizes this action provides that for a willful homicide the wrongdoer shall be responsible for "exemplary damages" as well as for "actual damages." If it be conceded that the plaintiff in error is right in his contention as to the general rule in the absence of an express statute, we think the court below, in view of these statutes, properly declared the law. The evidence of the defendant himself showed that the killing was willful and wholly unjustifiable, and he is therefore liable for both actual and exemplary damages.

3. Several assignments of error relate to the question of self-defense. It is claimed that the trial court should have submitted the question whether or not Morgan acted in self-defense to the jury. Morgan was a witness for himself on the trial, and gave an account of the circumstances under which he killed Barnhill. It is to be presumed that he stated the case as favorably to himself as the facts justified. In the statement of the case we have embodied Morgan's evidence. It shows that he brought on the difficulty. He used the first offensive language. He struck the first blow. He then pursued Barnhill and killed him while he was defenseless and trying to escape. In such a case the doctrine of self-defense has no application. There is other evidence in the case showing that Barnhill was begging for his life when Morgan shot him. But, looking alone at Morgan's statement, the facts recited by him show that he was the aggressor, and that his act was willful and unlawful. In view of his statement, the case should be affirmed, even if there was evidence of some other witness which, standing alone, might present the question of self-defense. It would be trifling with the administration of the law to allow him a new trial in which to present the question of self-defense to the jury, when in effect he has stated under oath that he did not act in self-defense, and that he is guilty of the charge preferred against him. *Motes v. U. S.*, 178 U. S. 476, 20 Sup. Ct. 993, 44 L. Ed. 1150.

The judgment of the circuit court is affirmed.



CENTRAL TRUST CO. OF NEW YORK v. PEORIA, D. & E. RY. CO. et al.  
CHAMBERLIN v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 756.

1. RAILROAD MORTGAGES—FORECLOSURE—DECREE—COLLATERAL ATTACK.

Questions relating to the validity of a decree directing foreclosure of a railroad mortgage cannot be raised by objections to the confirmation of the sale.

2. SAME.

Where a railroad stockholder objected to confirmation of the sale of the road under foreclosure on the ground that the purchaser bought for a trust company holding second mortgage bonds, instead of for another company which had formed a reorganization agreement recognizing the stockholders, but failed to show that that fact resulted in less being obtained for the property at the sale, and did not show the value of the property, or that less than the full value was bid, or that after payment of the first mortgage any surplus would be left for the second mortgage bondholders or other creditors or stockholders, or that he ever accepted the plan alleged, his objections were untenable.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Edward B. Whitney and Wm. W. Baldwin, for appellant.

J. M. Dickinson and Blewett Lee, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. November 18, 1899, a decree was entered foreclosing a first mortgage and ordering a sale of the Peoria, Decatur & Evansville Railroad. After publishing notice as directed, the master sold the road on February 6, 1900, to Adrian H. Joline for \$1,586,000. February 12, 1900, the master filed his report of sale. April 21, 1900, appellant filed objections to confirmation, substantially as follows: Appellant, not a party to the foreclosure suit, but a stockholder in the railroad company, on behalf of himself and all other stockholders who might desire to take the benefit of his objections, charged that the purchase was made by Joline under an agreement between the Central Trust Company, trustee in the first mortgage, and the Colonial Trust Company, owner of a large amount of second mortgage bonds of the railroad company, whereby the Colonial Company, after paying the first mortgage bonds, was to be permitted to reorganize upon the plan proposed by the Colonial Company, which contemplated that the Colonial Company should procure to be issued upon the faith of the reorganized property first mortgage bonds and preferred stock involving the annual payment of interest and dividends of not more than \$190,000, and the issue of common stock of the reorganized company to the extent of \$3,000,000, par value, and the disposition of the first mortgage bonds and of the preferred stock in such manner as the Colonial Company should see fit, and the issue of so much of the common stock as should be re-

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¶ 1. See Mortgages, vol. 35, Cent. Dig. §§ 1470, 1533.

quired for the purpose to those second mortgage bondholders who had sold their bonds to the Colonial Company for 50 per cent. of the face value of the principal thereof, payable in the common stock of the reorganized company, and the division of the remainder of the common stock among the Colonial Company and other assenting second mortgage bondholders in the proportion of three parts to the Colonial Company and one part distributively to the assenting second mortgage bondholders; that this proposed reorganization excluded from participation therein all stockholders and all other creditors of the existing railroad company; that the plan was a collusive agreement between the trustee of the first mortgage bonds and the Colonial Company to acquire for the sole benefit of the Colonial Company and the assenting second mortgage bondholders the property of the Peoria, Decatur & Evansville Railroad Company; and that the method by which the reorganization was to be accomplished was a fraud upon the rights of the railroad company and its several creditors who were not parties thereto, and upon the stockholders, for these reasons: (1) The decree of foreclosure and sale was needlessly brought about through collusion of the Central Company and the Colonial Company, by procuring to be applied to the unnecessary improvement of the road all money earned by the receiver and not required for the ordinary or for the reasonable maintenance and repair of the property, whereby money properly payable on account of the interest on the first mortgage bonds, the payment of which would have prevented the entry of the foreclosure decree, was applied by the receiver to the betterment of the security. (2) The Central Company, represented by Joline, agreed with the Colonial Company, represented by its solicitor, David Willcox, that the purchase of the property by Joline should actually be for the benefit of the Colonial Company, whereby any competition between purchasers at the sale was prevented and a diminished amount realized for the property. And the Central Company advanced to Joline the money necessary to make the deposit with the master required by the decree as an advance upon his bid. (3) A large majority of the first mortgage bondholders were represented by a committee of holders who had entered into a written contract with the Central Company for depositing with that company first mortgage bonds, second mortgage bonds, and stock of the railroad company under a plan of reorganization known as the "First Mortgage Committee's Plan." Under this plan the benefit of the reorganization was offered to the first mortgage bondholders, the second mortgage bondholders, and the stockholders of the present company; and no creditor of the company interposed any objection thereto. The Central Company continued to receive deposits of securities under this plan up to and including the 22d day of January, 1900. The sole representative of the Central Company at the sale was Joline, and it was his duty to use his best endeavors to acquire the property for the purpose of reorganization under the first mortgage committee's plan, which preserved the interests of all classes of security holders who were willing to join therein. In pursuance of the agreement hereinbefore referred to, Joline bid for the purpose of enabling the Colonial Company to

reorganize under its own plan as hereinabove set forth, and the so-called first mortgage committee's plan was suffered to be, and was, a cloak for the design to purchase the property for the benefit of the Colonial Company, and was calculated to deceive and mislead, and did deceive and mislead, other security holders of the railroad company. This appeal is from an order overruling appellant's objections and confirming the sale.

The first ground relates to the validity of the decree. The question cannot be raised on objections to the sale. Appellant probably realized this when on January 30, 1900, he filed his intervening petition, in which he sought to open up the decree and to be let in to defend. For reasons stated in *Central Trust Co. v. Peoria & D. E. Ry. Co.*, 43 C. C. A. 613, 104 Fed. 418, his petition was stricken from the files.

In his second and third grounds, appellant fails to exhibit any valid objection to the confirmation of the sale. If Joline bought for the Colonial Company, instead of for the Central Company, how was appellant harmed? He does not show how much less was realized at the sale than would have been if Joline had bid on behalf of the Central Company, nor the value of the property, nor that less than the full value was bid, nor that, after payment of the first mortgage, any surplus would be left for the second mortgage bondholders and other creditors, to say nothing of the stockholders, nor that there is any probability of a better bid at another sale, nor that he was ignorant of or misled by the action of the Central Company, nor that he applied for a postponement of the sale to enable him to get the stockholders together to protect their interests at the sale. Appellant does not even allege that he accepted the offer in the written contract between the Central Company and the first mortgage bondholders whereby the stockholders were to be included in a reorganization plan. But if he had alleged and proven the fact, it might show a cause of action against the Central Company and the first mortgage bondholders for damages, but certainly it would furnish no reason why the circuit court should retake the property and sell it again, as the court would be compelled to do, under a decree that is unassailable by appellant.

The order is affirmed.

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CHAMBERLIN v. PEORIA, D. & E. RY. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 719.

1. BILL OF REVIEW—LIMITATIONS.

A bill of review for error of law apparent on the face of the record must be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed.

2. SAME—CERTIFICATION OF JURISDICTIONAL QUESTION.

Where no certificate of a jurisdictional question is certified by the circuit court during the term at which the decree is entered, as required

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¶ 1. See Equity, vol. 19, Cent. Dig. §§ 1103, 1104.

by Judiciary Act March 3, 1891, § 5, the court has no jurisdiction to subsequently make the certificate.

**3. SAME—RESERVATION IN DECREE.**

A reservation, in a decree foreclosing a railroad mortgage, that all equities, and rights not specifically adjudged, including the discharge of a receiver and passing of his accounts, and all other questions of every kind and nature, not disposed of, are reserved for future adjudication, and reserving the right to make such further order at the foot of the decree as may seem just and proper, retaining jurisdiction for the purpose of enforcing all the provisions of the decree, did not reserve to the court the right to grant a certificate of a jurisdictional question after the term, so as to authorize an appeal under Judiciary Act March 3, 1891, § 11.

**4. APPEAL IN ERROR—FRIVOLOUS REVERSAL.**

Where a bill of review showed on its face that the circuit court lacked the power to hear it, a reversal of the decree dismissing the bill for the purpose of having affidavits of the defendants, erroneously omitted from the demurrers to the bill, attached, would be frivolous.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Wm. W. Baldwin and Edward B. Whitney, for appellant.

J. M. Dickinson and Blewett Lee, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. On March 2, 1899, appellant filed his bill to review a decree entered on March 30, 1897. The sole ground of review was the alleged want of jurisdiction apparent upon the face of the record. Appellees demurred for the reason, among others, that the bill was not filed within the time limited for the prosecution of an appeal from the decree sought to be reviewed. The demurrers were properly certified to by counsel, but were not supported by the affidavits of appellees as required by equity rule 31. The court overruled appellant's motion to strike the demurrers from the files. The correctness of the court's ruling in sustaining the demurrers is questioned by this appeal.

It is well settled that a bill of review for error of law apparent upon the face of the record must be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed. *Thomas v. Harvie's Heirs*, 10 Wheat. 146, 6 L. Ed. 287; *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 227, 10 Sup. Ct. 736, 34 L. Ed. 97. If an appeal from the original decree had been within the jurisdiction of this court, it would have had to be taken within six months. Section 11, Judiciary Act March 3, 1891. Since the only alleged error on which an appeal could have been taken related to the jurisdiction of the circuit court, an appeal, according to section 5 of that act, as interpreted by the supreme court, could have been taken to the supreme court at any time within two years only on condition that the certification required by section 5 had been made during the term at which the decree was entered. *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *Colvin v. City of Jacksonville*, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053; *The Bayonne*, 159 U. S. 687, 16 Sup. Ct. 185, 40 L. Ed. 305; *Merritt*

v. Bowdoin College, 169 U. S. 551, 18 Sup. Ct. 415, 42 L. Ed. 850. The term at which the original decree was entered came to an end long before the bill of review was filed. No certificate of the jurisdictional question was ever made. If the power of the circuit court to make the certificate had departed before the bill of review was filed, no appeal would be entertained by the supreme court; and, consequently, the bill of review would not lie. *Reed v. Stanley*, 38 C. C. A. 331, 97 Fed. 521.

But appellant insists that the right of the circuit court to certify the question of jurisdiction continued beyond the term by reason of a reservation in the decree. The suit was for the foreclosure of a railroad mortgage. The court, in its decree, adjudicated the question of its jurisdiction, the validity of the bonds and mortgage, the default of the mortgagor, the amount due, and the right to a foreclosure and sale. The reservation was as follows:

"All equities and rights of any parties not hereinbefore specifically adjudged, including the discharge of the receiver and the passing of his accounts, and all other questions of every kind and nature not hereby disposed of, are hereby reserved for future adjudication, the settlement of the same being held not to be necessary for the purpose of this decree, and the court reserves the right to make such further order at the foot of this decree as may seem just and proper, and jurisdiction in this court is retained by this court for the purpose of enforcing all the provisions of this decree."

In our opinion, a bare reading of this reservation furnishes a sufficient answer to appellant's contention.

It is urged that the decree must be reversed on account of the informality of the demurrers. Inasmuch as the bill of review showed on its face that the circuit court lacked the power to hear it right-fully, a reversal for the purpose of having the affidavits of appellees attached to the demurrers would be frivolous.

The decree is affirmed.

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#### PARK v. TAYLOR.

(Circuit Court of Appeals, Fifth Circuit. October 13, 1902.)

No. 1,108.

##### 1. ARREST WITHOUT WARRANT—GROUNDS—CIVIL CASES.

The right of arrest without warrant is limited to cases where the person arrested has committed, or is about to commit, a felony or a forcible breach of the peace, and does not extend to civil cases.

##### 2. FALSE IMPRISONMENT—CAUSING ARREST WITHOUT WARRANT—DEFENSES.

In an action to recover damages for assault and battery and false imprisonment, based on the action of defendant in causing plaintiff's arrest without a warrant, evidence that plaintiff was about to leave the state with a check, in violation of a contract, and that the arrest was made for the purpose of securing the check, constitutes no defense.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

This action was brought by Joseph W. Park, a citizen of Alabama, against J. W. Taylor, a citizen of Mississippi, for \$50,000 damages. Plaintiff alleged

that the defendant, with force and arms, assaulted him and arrested and restrained him of his liberty without any lawful authority and without probable cause. The defendant pleaded not guilty. The bill of exceptions shows "that evidence having been given on the part of the plaintiff tending to prove that the arrest of the plaintiff complained of by the plaintiff was made by one Fostick, acting by the direction of the defendant, without warrant, and evidence was given by the defendant tending to prove that in his lifetime one R. S. Park took out certain policies of insurance upon his own life, payable to his administrator, the aggregate amount of which policies was ten thousand dollars; that said policies were issued through an insurance agency of the defendant; that said policies were several in number; that when the policies were received the said R. S. Park refused to accept more than \$5,000 of such insurance, and it was then agreed that the other \$5,000 of insurance should be transferred to the defendant, by whom the premium thereon had been paid by defendant; that defendant thereupon wrote on to the insurance company to get forms for transferring said insurance, but before the forms for such transfers were received the said R. S. Park died; that it was therefore agreed that the plaintiff herein should be appointed administrator of R. S. Clark, should collect all of said policies, and should pay to the said defendant the sum of twenty-five hundred dollars, as his (defendant's) interest in said insurance; that the defendant agreed to become surety on the administration bond of the plaintiff, upon the agreement of the plaintiff to deposit in the bank of the defendant all moneys belonging to said estate, including the amount collected on these insurance policies, which were only to be drawn out upon orders approved by J. M. Boone, an attorney agreed on; that defendant became such surety upon such agreement; that thereupon proof of death was made by the defendant for the plaintiff, and sent into the company, which sent its check to the defendant for \$10,000, being the amount of all of said policies payable to the order of plaintiff as administrator; that defendant called plaintiff into his bank to sign receipts for said check and to indorse the same to the defendant, so that the same might be deposited in defendant's bank to the credit of said estate; that the plaintiff signed the receipts, but the same were not dated nor witnessed, and that the plaintiff thereupon, without the consent of the defendant, took said check, refused to indorse the same, and ran out of the bank, and disguised himself, and sought to leave the vicinity for the purpose of taking said check to Memphis, in the state of Tennessee; that the purpose was to prevent the proceeds of said check being received by the defendant in his bank; and the evidence tended to show that the defendant, for the purpose of securing possession of said check, caused the arrest of the plaintiff." Upon this evidence the court charged the jury that, "if they believed the facts said evidence tended to prove, then the defendant had probable and reasonable cause to cause the arrest of said plaintiff, and an arrest without warrant, under such circumstances, would be legal if it was made for the purpose only of securing said check." The jury, being so instructed, returned a verdict for the plaintiff, and assessed the damages at \$1. The plaintiff brings the case to this court, and assigns as error that the court erred in the charge given.

Tim E. Cooper, for plaintiff in error.

J. M. Boone, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendant caused the arrest of the plaintiff without warrant. This was the foundation of plaintiff's suit, which was for assault and battery and false imprisonment. Arrests without warrant are sometimes lawful. Circumstances may exist which of themselves are a command of arrest as imperative as the command of official authority.

Such right of arrest without warrant rests upon the inherent right of society to protect itself against sudden assaults in emergencies by the spontaneous action of its members. The right is limited to cases where the person arrested has committed, or is about to commit, a criminal offense. It does not extend to civil cases, for it is not supposed that in such cases public justice will suffer by such delay in arresting a wrongdoer as may be requisite to obtain legal process, if it be a case in which process of arrest may be lawfully obtained. When one makes or causes an arrest to be made without legal process, and the legality of his action is called in question, to sustain his action he must show a felony actually committed, and facts that had come to his knowledge which justified him in suspecting the person arrested to be the felon; or he must show a felony being committed, and an arrest made to prevent it. Forcible breaches of the peace are placed, as regards arrest without warrant, on the footing of felonies. Cooley, Torts, 174, 175. The right to liberty and immunity from arrest should be protected, unless the arrest is made necessary and proper under the principles stated.

It does not appear from the record that the plaintiff had committed any criminal offense or that he was about to commit one. The evidence tended to show that, in violation of an agreement made by him, he was endeavoring to prevent the proceeds of the check being received by the defendant at his bank. If it be conceded that the defendant was entitled to the possession of the check (although it was made payable to the plaintiff), the defendant had no right to secure its possession by force and violence. He should pursue his legal or equitable remedies, and not take the law into his own hands. The circuit court erred in the charge given.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

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#### BOSTON TOWBOAT CO. v. CHASE MACH. CO.

(Circuit Court of Appeals, Sixth Circuit. October 7, 1902.)

No. 897.

#### 1. PATENTS—INFRINGEMENT—TOWING MACHINE.

The Shaw & Spiegle patent, No. 383,917, for a towing machine, which describes a combination with a cable drum of an engine, the shaft of which is geared to said drum to balance the load on the cable, and a pressure-regulating valve located in the steam passage to the engine cylinder and operatively connected with the shaft of the drum, is limited by the prior art to the specific means described and claimed, among which is the valve technically known in mechanics as a "pressure-regulating valve," and it is not infringed by a machine in which such valve is not used.

On Rehearing. For former opinion, see 50 C. C. A. 318, 112 Fed. 432.

Harvey D. Goulder and George B. Marty (S. H. Holding and Frank S. Masten, of counsel), for appellant.

Albert E. Lynch, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WING, District Judge.

WING, District Judge. Upon the rehearing of this cause the consideration of the court has been confined chiefly to the question as to whether the state of the prior art, as disclosed by the record, does not compel a holding either that the appellant's patent is void for want of novelty and by reason of anticipation, or that its scope is so narrowed as not to include the device used by the appellee. The specifications of the appellant's patent point out the purpose of the device to be the obviation of a difficulty which is stated to be incident to the towing of vessels in a turbulent sea. With reference to this difficulty, it is stated in the specifications that:

"When one vessel is being towed by another in a turbulent sea, the tow line, cable, or hawser is subjected to sudden alternating degrees of tension consequent upon the changing relations of the vessels to each other as they ride upon the waves or settle in the troughs of the sea, and the sudden strains on the cables are sometimes so enormous as to be beyond the endurance of the cables, and the latter are therefore liable to be broken."

The means for accomplishing this object are described to be—

"A balancing cable drum, the balancing being effected by a steam or air engine so geared to the drum that the normal pressure of the engine cylinder or cylinders will balance the normal strain on the cable; but, if the strain on the latter be suddenly increased, the cushioning effect of the steam or air in the engine cylinder or cylinders will permit the cable to 'pay out' somewhat, and thus yield to the sudden strain, thereby rendering the action of the cable yielding or elastic. To counterbalance the increased strain on the cable, we provide a pressure-regulating valve, which is geared to the shaft of the cable drum and connected with the engine cylinder or cylinders, so that, when the strain on the cable causes the latter to pay out, the turning of the drum shaft will increase (by means of the regulating valve) the pressure in the said cylinders, and thus quickly counteract the tendency of the cable to pay out, and, when the lessening strain on the cable permits the drum to be turned (by the pressure regulating of the engine cylinder or cylinders), the reverse movement of the drum shaft will reverse the screw of the regulating pressure valve, to bring the pressure down to equalize the lessening strain on the cable."

Claim 1 of the patent is as follows:

"In a towing machine, the combination, with a cable drum, of an engine the shaft of which is geared to said drum to balance the load on the cable, and a pressure-regulating valve located in the steam passage to the engine cylinder or cylinders and operatively connected with the shaft of said drum, whereby the pressure of the engine cylinder or cylinders is increased as increased strain on the cable causes the latter to be paid out, and is diminished as the strain on the cable is lessened and the latter is hauled in, substantially as set forth."

Claims 2, 3, 4, and 5 cover the same device as claim 1, with additions concerning the minor mechanism relating to the operation of the connection between the drum and the pressure valve. The device designed to be covered by claim 1 is a machine to be used in towing, consisting of an engine, the shaft of which is geared to a drum adapted to have a towing cable wound about it, and having mechanism connecting the shaft of the drum with the valve which admits steam to the



cylinders of the engine. This connecting mechanism is adapted to operate the valve when the shaft of the drum is put in motion. When the drum is operated by the unwinding of the cable, the connecting mechanism opens the valve. When the drum rotates in the opposite direction, the connection tends to close the valve. There are certain stops provided in the mechanism which prevent the operation of the valve in opening and closing beyond certain desired limits. While the valve which is subject to the operation of this connecting mechanism is described in the specifications and the claim as a "pressure-regulating valve," it is urged by the appellant that the valve intended by this designation is a simple throttle valve. We will consider the patent, in connection with the devices disclosed in the prior art, as if, instead of the designation "pressure-regulating valve," there had been used the term "valve," or "throttle valve."

In the English patent to Gray, sealed June 11, 1867, and dated December 18, 1866, there is described, as the second part of the invention, a steam steering engine, the purpose of which was to keep the rudder of a ship in any required position and to restore it to that position against the contrary action of the sea. To quote from the specifications:

"To accomplish this, I construct an engine with two cylinders (sometimes called a 'pair of engines,' but in this specification I will use the term 'engine' to include the whole), with their steam and exhaust passages and slide valve so arranged that the direction of the steam and the exhaust can be reversed by moving a special admission valve into one or other of its positions. I attach this admission valve by suitable connections to a part of the telegraph gear described in the preceding part of this specification, and there designated the traverse lever, which receives its motion from the screwed shaft, therein also described; and I thereby communicate motions to this admission valve corresponding to the longitudinal motions of that screwed shaft, so that the position of this admission valve with reference to its whole travel will always correspond with the position of the screwed shaft with reference to its longitudinal travel, and it will agree in its positions, also, with the positions and indications of the telegraph index lever. \* \* \* The steering-wheel shaft may be either the shaft of a chain barrel, or a screw with side arms, or the screw or shaft for actuating hydraulic or other steering apparatus."

On page 19 of the specifications, Gray describes the valve referred to as follows:

"K, stop valve for letting on the steam to the engine. This valve does not form a working part of the engine, but is merely an admission valve. When it is opened at one end, the engine rotates in one direction; when it is opened at the other end, the engine rotates in the opposite direction. \* \* \* This stop valve is opened and shut by a lever, Q<sup>3</sup>, on the traverse lever shaft, Q, and the position of the stop valve with reference to its whole travel will always correspond with the position of the screwed shaft, D, with reference to its longitudinal travel."

There appear in the drawings and specifications of this patent the combination of a drum having a drum shaft which is operated by a steam engine, and an admission valve which is operated by a lever, Q<sup>3</sup>,—this lever taking its motion from a beveled gear end upon the drum shaft. By the following language in Gray's specifications it appears that Gray had fully in mind the idea of using steam in the cylinder of the engine as a means of lessening the shock of waves:

"The steering engine acts, under these circumstances, as a yielding, but powerful, brake, and restrains the rudder into its required position, acting of its own accord within the limits of the traverse of the screwed shaft."

In the English patent to Scott and Gilmour, June, 1878, there is described a mechanism connected with the towage of ships or vessels for facilitating the instantaneous and efficient coupling or uncoupling of towing hawsers, wire ropes, or chains, and also for preventing sudden jerks upon or breakage of these, particularly applicable for, and giving greater safety when towing in a seaway or squally weather. In these provisional specifications there is suggested a pressure fluid tow cylinder, made strong, with close screwed-on ends and buffer springs fitted within and close up to the ends, and of such a length between the inner ends of the buffers as to contain the air, steam, or other elastic fluid in front of the piston, and allow of its working freely to the extent required for the varying strain on the working parts of the cylinder and piston, and the consequent lengthening, or shortening, or motion of the tow rope. The steam from the boiler, or the compressed air or other elastic fluid from force pumps or other pressure vessels, is admitted by a branch pipe, with inlet back pressure self-closing check valve and chest fitted in the front end of the cylinder. It is further stated in the specifications as follows:

"On board the tow ship, or the ship to be towed, when they have the steam winding engines on board, the end of the towing rope or the coupling chain thereof may be attached to the winding barrel of such steam winding or hauling engines; the winding strain of the steam engine and its gearing being made to act or sustain the hauling strain, and yet give the yielding effect analogous to the action of the steam or air cylinder when this arrangement is found more convenient than by having the special steam or air cylinder fitted and applied for the said purpose."

In the English patent to James Taylor, No. 3,999, dated October 2, 1880, it is stated in the provisional specifications that the invention described is applicable for use with cables for ships' anchors, and for general use for warping and hauling on board ship, especially salvage ships, and for towing purposes. In the specifications, on page 4, appears the following:

"If desired, the apparatus may be worked from a donkey engine, or the main engines through the bevel gear, I, and the shaft, J. \* \* \* To prevent sudden jerks on the cable, paying out the cable by overcoming the friction when a steam motor is used, I connect a portion of the cable, G, to a lever which operates the valve of the engine sufficiently to cause the apparatus to take in or recover the portion paid out by the jerk."

In the English patent to Sickles of 1862 there is described an apparatus for working the steering gear of a ship, which is also applicable for various other purposes, such as for pumping or lifting weights. On page 4 of the specifications it is said:

"To insure the use of the least possible power required to operate the steering apparatus, the valve or valves which admit the steam or other fluid under pressure to the working cylinders is so connected with the steering apparatus that, while the steersman, by turning the steering wheel, opens the valve to admit steam to the cylinders, so as to cause the rudder to move, the steering apparatus, in moving, will give this same valve or valves a closing motion, and thus modify the extent of the opening of the valve, and the rapidity of admission of the steam or other fluid to the working cylinders."

On page 5 it is said:

"T is a hoisting drum on the engine shaft, upon which a rope is wound when using the steering engine as a hoisting engine."

In this patent there is shown an engine operating a drum, with which is operatively connected the valve which admits steam to the engine, as appears from the following language:

"But, if the engine shaft moves, the position of the pins, t, t, t, t, in the V-slots, will depend upon the resistance offered to the engine; and, if this resistance is greatly increased, the continuous movement of the spiral cam will carry the pins to one or the other end of the slots, u, u, u, u, and the full opening of the valves will be obtained to give full power to the cylinders in overcoming the resistance offered by the rudder or steering apparatus. The arrangement by which the extent of the effective opening of the valves is made to correspond with the resistance offered by the steering apparatus can be variously modified."

The principal object of the device described and claimed in the appellant's patent was to use the steam in the cylinder of an engine as a spring or cushion, which would yield to an unusual, and possibly breaking, strain upon the towing cable in a rough sea, and thus prevent a parting of the cable. Connecting operatively the shaft of the cable drum with the valve admitting steam to the engine was for another purpose, namely, to recover the outlay of the cable after the force of the strain which had occasioned it had been expended. The idea of using steam or air as a cushion against strain was old. Controlling the supply of steam to the engine by valves actuated by some moving portion of the engine or its connections was old. The use of these combined devices in connection with towing was old. If invention was required to construct the device described in the appellant's patent, it was in the specific means used in combining and connecting the parts of the mechanism. Without expressing an opinion as to the validity of the patent upon which suit was brought, it is enough to say that it is so limited in scope by the state of the prior art as to be confined to the specific means described and claimed. The appellee's device is not within this limited field.

The decree of the circuit court is affirmed.

## NEW DEPARTURE MFG. CO. v. SARGENT et al.

(Circuit Court, D. Connecticut. October 16, 1902.)

No. 1,070.

## 1. PATENTS—INVENTION—DOOR BELLS.

The Rockwell patent, No. 471,983, for a bell mechanism, is void for lack of invention, in view of the state of the prior art.

In Equity. Suit for infringement of letters patent No. 471,983, for a bell, granted to Edward Dayton Rockwell March 29, 1892. On final hearing.

T. Hart Anderson, for complainant.

Beach & Fisher, for defendants.

PLATT, District Judge. This is a bill in equity for an injunction and accounting, claiming infringement by the defendant of letters patent No. 471,983, dated March 29, 1892, to the complainant (at that time the New Departure Bell Company), as assignee of Edward Dayton Rockwell. The defendant insists that, in view of the state of the prior art, the patent is invalid, and offers the construction which the courts have already placed upon it as conclusive of his contention. The courts have not passed specifically upon this particular patent; but the claim is that the adjudications upon the companion patent, No. 471,982, by analogy comprehend the patent in suit, and that, taken in connection with such adjudications, the views already expressed with reference to the patent in suit, coupled with the further light now cast upon it, remove every doubt as to its invalidity. It is therefore important to examine somewhat critically the entire controversy. It goes without saying that if it is admitted that the defendant had no right to acquire, from his reading of the opinions on file in the various courts touching this and cognate matters, a positive belief that the complainant's patent was invalid, his actions, as portrayed by the evidence, would offer a reasonable excuse for the charge of piracy laid against him by the complainant. He might not be an intentional pirate, but he would be one in fact. In such an event, it would be idle to protest that his intentions were honorable. Deeds speak with a clarion tongue; purposes only whisper.

Now for a brief investigation. Both patents were granted on the same day, but patent No. 471,982 was applied for some weeks earlier, and was for a bicycle bell. Suit was brought against Bevins Bros. Manufacturing Company, in this district, upon three patents, numbered 456,062, 471,982, and 471,983. Judge Townsend held that No. 471,982 was valid, and that claim 2 thereof was infringed by the defendant's device. He found the other patents, one of them being the patent in suit, not infringed. 64 Fed. 859. An appeal was taken, and the circuit court of appeals for the Second circuit (Judge Lacombe writing the opinion) held that, in view of the state of the prior art, patent No. 471,982 was invalid. 19 C. C. A. 534, 73 Fed. 469. The circuit court in the New Jersey district, through Judge Acheson, in spite of Judge

Townsend's decision, examined the matter with care, and found patent No. 471,982 invalid. *New Departure Bell Co. v. Hardware Specialty Co.* (C. C.) 69 Fed. 152. That decision was not disturbed on appeal.

The court of appeals for this circuit, in reaching its conclusions upon the invalidity of No. 471,982, relied largely upon the Bennett (British) patent (2,425). The court says that the appearance of that patent in the English archives, years in advance of Rockwell's application, prevented him under our laws from obtaining a patent for practically the same thing; but that, nevertheless, he might have exercised some inventive genius himself, since there was no evidence that the British patent and the model representing it had not lain dormant in the British patent office until unearthed as an anticipatory device in the Bevins Case, and therefore it was probable that it had not crept into, and become a generally known part of, the bellmaker's art.

The line of reasoning which persuaded Judge Townsend to sustain the validity of patent 471,982 may have been, briefly stated, of this general character: The combination was a base plate, striker bar, lever, spring, and gong, so related to each other as to operate in a certain way and produce a certain result, viz., to work an alarm when attached to bicycles; but, to accomplish this, other mechanism for rotating the striker bar was essential, and so a geared pivoted lever is connected with a spring and a revoluble striker, and extends beyond the base plate, so that it can be worked by the thumb and finger while the hand grasps the handle bar. Pressing the thumb piece causes the striker bar to whirl in one direction. When that pressure is removed, the spring causes it to whirl in the opposite direction. He finds the spring in the Allen and Goulden patent. He finds other elements in different patents, but does not discover all the elements in any one patent, and some of them were adapted to other purposes. He found the closest approach in the Bennett patent. That had a revoluble striker bar, spring actuated in one direction, and lever combined with a horizontal movable rod; but its purpose was different, and, for that reason, it did not anticipate, and, after discussing the subject clearly and exhaustively, he sustained the validity of the patent. It is not easy to escape the conclusion that the controlling thought which clinched the matter was the conviction that Rockwell was entitled to an inventor's reward. The Bennett patent had slept for many years in the English archives. Earnest efforts had been made, by many inventors, to supply the demand which had sprung up in the market for a satisfactory bell; and, until Rockwell came along, no one had produced an article with that profusion of good qualities which made his bell useful and available. Bennett's call bell was in existence. If it would have suggested, to any one skilled in the bellmaker's art, the combination which Rockwell had found, why did it for so long a period escape attention? When the demand was so urgent for a new device, how could the adaptation of old and well-known principles and devices of the same general character to a new use be overlooked? Ergo, there must have been invention,—very little perchance, but still inventive genius was there present. The court of appeals may have appreciated that point of view. At any rate, no novelty or invention was found in the bicycle bell patent.

If there was no invention in reorganizing bell mechanism into a bicycle bell by the use of well-known means, how can there be invention in using well-known means to reorganize a bicycle bell into a door bell? The effect produced by pressing a lever with a spring-actuated return motion is found in the Allen and Goulden patent of 1890, as well as in the British patent. The turn button, furnishing motive power through a central shaft, is found in the Allen and Goulden patent of 1891. These changes were, then, obvious in the same art when Rockwell applied for his two patents. If a revoluble striker bar is centrally mounted with reference to the gong, and means for communicating motion is furnished through the pinion, it can be done with what was old in the bellmaking art; and it is evident that free rotary motion must ensue, unlimited so long as the power is applied, and dependent upon the direction in which it is exercised. Lugs were old and necessary to such a construction. All changes from the then known art have been declared by the court to be merely colorable in the case of the restricted method; and it seems fairly obvious that, if the situation is so in the one case, it must obtain in the other.

Has the complainant received any aid or comfort from Judge Townsend in his treatment of the patent now in suit when he decided the Bevins Case? Without question Judge Townsend would have given the subject much more critical examination, had he not been satisfied that the Bevins Bros. device was not an infringement of 471,983. I quote from pages 864 and 865 of 64 Fed.:

"The single claim of patent No. 471,983 is as follows: 'In bell mechanism, the combination, with a frame and gong and lug upon the gong, of a centrally pivoted pinion loosely mounted on a central post on the frame, and having an arm upon one side, strikers upon the arm, and mechanism for communicating motion to it through the pinion, substantially as set forth.' The object of the invention was 'to produce an improved bell, that can be operated without the use of springs of any kind, and can be caused to emit a continuous ringing sound resembling that of an electric bell.' Complainant's exhibit 'Complainant's Door Bell,' constructed in accordance with the specifications of said patent, shows a knob, with a square shank, secured within an escutcheon on the outside of an object, such as a door, and connected with a spindle on the inside of such door. Upon this spindle is a cog-wheel, by which motion is communicated to a centrally mounted revoluble striker arm carrying loosely pivoted strikers. There is also a gong provided with a lug. The device may be operated in either direction by a turn of the knob. It will be seen that this construction shows the loosely pivoted strikers claimed in patent No. 456,062, and the centrally mounted revoluble striker arm described, but not claimed, in patent No. 471,982, and substitutes, for the lever and spring therein claimed, mechanism which dispenses with said spring device. Similar mechanism, similarly operated, is shown in patent No. 460,347, granted to Allen & Goulden, April 14, 1891, for door bells. The Bennett patent for door bells, already considered, shows such a centrally mounted revoluble striker arm. The spring, however, in the Bennett device, prevents its being operated in either direction at will. The striker arm of the said Allen & Goulden patent may be revolved in either direction at will, but it is not centrally mounted. The state of the art, therefore, requires that the patentee be limited to the precise construction described and claimed, and which includes the free rotary movement of the striker arm in either direction, and the mechanism for communicating such motion to the striker through the pinion. The defendant's device cannot be rotated in either direction at will; it is only adapted to bicycle bells; it is operated by means of a lever and spring device copied from that claimed in patent No. 471,982;

and, except for its adaptation to a bicycle bell by the infringement of 471,982, it more nearly resembles the Bennett device than that of complainant. Patent No. 471,983 is intended for and is adapted to stationary bells to be used on doors. It is specially designed so as to dispense with the necessity of using the device claimed in No. 471,982. *Westinghouse Air Brake Co. v. New York Air Brake Co.* (C. C.) 59 Fed. 581, 607. Various suggestions are made in support of the claim of novelty in the centrally pivoted swinging arm. Thus it is said that the arm must extend almost across the inside of the gong, and be adapted to swing around its entire diameter. But the Bennett patent shows the arm swinging around the entire diameter of the gong, and it surely would not require invention to duplicate said arm by extending it in the same way on the opposite side. The Bennett strikers, it is true, are different; but the specific striker described in this patent is not, and could not be, therein claimed, because it had been already described and claimed in 456,062. The fact that the arms are differently mounted does not affect the practical identity in construction and similarity in function and operation."

His treatment of the patent in suit, comparatively meager as it is, throws a strong side light upon the present contention, and it is perhaps fair to assume that he would have found it invalid, had he been aided by the reasoning of the circuit court of appeals. He found the loosely pivoted strikers in one device, and the centrally mounted revoluble striker arm in another, but could not find in any of them the free rotary movement of the striker arm in either direction and the mechanism for communicating such motion to the striker arm through the pinion.

Whatever view he might now hold on that subject, even that shred of novelty and evidence of inventive skill is most neatly and artistically stripped from the patent in suit by the appearance in the prior art of the Gregory device, shown in letters patent No. 168,391, dated October 5, 1875. Here is found a striker arm centrally located with reference to the gong, with capacity for free rotation in either direction by means of the pinion. Complainant's expert concedes that the Gregory device can be used so that the spindle carrying the clappers can be freely turned in either direction to any extent. That being so, it is an easy matter to put the Gregory door alarm on one side of a door, and, putting the crank lever on the opposite side, cause the clappers to whirl in either direction on the spindle at will. Only two slight modifications appear and they are confessedly immaterial. It was not necessary for the defendant to plead the Gregory patent in anticipation. The complainant seems to admit that it may be examined as illustrating the state of the prior art. If the matter had come to my personal attention, unaided by expert or counsel, it would have been proper for me to use whatever information that patent affords in drawing my conclusions as to the validity of the patent in suit.

The objections to the surrebuttal testimony fall to the ground of their own weight, since these conclusions are in no wise affected by the Lynch or Wells patents. The complainant has not been harmed, so far as can be seen, by any irregularities or improprieties, if any there be, which it is urged so strenuously that the defendant committed.

Let the complaint be dismissed.

## COOK v. STERLING ELECTRIC CO. et al.

(Circuit Court, D. Indiana. October 30, 1902.)

No. 10,084.

**1. PATENTS—SALE OF INVENTION BEFORE PATENT—VALIDITY OF ORAL AGREEMENT.**

An oral agreement for the sale of an invention, founded on a sufficient consideration, made pending an application for a patent, is valid in equity, and constitutes a good defense to a suit in equity for infringement, brought by the inventor against the purchaser after the issuance of a patent.

**2. EQUITY PLEADING—SETTING DOWN PLEA FOR ARGUMENT.**

By setting a plea down for argument without replication, a complainant waives any objection to the plea in form or substance, which can only be taken by exceptions, and admits the truth of all facts stated therein which are well pleaded, however inconsistent with or contradictory of the allegations of the bill.

In Equity. On argument of plea.

Stuart, Hammond & Sims and Charles C. Bulkley, for complainant.  
John F. McHugh and Charles A. Brown, for defendants.

BAKER, District Judge. On April 19, 1902, Frank B. Cook, complainant herein, filed his bill against the Sterling Electric Company et al., in which he alleges that he was the first and original inventor of a certain new and useful improvement in telephone switch boards, and that on January 16, 1900, letters patent No. 641,373 were duly granted to him therefor. He further alleges that the defendants unlawfully and without his license have made, used, and sold sundry specimens of the apparatus covered by his patent, and are threatening to continue so to do, to his great wrong and injury; and he asks for an injunction restraining the defendants from making, using, or selling the invention covered by his patent, and for damages. The application for the patent was filed in the patent office on February 8, 1898. The defendants have filed a plea to the whole bill, which, omitting the caption and formal parts, is as follows:

"That prior to any of the acts complained of in said bill the complainant herein, on or about the 3d day of October, 1899, and prior to the issuance of said patent, made with the Sterling Electric Company, defendant herein, an oral agreement purporting to grant thereby to said Sterling Electric Company, and to its officers and directors in its behalf, the exclusive right to make, use, and sell, and to license others to make, use, and sell, various improvements, among which was the improvement in telephone switch boards described in United States letters patent No. 641,373, for the full term of the life of the said patent throughout the United States, in consideration of four hundred shares of the capital stock of said Sterling Electric Company, of the value of \$40,000, and \$8,000 in cash, which was paid to said complainant. That since the making of said oral agreement said complainant, Frank B. Cook, has repeatedly stated orally and in writing to these defendants and to others that the corporation defendant and the individual defendants, who are officers and directors of said corporation, in its behalf, have been authorized and exclusively licensed to make, use, and sell, and to license others to make, use, and sell, the apparatus described and claimed in said letters patent throughout the United States, by him, the said Frank B. Cook, the patentee



of said patent, during the entire life of said patent,—all of which statements these defendants aver to be true, and they plead said license to the said complainant's bill, and pray judgment."

The plea has been set down for argument by the complainant, who insists that the same does not state facts sufficient to constitute a bar or defense to his bill. The various contentions of the complainant are reducible to the single proposition that the oral agreement of sale set up in the plea is void at law, and that, being void at law, it must be regarded as void in equity; or, stated in other words, that an oral agreement for the sale of an invention, made after application for a patent and before it is granted, is invalid, both at law and in equity, when pleaded as a bar or defense to a bill by the patentee for infringement. The court entertains no doubt that an oral agreement for the sale of an invention, founded on a sufficient consideration, made pending an application for a patent, is valid in equity, and constitutes a good defense to a suit brought by such inventor after he has obtained a patent for the invention. The inventor of a new and useful improvement acquires thereby no exclusive right to it until he obtains a patent. The exclusive right is created by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is obtained. But the inventor of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires. Cook possessed this inchoate right at the time the oral agreement of sale was made. The invention had then been made, and an application was pending to obtain a patent. This inchoate right to the exclusive use of the invention was a property right, and the subject of bargain and sale, unless forbidden by the statute. The statute (section 4898, Rev. St. U. S.) does not prohibit such bargain and sale. It applies solely to the assignment, conveyance, or grant of a patent, or an interest therein, and not to the sale of the invention before the issuance of a patent. The statute does not profess to deal with the invention until the inchoate right to its exclusive use has been perfected and made absolute by the obtaining of a patent. Before the patent is granted, the sale of the inchoate right to the exclusive use of an invention is governed by the general principles of the law relating to bargains and sales. The case of *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504, decides that the inchoate right to an invention may be sold and assigned before a patent therefor has been granted. In that case, it is true, the assignment was in writing, but, unless a right of property existed in the invention before the patent was issued, the assignment would have been invalid for want of a subject-matter on which it could operate. In this country, where the principle of the patent laws is recognized, where an invention is regarded as property which may be set apart for a person's own exclusive use, why is it not assignable without an enabling statute? What reason can be assigned why an invention, which is regarded as property, shall not be transferable, like other property, there being nothing in the statute to prohibit it? In my opinion, it can be done. An oral assignment or sale of an invention before the issuance of a patent therefor is valid, and invests the purchaser with the equitable

title; and the inventor who, after such assignment or sale, obtains a patent, holds the legal title in trust for the owner of the equitable title. *Pitts v. Whitman*, 2 Story, 609, Fed. Cas. No. 11,196; *Whiting v. Graves*, 3 Ban. & A. 222, Fed. Cas. No. 17,577; *Hapgood v. Rosenstock* (C. C.) 23 Fed. 86, 23 Blatchf. 95; *Continental Windmill Co. v. Empire Windmill Co.*, 8 Blatchf. 295, Fed. Cas. No. 3,142; *Dalzell v. Manufacturing Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Burr v. De La Vergne*, 102 N. Y. 415, 7 N. E. 366; *Whitney v. Burr*, 115 Ill. 289, 3 N. E. 434; *Burke v. Partridge*, 58 N. H. 349; *Springfield v. Drake*, Id. 19; *Blakeney v. Goode*, 30 Ohio St. 350; *Searle v. Hill*, 73 Iowa, 367, 35 N. W. 490, 5 Am. St. Rep. 688. These cases establish the doctrine that an oral agreement for the sale and assignment of the inchoate right to the exclusive use of an invention before a patent has been granted therefor is not within the statute of frauds, nor within section 4898 of the Revised Statutes, requiring the assignment of a patent or of an interest therein to be in writing, and that such an agreement may be specifically enforced in equity upon sufficient proof thereof.

It is claimed that, whatever may be the equitable rights of the defendants under the agreement, the legal title is in the complainant, and that the oral agreement cannot be set up as a defense, and that the defendants should file a bill setting up their equitable rights, and compel a transfer of the legal title. It suffices to say that this contention overlooks the fact that this is a suit in a court of equity, where, in matters within its jurisdiction, an equitable title is as good as a legal title as to all parties affected by such equity. It cannot be maintained in a court of equity that a party holding the equitable title will be denied his equitable rights by the holder of the naked legal title. In such a case the holder of the legal title stands, in a court of equity, as a mere trustee for the use and benefit of the owner of the equitable title or estate. It certainly would be against conscience to permit a complainant, while holding the consideration for the oral agreement of sale, to pursue the defendants as wrongdoers.

No objection, either in point of form or substance, has been pointed out to the plea by any exception thereto. When a plea is set down for argument without any replication, no objection can be taken to its form or regularity. Such objection can only be made by exceptions. By setting the plea down for argument, the complainant tests its legal sufficiency, and in effect demurs to it. The truth of all facts stated in the plea which are well pleaded is admitted, however inconsistent with or contradictory of the allegations of the bill. 2 Beach, Mod. Eq. Prac. § 325.

The plea is allowed as sufficient, with leave to the complainant to reply thereto, if so advised, within 20 days. Failing to reply, the bill will be dismissed.

## KINNER v. SHEPARD et al.

(Circuit Court, D. Connecticut. October 22, 1902.)

## 1. PATENTS—PROFITS OF INFRINGEMENT—ALLOWANCE FOR LABOR COST OF ARTICLE.

In an accounting to determine the profits for which an infringer is liable, where his average daily production of the infringing article was only one-half the capacity of the machine by which it was made, he is entitled to credit as labor cost for only one-half the amount paid to the workmen who operated the machine for their services during the entire time.

On Exceptions to Master's Report on Re-Reference. See 107 Fed. 952.

Wm. E. Simonds, for complainant.

E. B. Barnum, for defendants.

PLATT, District Judge. The complainant's exceptions are not sustained.

The exceptions filed by the defendants are all addressed to one or the other of two definite contentions: First. Objections to so much of the report as tends to enlighten the court upon the question of damages. Second. Objections to such portions of the report as deal with the matter of the profits made by the defendants by reason of their sale of the infringing device.

The exceptions touching upon the question of damages are sustained. No sufficient evidence has been adduced to support a claim that the complainant should recover any sum in the nature of damages. It does not appear that complainant could or would have sold any considerable quantity of the goods sold by the defendants.

The important question to be passed upon is to determine, as closely as can be done, from the evidence reported by the master, what profit the defendants derived from their infringing sales. That problem is somewhat simplified by the admissions made by the defendants. They practically admit the principle adopted by the master, who followed, as he says, a long-established practice in this court, in adding 25 per cent. upon the cost of labor and materials to cover shop and selling expenses. They say that, if the master had retained the labor account as they reckoned it, his result would substantially coincide with the cost which they reached in their former estimate. It is not unlikely that the rather rough estimate formerly suggested by them may have been above the actual facts. If so, the master's figures in this respect would benefit the defendants to an equal extent.

The only real contention is grouped around the discussion as to whether the master has properly adjusted the labor account. He is clearly right in saying that it would be unjust to charge to the labor on the infringing goods the entire sum which the defendants paid to the men and boys who gave up some part of their time to the infringing machine. The master reasons in this wise: The capacity

¶1. Accounting by infringer of patents for profits, see note to *Brickill v. Mayor*, etc., 50 C. C. A. 8.

of the machine was 550 dozen per day. The actual production was 230 dozen per day. The defendants paid all parties who worked on the machine \$6,010. Of this lump sum the men and boys who produced the infringing goods from the machine are only entitled to  $\frac{28}{55}$ , which is \$2,513.27. If his premises are correct, it is probable that his conclusion would furnish the most equitable rule which can be evolved from the mass of testimony which he had before him. That testimony is especially noticeable for its omissions, uncertainties, guesses, irregularities, and general confusedness.

The defendants are not entitled to any unusually tender consideration and care. They undoubtedly damaged the complainant more seriously than he can possibly be recompensed by this decree. He fails to recover his due, because he is unable to furnish even a fairly reasonable presumption that he lost his customers through the sales made by the defendants. It does not avail them that, when their laborers were not working the machine to the complainant's disadvantage, they were either idle or employed at other remunerative labor. Such hours ought not to be used by the defendants in casting up an account which has for its primary purpose the diminution of the sum of money which should find its way into the complainant's coffers.

But are the master's premises correct? A careful examination of the evidence leads to the conclusion that he has, to a small, and perhaps pardonable, extent, overestimated the capacity of the machine and underestimated the production. The machine might have done all that he gives it credit for doing much of the time, and, in the way it was actually used, would have been very likely to approach those figures. The actual production, however, seems to have been a little more than he states it to have been. There were years when quite a few more dozen per day were produced. It appears, under all the circumstances, eminently fair to make the division of time equal,—just half and half. And so, with very slight changes in the other figures, which seem warranted, the problem is thus stated and solved:

Defendants' receipts from infringing sales as found by Judge Townsend .....	\$16,727 88
Defendants' costs:	
Wire .....	\$6,618 21
Clasps .....	675 58
Labor on wires (one-half of \$6,010) .....	3,005 00
25 per cent. on cost of labor and materials .....	2,574 70
Total cost .....	12,873 49
The balance is profit .....	\$3,854 39

And this amount the defendants ought to pay.

Counsel for complainant suggests that a motion for increased damages will be made after the filing of this opinion. This is his undoubted right. I think, however, that it is fair to him and his client that my views upon that matter should be clearly appreciated at this juncture. I have taken the necessary time, and have given the entire record in this cause much study and thought. The arguments which can be advanced in support of the motion are apparent, but I am very strongly predisposed to take the same view of the matter which

Judge Townsend did. I trust that counsel will concede that this is my own independent view of the situation, and in no sense an imitation or following of one for whose judgment I have the highest respect. I am sure that I have given the matter very much more thought than he had the time to give, and I find that in this case, as in many others, "all roads lead to Rome."

Let a decree be entered for \$3,854.39, with interest thereon from May 1, 1897, and costs.

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VICTOR TALKING MACH. CO. et al. v. AMERICAN GRAPHOPHONE CO.  
(three cases).

(Circuit Court, D. Connecticut. October 24, 1902.)

Nos. 1088-1090.

1. PATENTS—SUIT IN EQUITY FOR INFRINGEMENT—PARTIES.

A former licensee under a patent cannot join as a complainant in a suit for its infringement on the theory that it has an interest in the accounting for past infringements, unless all subsequent assignees of the license are also joined.

2. EQUITY—MISJOINDER OF PARTIES—RIGHT OF AMENDMENT.

A bill to which a demurrer has been sustained on the ground of a misjoinder of complainants may be amended by dismissing as to the party without interest.

In Equity. Suits for infringement of patents. On demurrers to bills.

Horace Pettit, for complainants.

C. A. L. Massie, for defendant.

PLATT, District Judge. These suits are for infringement of divers letters patent, one based on No. 564,586, one on No. 534,543, and one on No. 548,623. A demurrer is filed in each case. Each bill discloses the same alleged defect. The demurrers are exactly alike, and are directed at that alleged defect. All the suits can be settled in one discussion, and will receive that treatment.

The important facts are as follows: Emile Berliner was the original inventor of the patents in suit. Early in their history the chain of title merged and became vested in the United States Gramophone Company. Some time in 1895 the United States Gramophone Company, owning the entire title, granted an exclusive license to William C. Jones, which was subsequently confirmed and modified by the parties. This exclusive license was in October, 1895, transferred to the Berliner Gramophone Company. In September, 1901, the Berliner Gramophone Company, still owning the exclusive license, granted to E. R. Johnson "the said exclusive license and all its rights therein and thereunder to manufacture, sell, use, and deal in said invention and inventions," with right to assign the same to the Victor Talking Machine Company. In October, 1901, Johnson assigned to the Victor Talking Machine Company said exclusive license.

¶ 2. See Equity, vol. 19, Cent. Dig. § 554.

These facts appear to be reviewed, condensed, digested, and explained by the later averments in each bill, which, as they are all alike, are quoted from the one in hand:

"And your orators further show unto your honors that by virtue of the premises your orator the United States Gramophone Company, is now, and has been at all times since the date of the said assignment to it, the sole and exclusive owner of the said letters patent No. 534,543, and that your orator the Victor Talking Machine Company is now and has been at all times since the date of the said agreement with it, and the said transfers and assignments of the said rights to it, the sole and exclusive licensee as aforesaid under the said letters patent No. 534,543, for the manufacture and sale of said invention patented in said letters patent, throughout the United States. Your orators show unto your honors that they are now, and were at the time of the commission of the acts hereinafter complained of, the sole and exclusive owners of the legal and equitable title in and to the said letters patent No. 534,543, and in and to the improvements therein contained, and of all rights of action thereto pertaining, as will more fully and at large appear by reference to the said agreements, assignments, and proofs in court to be produced."

Under these circumstances, the Berliner Gramophone Company would appear to have divested itself of any interest in the subject-matter.

Counsel for complainants contends, however, that if after full hearing it should be found that the patents had been infringed, and a decree should be entered sending the matter to a master for an accounting, the rights of the Berliner Gramophone Company for past damages and profits would be incidentally included in the general subject-matter, and that it is the province of a court of equity to extend its charitable arm over all parties who can be seen to have a possible interest. Counsel for defendant, per contra, contends that if such a right exists, which he strenuously denies, remedy is in a court of law; citing *Root v. Railroad Co.*, 105 U. S. 189, 26 L. Ed. 975. In that case the patent had expired, and redress was sought in equity for past infringements. This was denied, it is true; but the reasoning of the court on page 216, 105 U. S., 26 L. Ed. 975, and passim, does not bear out the contention of the defendant in such a case as the one at bar.

I am slightly inclined toward the opinion that the Berliner Gramophone Company did divest itself of all its rights, so far as they could be reached by these suits, including even a right so remote and contingent as that of claiming damages for past infringements. The case, however, does not necessarily turn on that point. A misjoinder cannot be distinguished from a nonjoinder in principle or effect. Either fault can be searched out, found, and cured by demurrer. If the Berliner Company is properly a party complainant, without question Johnson is entitled to the same privilege. If equity, with its far-reaching arm and comprehensive vision, stretches to the horizon, it would fail in its duty if it stopped short of the last beacon. It is no adequate answer to say that the defendant may have done no wrong during the short time Johnson was in the saddle. During that period, brief as it was, his position differed in no respect from that occupied by the Berliner Company for a number of years.

The defendant has undoubtedly invoked the aid of the demurrers herein with propriety, but I cannot agree with him that favorable

action thereon by the court is fatal and final. The cases which he cites fall short of that conclusion. In *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729, for example, it was decided that after the demurrer had been sustained by the court the party without interest could be dismissed upon proper motion. And so in *House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838, the decree in the circuit court had been for general dismissal. The supreme court says that if it had been dismissed without prejudice, or for misjoinder, or want of interest, the decree would have been affirmed; but, since it was absolute, the case was sent back, to be amended if the parties so desired.

Let the decree conform to this opinion. If the complainant wishes to amend by striking out or adding, he can do so within 20 days. If he fails to do so, let the bills be dismissed, with costs.

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PALMER et al. v. LANDPHERE.

(Circuit Court, D. Connecticut. October 8, 1902.)

No. 881.

1. PATENTS—INFRINGEMENT—QUILTING MACHINES.

The Palmer patents, No. 308,981 and No. 308,982, for machines for quilting fabrics, held infringed.

2. SAME—CONTRIBUTORY INFRINGEMENT—SALE OF PARTS.

One who bought and resold at a profit separate parts of infringing machines, which he was employed by the purchasers to set up, cannot avoid liability as a contributory infringer on the ground that he was merely selling his labor as a skilled workman, and where he had notice of the infringement he may be required to account.

In Equity. Suit for infringement of letters patent Nos. 308,981 and 308,982 for machines for quilting fabrics, granted December 9, 1884, the former to Frank L. Palmer, and the latter to William H. Palmer, Jr. On final hearing.

Dickerson & Brown, for complainants.

J. E. Maynadier, for defendant.

PLATT, District Judge. The letters patent upon which this suit is based are Nos. 308,981 and 308,982, issued on the 9th day of December, 1884, respectively, to Frank L. Palmer and William H. Palmer, Jr., and controlled by the complainants. Defendant is charged with having infringed claims 14 and 24 of patent No. 308,981, and claims 2, 3, 4, 12, 15, and 20 of patent No. 308,982. The defense is noninfringement.

I need make no extended comment upon the state of the prior art, nor upon infringement. The contentions involved in such a discussion have been fought out thoroughly, and to a finish, in the Crefeld Mills Case (C. C.) 57 Fed. 221, and in the case in the First circuit (35 C. C. A. 86, 92 Fed. 926), when the circuit court of appeals overruled Judge

¶ 2. Contributory infringement of patents, see note to *Edison Electric Light Co. v. Peninsular Light, Power & Heat Co.*, 43 C. C. A. 485.

Putnam ([C. C.] 84 Fed. 455) on the only question which troubled him, sustaining therein fully and unequivocally the position taken by complainant.

The discussion before me seems to be almost entirely a threshing over of old straw, although I am bound to confess that counsel for defendant wielded the flail with commendable vigor. After waiting for the dust to settle, I find nothing positively new except a citation of patent No. 313,230. The defendant asks me to hold that that patent acts as an estoppel. It is so clearly a subsidiary patent dominated by the patents in suit as to demand nothing more than a passing glance.

As the work which can be done with the machine described in No. 313,230 can be done just as well by machines constructed in conformity to the description of the patents in suit, and taking into account the disadvantages in amount of power required and in the amount of room needed, it seems to go without saying that, if there was anything patentable in the combination described in No. 313,230, it was a subsidiary improvement dominated by the patents in suit.

Defendant also contends that he gained his knowledge of the machines while he was employed as a mechanic by the owners of the patents in suit, and that he had a right, after leaving their employ, to enter the employ of a rival concern, and fit up that concern with the patented machines, and that he could continue shifting his employment, and in each case of new service furnish the new rival with his personal knowledge, so as to enable that rival to infringe, in defiance of the patents sued upon. This argument carries with it the necessary corollary, that in each case the defendant remains simply and absolutely a mere employé, working for a specific return in wages as compensation for his labor. It is obvious that I cannot know what evidence Judge Townsend had before him when he overruled a plea setting up substantially the same defense, in this same suit, but I should infer from his opinion ([C. C.] 99 Fed. 568) that it contained many of the ingredients which have been served up to me on final hearing. I avail myself of the judge's labor to fortify my views. But, in addition to that, a diligent search of the record, and a careful examination of the proofs, force me to reach a different conclusion from that contended for by the defendant.

I find that he was, without question, selling the different articles which enter into the construction of the infringing machines at a profit. Under all the evidence it is idle for him to claim the contrary. How can he contend that when he received lump sums by check he can now subdivide such payments into an original actual cost, plus \$15 a day for his labor?

His entire line of conduct since he left the Palmers has been that of a malicious injurer. There is no evidence to warrant the statement that he was discharged without good and sufficient reason. Under his original employment he learned the details of the quilting business, and with that knowledge he went forth into the world. Starting with a place of business of his own, and, in connection with that, using Diamond & Stuard as a vantage point, he has left the marks of his unfair methods behind him in various places. His dealings with the Cold-Blast Feather Company, the California Cotton Company, and



with John Burton for the Queen Down Quilt Manufacturing Company, amply sustain the conclusion at which I have arrived.

And at the end the defendant contends that the complainants are not entitled to an accounting. Complainants set up in their bill these two averments:

"And your orators further show unto your honors, on information and belief, that said defendant was duly notified of said infringement and of the rights of your orators in the premises, and continued after such notice to make, use, or vend the article so patented, and refused to desist from said infringement, and still continues so to do.

"Your orators further show unto your honors, on information and belief, that the said defendant has had notice of said infringement, and of the rights of your orators in the premises, but has disregarded said notice and refused to desist from said infringements, and still refuses so to do."

On March 11, 1901, when final proofs were being taken before John A. Shields, Esq., special examiner, among other things stipulated and agreed upon, defendant's counsel admitted that "defendant was notified of infringement herein, as notification is alleged in the complaint."

After his admission of notice on record, the defendant ought not to be permitted to go scot free. Having indulged in such conduct as has been portrayed above, there seem to be no equities under which he can seek shelter. Let the matter go to a master for accounting.

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SNOW v. ENTERPRISE MFG. CO.

(Circuit Court, E. D. Pennsylvania. October 14, 1902.)

No. 54.

**1. PATENTS—ANTICIPATION—FOOD CHOPPERS.**

The Snow patent, No. 626,212, for an improvement in food choppers, is void for anticipation.

In Equity. Suit for infringement of letters patent No. 626,212, for a food chopper, granted May 30, 1899, to Levi T. Snow. On final hearing.

Albert H. Walker, for complainant.  
Howson & Howson, for respondent.

J. B. McPHERSON, District Judge. This is a bill in equity charging the infringement of the first claim of letters patent No. 626,212, granted in March, 1899, for improvements in a food chopper. The first claim, which is the only one in controversy, is as follows:

"(1) In a food chopper, the combination with a case, having an opening in its rear end, of a forcing screw adapted to be entered into and removed from the case through the said opening, one of the said parts being formed with an annular bearing shoulder for receiving the forward thrust upon the screw when the same is at work, a cutter coupled with the outer end of the screw and having bearing upon the outer face of the outer end of the case, and an adjusting instrumentality applied at the outer end of the screw for drawing the same forward in the case and forcing the cutter rearward to a bearing, whereby the end thrust bearings of the screw are located at the opposite ends of the case."

I have carefully read and considered all the testimony in the case and the arguments of counsel thereon; but, in view of the concession in the brief of complainant's counsel that the claim in suit calls for nothing necessarily different from what is shown in a former patent, No. 591,575, granted in 1897 to Snow, except the annular bearing shoulder extending outward from the rear end of the forcer (b) of that patent, upon the outer border of the opening in the rear end of the case, it seems to me to be unnecessary to do more than state the conclusion at which I have arrived upon this single narrow point. That conclusion is this: In view of the prior state of the art, and particularly in view of the Rademacher German patent of 1889, and the Brown patent, No. 591,323, granted by the United States in October, 1897, both these patents referring to the art of improvements in meat choppers, the alleged improvement was not patentable, because it had been anticipated. If it is permissible to turn to another art, the Brennan patent, No. 296,311, of April 8, 1884, for an improved faucet and stop cock, describes a structure in which a closely similar bearing shoulder is presented; but my conclusion has not been consciously influenced by this patent, because the Rademacher and Brown devices in the art to which the complainant's chopper belongs seem to me to have anticipated the alleged invention.

If this view of the case be correct, it is unnecessary to consider the defenses of infringement or lack of invention. A decree may be entered dismissing the bill, at the costs of the complainant.

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WINN et al. v. WABASH R. CO.

(Circuit Court, W. D. Missouri, W. D. October 10, 1902.)

**1. RAILROADS—CONSOLIDATION—CITIZENSHIP OF CONSOLIDATED COMPANY—FEDERAL COURTS—JURISDICTION—REMOVAL OF CAUSE.**

Rev. St. Mo. 1899, § 1059, authorizes the consolidation of railroad companies in the state, where the consolidation will form a continuous line, subject to all the obligations and liabilities which belong to either of the companies making the consolidation. Section 1060, providing for aid between railroads, authorizes the buying, leasing, or consolidating of railroads within the state, and declares that companies so sold, leased, or consolidated shall exercise all rights, powers, and privileges conferred on state railroads, and "shall be subject to all the duties, liabilities, and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state." The Wabash Railroad was formed by consolidating four railroads, one of which existed and was incorporated in each of the states of Ohio, Illinois, Indiana, and Missouri. At a meeting of the stockholders of the four companies, held in Ohio, five consolidation agreements were executed, one of which was filed, as required by section 1059, in the office of the secretary of state of Missouri, and others were filed in the other states. *Held*, that the consolidated corporation thereby became a citizen of each of the states in which the articles were so filed, subject to its laws, and therefore such corporation is not entitled to remove an action arising in Missouri to the federal court on the ground that it is a resident of another state.

**On Plea to Jurisdiction after Removal from State Court.**

The plaintiffs, citizens of the state of Missouri, instituted suit in the circuit court of Jackson county, Mo., on a cause of action which arose in the

state against the defendant as a common carrier. On petition of the defendant, alleging that it was a citizen of the state of Ohio, the cause was removed into this court. Plaintiffs filed a plea to the jurisdiction of the court, taking issue on the truth of the allegation that the defendant is a citizen of Ohio. The conceded facts respecting the formation of the defendant corporation are as follows:

In 1879 the Wabash Railway Company, a consolidated corporation of the states of Ohio, Illinois, and Indiana, was consolidated with the St. Louis, Kansas City & Northern Railway Company, a Missouri corporation, forming the Wabash, St. Louis & Pacific Railway Company. Among the earlier constituent corporations forming the Wabash Railroad Company was the Toledo, Wabash & Western Railway Company, an Ohio corporation, organized in 1853. In 1883 the Wabash, St. Louis & Pacific Railway Company went into the hands of receivers, appointed by the circuit courts of the United States for the Seventh and Eighth judicial circuits. The line was subsequently divided at the Mississippi river, and two receivers were appointed. Thomas M. Cooley, of Michigan, was appointed receiver of the lines east of the Mississippi river, who was succeeded in such receivership by General John McNulta, of Illinois. Solon Humphreys and Thomas E. Tutt were appointed receivers for the line west of the Mississippi river. In 1886 the property of the Wabash, St. Louis & Pacific Railway Company was sold at foreclosure sale; and the receivers on the west side of the Mississippi river were directed to turn over the property to a committee of bondholders, designated as the "Purchasing Committee," who purchased the property at the sale. The lines east of the Mississippi river were operated under that receivership until 1889, when the receiver was discharged and the property turned over to this same purchasing committee. In March, 1887, the Wabash Western Railway Company, a Missouri corporation, was organized under the laws of Missouri, and acquired the property formerly owned by the Wabash, St. Louis & Pacific Railway Company, by deed from said purchasing committee. This Missouri corporation paid a license fee to the state of Missouri. On the 13th day of March, 1889, a new corporation was formed in the state of Michigan, called the Detroit & State Line Wabash Railroad Company. On the 11th day of March, 1889, a new corporation was formed in the state of Illinois, called the Wabash Eastern Railroad Company of Illinois. On the 23d day of May, 1889, a new corporation was formed in the state of Indiana, called the Wabash Eastern Railway Company of Indiana. On the 23d day of May, 1889, a new corporation was formed in the state of Ohio, called the Toledo Western Railroad Company of Ohio.

Subsequently stockholders' meetings of these respective roads were held in Ohio, Michigan, Indiana, Illinois, and Missouri,—that of the Toledo Western Railroad Company on the 27th day of May, 1889; the Detroit & State Line Wabash Railroad Company on the 23d day of May, 1889; the Wabash Eastern Railway Company of Indiana on the 21st day of May, 1889; the Wabash Eastern Railroad Company of Illinois on the 21st day of May, 1889; the Wabash Western Railway Company of Missouri on the 23d day of May, 1889,—at which meetings of the stockholders the respective railroads assented to and authorized a consolidation of said railway companies and the formation of a new consolidated corporation to succeed them. The agreement for consolidation propounded by these several constituent roads recited that the railroads of the several parties thereto connected with each other, so as to constitute connecting lines, but were not competing or parallel lines, and that it was considered to be for the advantage of all parties thereto, as well as for the public, that said several lines, franchises, and capital stock of all the corporations should be united, consolidated, owned, and worked in common. After reciting the capital stock of the respective parties, divided into preferred and common stock, it is stated that the same had been deposited with said purchasing committee under the plan of reorganization, and that it was intended that the stock of said new consolidated corporation should be issued to the holders of such certificates to an amount equal to the stock as deposited by them, as being the persons entitled to the same, as the equitable owners of the stock subscribed for in each of the corporations in carrying out said plan of reorganization. The agreement

further recited that the terms and conditions thereof "shall be that from and after the consummation of this agreement and act of merger or consolidation by the corporations, parties hereto, and filing the same, duly certified, in the office of the secretary of state of each of the states hereinbefore mentioned, and a certified copy thereof in the office of the recorder of each of the counties through which said lines pass in the state of Illinois, said corporations, parties hereto, shall be deemed and taken to be one corporation, under the name and style of the Wabash Railroad Company." It was further provided that all the powers, privileges, franchises, etc., vested in each of said original corporations under their several charters of incorporation or laws of the several states, should thereby be transferred to and vested in said consolidated company, as well as all the other property, etc., of the respective companies, and "when this agreement shall be ratified by all the parties hereto, and copies filed with the secretary of state of the several states through which said roads pass, and in which the respective parties hereto were incorporated, be and become vested in the said consolidated company without any further or other deed, transfer, or conveyance in that behalf." It fixed the capital stock of the consolidated company at \$52,000,000, \$24,000,000 of which should be preferred stock and \$28,000,000 common stock. It provided as to how the certificates of stock deposited with the said purchasing committee should be exchanged for stock in the consolidated company. It then provided as to the mode of carrying the consolidation into effect, for the election of directors and other officers "of the new corporation provided for by this agreement," and for the time and place for the selection of such directors. "The directors thus chosen shall be directors of the consolidated corporation, and immediately upon the organization shall assume, enjoy, and possess all the powers, rights, and privileges now held or enjoyed by the board of directors of either of said corporations parties thereto, and thereupon forthwith all the property, rights, and franchises, of whatever name or nature, belonging to the parties of the first, second, third, fourth and fifth parts, or either of them, shall pass to and be vested in the said new corporation, and the five named corporations shall forever cease and determine." It was further provided that "five originals of these articles of consolidation shall be signed by the president, and attested by the secretary, and sealed with the corporate seal of each of the consolidating parties thereto, and this agreement shall be spread upon the records of each company, and agreed to by the stockholders of each of said companies, and one of said agreements of consolidation, or a certified copy thereof, filed with each of the secretaries of state of the states of Ohio, Michigan, Indiana, Illinois, and Missouri."

These articles of agreement were properly executed by the several constituent companies, a joint meeting was thereafter held in the state of Ohio pursuant to said agreement, and copies of the agreement were successively filed in said respective states; the filing with the secretary of state for the state of Missouri being prior in point of time to that of the filing with the secretary of Ohio. The \$52,000,000 of stock were issued and distributed, \$30,000,000 of which represented the interests of the Missouri constituent, and only \$700,000 the Ohio constituent. As a similar question has arisen in the Eastern district of this state, it is important that it should be settled in the same way for both districts; and to insure more authoritative ruling thereon THAYER, Circuit Judge, and ADAMS and PHILIPS, District Judges, sat in the hearing of this case and unite in this opinion.

D. B. Holmes, for plaintiffs.

George S. Grover and C. N. Travous, for defendant.

Before THAYER, Circuit Judge, and PHILIPS and ADAMS, District Judges.

PHILIPS, District Judge (after stating the facts as above). The question to be answered, on the foregoing facts, is whether or not a suit instituted by a citizen of the state of Missouri in the state

court against the Wabash Railroad Company on a cause of action which arose in the state is removable into the United States circuit court on the ground that the Wabash Railroad Company is a citizen of the state of Ohio. It was conceded by both parties at the hearing that upon the completion of the agreement of consolidation the respective constituent corporations were dissolved and went out of legal existence, and eo instante the consolidated company, the Wabash Railroad Company, came into existence as a new corporation; and such is the law. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Railway Co. v. Berry*, 113 U. S. 465, 5 Sup. Ct. 529, 28 L. Ed. 1055; *Railway Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; *State v. Keokuk & W. Ry. Co.*, 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222; *Evans v. Railway Co.*, 106 Mo. 601, 17 S. W. 489; *State v. Leuseur*, 145 Mo. 322, 46 S. W. 1075.

It must, we think, logically follow that this new consolidated company has a legal existence in each of the states in which the constituent companies previously existed. At the time of the execution of the articles of consolidation the Wabash Western Railway Company was a Missouri corporation, chartered under and existing by virtue of the laws of the state. As such it was subject to the laws and regulations of the state which created it. It possessed such powers and rights only as were granted to it, and was subject to such limitations and restrictions as the constitution and statute laws imposed upon it. Without an enabling act of the state it had no power, authority, or right to enter into an agreement of consolidation with a foreign corporation, and thereby transfer to and vest in the new company its franchises and property. This authority is conceded to have been derived from sections 1059 and 1060 of the Revised Statutes of Missouri of 1899, which are as follows:

"Sec. 1059. Companies May Consolidate, When.—Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose, or by the approval, in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted: provided, however, that the foregoing provisions

of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except, when by such consolidation a continuous line of roads is secured, running in the whole or in the main in the same general direction. \* \* \* Before any railroad companies shall consolidate their roads, under the provisions of this article, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated.

"Sec. 1060. May Aid Other Railroads, On What Terms.—Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the state, for the purposes of forming a connection of the last mentioned road with the road owned by the company furnishing such aid, or any such railroad company which may have built its road to the boundary lines of the state may extend into the adjoining state, and for that purpose may build, buy, lease or consolidate, in the manner provided in the preceding section, with any railroads in such adjoining state, and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of such companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively; or any railroad company duly incorporated and existing under the laws of any state of the United States may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations, as fully as if incorporated in this state: provided, that no such aid shall be furnished, nor any purchase, lease, subletting or arrangements perfected until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sublet, consolidated or affected by such arrangements, shall have been called by the directors thereof, at such times and places and in such manner as they shall designate, sixty days' public notice thereof having been previously given and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the secretary of state: and provided further, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or make arrangement for operating the same as provided in this act, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state; and a corporation in this state leasing its road to a corporation of another state, or licensing or permitting a corporation of another state, under any running arrangement, to run engines and cars upon its road in this state, shall remain liable as if it operated the road itself; and a corporation of another state, being a lessee of a railroad in this state, or running its engines and cars upon a railroad in this state under a license, permit or running arrangement, shall likewise be held liable for

the violation of any of the laws of this state, and may sue and be sued in all cases and for the same causes and in the same manner as a corporation of this state might sue or be sued if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state, being the lessee as aforesaid, or extending its railroad as aforesaid into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state."

Section 18 of article 12 of the state constitution, in force at the time of the execution of the consolidating act, declares that:

"If any railroad company organized under the laws of this state shall consolidate, by sale or otherwise, with any railroad company organized under the laws of any other state, or of the United States, the same shall not thereby become a foreign corporation; but the courts of this state shall retain jurisdiction in all matters which may arise, as if said consolidation had not taken place. In no case shall any consolidation take place, except upon public notice of at least sixty days to all stockholders, in such manner as may be provided by law."

The consolidation, in so far as the Missouri constituent was concerned, was made subject to said constitutional restriction. *Shields v. Ohio*, 95 U. S. 319-323, 24 L. Ed. 357; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301-310, 14 Sup. Ct. 592, 38 L. Ed. 450; *Railway Co. v. Adams*, 180 U. S. 2, 21 Sup. Ct. 240, 45 L. Ed. 395; *Railway Co. v. Berry*, 113 U. S. 465-475, 5 Sup. Ct. 529, 28 L. Ed. 1055. Said provision of the state constitution was a caveat to all the constituent members to the consolidated agreement that, in entering into the compact for a new corporation, the Wabash Western Railway Company should not thereby become a foreign corporation, and that the courts of the state should retain jurisdiction in all matters arising thereafter as if such consolidation had not taken place. The very existence of the new corporation in Missouri was derived from a grant of the state. In *Shields v. Ohio*, 95 U. S. 323, 24 L. Ed. 357, the court, speaking in reference to the character of the consolidation, said:

"The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation,—no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant. \* \* \* When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were 'granted' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other."

So in *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 364, 25 L. Ed. 185, the court, speaking of the transmutation of the old into the new, said:

"Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise and enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act. \* \* \* That act created a new corporation, and endowed it with the several immunities, franchises, and privileges which had previously been granted to the two companies, but which they could not longer enjoy. It necessarily follows that the new company held the rights granted to it under and subject to the law as it was when the new charter was granted."

The existence of the consolidated company in Missouri coming as a grant from the state, how, in the face of the constitution of the state, that its right to consolidate with an outside corporation shall not operate to make it a foreign corporation for jurisdictional purposes, can it be maintained that the new corporation is a citizen of the state of Ohio, a foreign corporation, with the right of removal from the state to the federal court? The express limitation of the constitution is that, while the Wabash Western Railway Company might consolidate with a foreign corporation, the state courts "shall retain jurisdiction in all matters which may arise, as if said consolidation had not taken place." The new consolidated corporation was created *cum onere*,—with this restriction of the organic law of the state, the sovereign from which it received the grant to be in the state, placed upon it.

Stress is laid in argument by the learned counsel for the defendant company on the fact that it is apparent on its face that the agreement for consolidation pursued in detail the provisions of the Ohio statute authorizing the consolidation of an Ohio railroad with outside railroad companies, and that therefore it evidences a purpose to organize an exclusive Ohio corporation. The conclusion drawn, it seems to us, is a non sequitur. The authority of the Ohio constituent to enter into a consolidation being entirely derived from the grant, a statutory regulation of the state of Ohio, the proceeding had to conform to all the essential requirements of the state statute to become effective in that state. The same is equally true as to the requirements of the laws of each of the other states in which the constituent companies were located and incorporated. Unless the consolidation agreement had provided for a compliance, and each company had complied, with all the essential requirements of the law of the respective states, the consolidation could not have become operative. Forsooth, that the statute of the state of Illinois required a certain thing and the state of Missouri another to be done—one more and one less than the other—to authorize the act of consolidation of corporations existing under grants of the respective states, could not make the consolidated company a citizen of one state any more than of the other. Had the articles of agreement for consolidation expressly provided that the consolidated company should be deemed and become a corporation alone of the state of Ohio, it would have been ineffective, as the agreement could not qualify or extend the grants, with their limitations, under the statutes of the respective states. *Railway Co. v. Adams*, 180 U. S. 1-17, 21 Sup. Ct. 240, 45 L. Ed. 395; *O'Brien v. Cummings*, 13 Mo. App. 197. While the Ohio statute goes into more details, and postpones the effective completion of the act of consolidation until certain things are done, these were only essential to the completion of the grant in that state to the existence of the consolidated company. This is made clear by the language of section 3382 of the Ohio statute, which declares:

"When the agreement is made and perfected, as provided in the preceding section, and the same, or a copy thereof, filed with the secretary of state, the several companies, parties thereto, shall be deemed and taken to be one company, possessing within this state all the rights, franchises, and privileges,



and subject to all the restrictions, disabilities, and duties, of a railroad company."

It did not, as it could not in law, undertake to declare or define the powers, status, and restrictions of the consolidated company in another sovereign state; and in recognition of this fact said section contained the qualification:

"The several companies, parties thereto, shall be deemed and taken to be one company, possessing within this state all the rights," etc., "of a railroad company."

It is provided, for instance, as disclosed by the articles of agreement, that it was required by the statute of Illinois that, in addition to filing the final agreement, when duly executed, with the secretary of state, it should be filed with the recorder of deeds in each county through which the road ran. Did this additional requirement—a further act to be done under the Illinois statute to authorize the act of consolidation—make the consolidated company exclusively a citizen of Illinois any more than of any other state represented by the original constituent companies?

It is true that section 3383 of the Ohio statute provides for a stockholders' meeting, after the adoption of the agreement, for the election of officers "of the new company, \* \* \* provided all the stockholders of the constituent companies are present." And the following section provides that:

"Upon the election of the first board of directors of the company created by the agreement of consolidation, all and singular the rights, privileges, and franchises of each of the companies to the agreement, and all the property, etc., shall be deemed to be transferred to and vested in such new company without further act or deed; all property, rights of way, and other interests, shall be as effectually the property of the new company as they were of the companies parties to the agreement," etc.

On this is based the contention of counsel for defendant that the consolidation never became effective until such meeting of the stockholders of the new company and the election of a new board of directors, and that, inasmuch as the place of assembling the stockholders was in the state of Ohio, they constituted the natural persons constituting the corporation, and by their conventional act of electing a board of directors in Ohio their citizenship is to be imputed to the corporation as of the state of Ohio. This is strained and too metaphysical for practical application. Section 3381 of the Ohio statute had provided the manner of executing the agreement for consolidation on behalf of the stockholders of the Ohio corporation substantially as the Missouri statute provided. This was followed up by section 3382, declaring that "when the agreement is made and perfected as provided in the preceding section, and the same, or a copy thereof, filed with the secretary of state, the several companies, parties thereto, shall be deemed and taken to be one company,"—clearly indicating that the new company had already been brought into existence, the evidential fact of which was the filing of the agreement with the secretary of state, which was done. The succeeding section (3383), therefore, provided merely a mode for bringing into existence a board of directors

and officers of the new company, already created. The succeeding section (3384) provides that, upon the election of the first board of directors "of the company created by agreement of consolidation," the property, franchises, etc., of the constituent companies, "shall be deemed to be transferred to and vested in such new company without further act or deed." This is nothing more than a declaration by the Ohio statute of what is necessarily implied by such agreement for consolidation under the Missouri statute, and what the law under such statute would execute, without more.

The holding of this organization meeting in Ohio, rather than in St. Louis, where the board of directors of the new company have since usually held their meetings, was entirely optional; and in no legal sense was it essential for the transaction of the business in hand. It could not have the effect of fixing the situs of the corporation, as such corporation has a domicile in each of the states by which it is created; and the meeting and transaction of business in either state binds it everywhere. *Graham v. Railway Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Ohio & M. Ry. Co. v. People*, 123 Ill. 467, 14 N. E., loc. cit. 879; *Bridge Co. v. Mayer*, 31 Ohio St., loc. cit. 325.

Let it be conceded, as contended by counsel, that the rule is firmly established that the legal entity,—the artificial corporation,—which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endows it with its faculties and powers, and that the legal residence or domicile of the natural persons who constitute the stockholders is imputable to the state chartering the corporation. It must as well obtain that as the consolidated company "has no legal existence in either state, except by the law of the state" (*Railway Co. v. Wheeler*, 1 Black, 297, 17 L. Ed. 130), the citizenship of the stockholders in the respective constituent corporations entering into the consolidation is imputable to the state where such constituent corporation was created, and this imputation is carried over into the consolidated company as respects that portion of the road lying within a state whose law authorized the act of consolidation. This view is authoritatively sustained. In *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359-362, 25 L. Ed. 185, the court, discussing the legal effect of a consolidation of two railroad companies, as distinguishable from a mere partnership arrangement or merger, said:

"The intention of the legislative act as expressed in the consolidating act controls. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies."

Quoting from *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418:

"The effect of a consolidation is a dissolution of the corporations previously existing, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence."

More pertinent still to the issue at bar is the case of *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207. The Chicago & Southwestern Railway Company, an Iowa corporation, consolidated with a Missouri corporation of like name, under the Missouri statute in question and a like statute of the state of Iowa. The court said:

"The two companies became one. But in the state of Iowa that one was an Iowa corporation, existing under the laws of that state alone. The laws of Missouri had no operation in Iowa."

The corollary of this proposition is equally true,—that in the state of Missouri it was a Missouri corporation, existing under the laws of that state alone.

It is not deemed pertinent to discuss the language employed by the courts in cases like *Railway Co. v. James*, 161 U. S. 548, 16 Sup. Ct. 621, 40 L. Ed. 802, *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 75 Fed. 433, 22 C. C. A. 378, 43 U. S. App. 550, and *Taylor v. Railway Co. (C. C.)* 89 Fed. 119, and like cases, for the reason that they were not instances of the consolidation of the original corporation, which were dissolved and went out of existence and a new corporation came into being under the act of consolidation. Where a corporation of one state acquires by purchase a railroad corporation in another state, and the right, under the law of the state which created the corporation so purchased, to operate the same subject to the domestic laws of that state, and even under conditions which require the purchasing company to become a domestic corporation of such state, the purchasing corporation is not dissolved or merged into a new corporate existence. It retains its original autonomy, and for jurisdictional purposes its citizenship adheres in the state which granted its original charter. Likewise may a corporation of one state consolidate with a corporation of another state under articles of agreement which do not work a dissolution of either corporation with a consequent loss of its citizenship in the state of its creation. Had the Ohio corporation acquired the Missouri corporation by purchase, and the like, it would have owned and controlled the road in Missouri, without affecting its citizenship for jurisdictional purposes.

The case of *Walters v. Railroad Co. (C. C.)* 104 Fed. 377, invoked by defendant, is an apt illustration of the distinction. It is manifest from the opinion that the court found from the facts that no new corporation was created by the consolidation, but that it assumed the form of a sale of the property of the Nebraska railroad company to the Chicago, Burlington & Quincy Railroad Company of Illinois. Hence the language of the court:

"The manner of consolidation was a sale of all of the property of the Nebraska corporation to the defendant company, and an issue of new stock of the defendant company to the stockholders and owners of the Nebraska corporation. That a consolidation may be effected by a sale of the property and franchise of one corporation to another, without the creation of a new corporation, is well established by the authorities. \* \* \* Where, however, a new corporation is created by the joint action or operation of the laws of two or more states, the citizenship of such corporation will be treated as that of each state."

While it is not deemed of any controlling importance, it may be respectful to advert to the suggestion of defendant's counsel that the defendant company was held to pay to the secretary of state of Ohio \$52,000 as fees for filing the articles of agreement of said consolidation. The payment of these fees was resisted by the defendant company on the ground that it did not thereby become in effect an exclusive new corporation of the state of Ohio, and that it existed in

other states as well. The supreme court overruled this contention, and held that the defendant company was in effect a new consolidated company, which could only exist in Ohio by consent of the state, and was subject to such regulations, conditions, and burdens as that state might see fit to impose. The court said:

"The purpose of the tender of the articles of consolidation to the secretary of state was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without that state's consent they could not have been procured." *Ashley v. Ryan*, 153 U. S., loc. cit. 440, 14 Sup. Ct. 866, 38 L. Ed. 773.

This must be equally true as to this consolidated company in the state of Missouri,—that the rights sought to be secured by the consolidated company could only be acquired in the state of Missouri by a grant of the state, and depend for their existence upon the provisions of its laws, and without the state's consent they could not have been procured.

While the case of *Railway Co. v. Meech*, 69 Fed. 753, 16 C. C. A. 510, 32 U. S. App. 691, on account of the peculiar plea interposed by the company, did not present the precise question at bar, it is quite evident, from the trend of the opinion, that the court entertained the view that where a railroad company, like the Missouri Pacific, is operating a continuous line as one company through several states, under an act of consolidation authorized by the local law of the respective states, it is a corporation of the state from which it derives its authority to be in the state, and that, as it derives all of its powers to act as a corporation in the state of its adoption from the local laws, "if it is there sued for an act done within the state, it is sued and must answer as a domestic, and not as a foreign, corporation,"—quoting with approval the language of Mr. Justice Breese in *Quincy R. Bridge Co. v. Adams Co.*, 88 Ill. 615-619, that:

"The only possible status of a company acting under charters from two states is that it is an association incorporated in and by each of the states, and, when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only; the legislation of the other state having no operation beyond its territorial limits."

Other interesting questions may suggest themselves to the judicial mind as to the rights of this consolidated company to sue in the United States court of other states on the ground of diverse citizenship, and its right of removal on the ground of being a nonresident defendant when sued in the state court for a cause of action arising in another state, or its right of defense to such action on the ground that the company sued is not liable on the cause of action stated. But any discussion here of these questions would be mere obiter dictum. What we decide is that, the cause of action against the company having arisen in this state, the defendant is not entitled to remove the controversy into the United States circuit court on the ground that it is a citizen of another state.

It results that the plea to the jurisdiction is sustained, and the cause will be remanded to the state court. All concur.

BARTLETT v. GATES et al.

GATES et al. v. BARTLETT et al.

(Circuit Court, D. Colorado. October 2, 1902.)

No. 4,331.

**1. CORPORATIONS—STOCKHOLDERS' MEETING FOR ELECTION OF DIRECTORS—WHEN WILL BE CALLED BY COURT AND MASTER IN CHANCERY APPOINTED TO CONDUCT IT.**

The directors and officers of the corporation, for the purpose of preventing a stockholders' meeting for the election of directors for the corporation at the time appointed by law, and of perpetuating themselves in office, intentionally refused to give the notice of such meeting required by law, and repealed and enacted by-laws to aid them in their illegal purpose, and availed themselves of an injunction, based on their own illegal action, enjoining the holding of such meeting or any substitute therefor. Thereupon the stockholders, who were the real defendants in the original bill, filed a cross-bill praying for a modification of the injunction, so as to permit, upon due notice, the holding of a stockholders' meeting for the election of directors at a time to be fixed by the court, and for the appointment of a master in chancery to take the charge, control, and direction of such meeting. It clearly appeared that the attitude of the directors and officers of the corporation toward the stockholders who desired to displace them was such as to preclude the possibility of the holding of an election for directors under their authority and control, which had been enlarged and extended by by-laws recently enacted for that purpose, which would be conducted in a fair, orderly, and legal manner. *Held*, that the injunction issued on the original bill should be modified, so as to admit, upon due notice, of the holding of the stockholders' meeting for the election of directors at a time to be appointed by the court, and that such meeting and election should be held under the supervision and control of the master in chancery appointed by the court for that purpose.

See 117 Fed. 362.

Wolcott, Vaile & Waterman and W. B. Hornblower, for cross-complainants.

D. C. Beaman, C. J. Hughes, Jr., Cass E. Herrington, J. M. Waldron, and A. M. Stevenson, for cross-respondents.

CALDWELL, Circuit Judge. I have only had time to make a very brief statement of some of the leading facts in the case and state my conclusions thereon, which, after the learned and exhaustive arguments of counsel, I feel that I can do with some confidence that I have a clear understanding of the case and the issues involved.

The Colorado Fuel & Iron Company is a Colorado corporation, having an authorized capital stock of \$40,000,000, of which about \$26,000,000 has been issued in shares of \$100 each. More than 10 years ago the corporation caused its stock to be regularly listed on the New York Stock Exchange, where it has been extensively dealt in for many years. In compliance with the rules and regulations of the exchange, the corporation constituted and appointed the Knickerbocker Trust Company of New York City its transfer agent, and the Atlantic Trust Company its registrar, in that city. From the time the stock was listed on the New York exchange, the Knickerbocker Trust Company, as the authorized transfer agent of the corporation,

kept a list of the names of members of the corporation, showing the post-office address of each stockholder, and, being furnished by the secretary of the corporation with notices signed by him of stockholders' meeting, mailed one of such notices to each stockholder at his post-office address. For 10 years the annual meeting of the stockholders for the election of directors of the company was held at the time fixed by the by-law of the company, in pursuance to such notices and the 10-days notice given by the secretary of the company by publication in a newspaper, as required by law. During all that time no question was ever raised as to the legal sufficiency of the notice given of the stockholders' meetings, or of the regularity or validity of the meetings held in pursuance thereof. There is no doubt of the regularity and validity of such meetings. The annual meeting of the stockholders for the election of a board of directors and the transaction of other business was by a by-law of the corporation required to be held on the 20th day of August, 1902, at the company's office in the city of Denver. In apt time the corporation furnished the transfer agent in New York City with notices to be mailed to the several stockholders of the annual meeting to take place on the day named. The notices were in this form:

"The Colorado Fuel and Iron Company, Denver, Colorado.

"Notice.

"July 21, 1902.

"The annual meeting of the stockholders of the Colorado Fuel & Iron Company for the election of directors and transaction of general business will be held at the office of the company, Boston Building, Denver, Colorado, on Wednesday, August 20th, 1902, at 3 o'clock p. m.

"D. C. Beaman, Secretary.

"If you cannot attend this meeting, please sign the inclosed proxy, and return to S. I. Heyn, Assistant Secretary, Denver, Colorado."

One of these notices was by the transfer agent mailed to each stockholder at his post-office address. Shortly after this was done, the fact was developed that there was a division of opinion among the stockholders as to the proper persons to be chosen for directors at the coming annual meeting; and at the same time it was asserted by those stockholders who favored a change of directors and management of the company that they represented, either as owners or holders of proxies, four-fifths of the stock of the company. Believing or fearing this claim was well founded, the stockholders and directors of the company opposed to any change began immediately to concert measures to prevent the holding of the annual meeting of stockholders for the election of directors on the day fixed therefor by the by-laws. Some of the means resorted to to accomplish this end may be briefly noticed.

A statute of the state provides:

"Public notice of the time and place of holding such elections, and also of all general or special meetings, shall be published not less than ten days previous thereto in a newspaper published in or nearest to the place in which the principal office of the company shall be kept, as specified in its articles of incorporation." Mills' Ann. St. § 481, as amended by Laws 1895, p. 150.

The duty of publishing this notice is devolved on the secretary of the corporation. The secretary of the company, who sustained to it

the triple relation of director, secretary, and general attorney, refused to obey the command of this statute, and, disregarding his legal duty in the premises, intentionally refused to publish the required notice of stockholders' meeting, for the purpose of preventing the holding of such meeting. That this was his purpose is confessed. The motives for such action are not material in the eye of the law, and, whatever they may have been, they cannot condone its illegality. Undoubtedly, in view of the triple relation the secretary sustained to this company, his action had the sanction and approval of the other directors of the corporation. With the obvious purpose of embarrassing the stockholders opposed to them in the struggle for the control of the corporation, the board of directors hurriedly passed and as hurriedly repealed a by-law, and repealed several by-laws which had been in force a long time, and passed others in their stead. Finally, on the day fixed for holding a meeting, and only an hour or two before the hour fixed for the meeting, the original bill in this case was filed, and, without notice to any one, an ex parte injunction was issued thereon enjoining the directors and stockholders of the corporation from holding the meeting, in these terms:

"You and each and every of you, your agents, servants, attorneys, proxies, substitutes, employes, or representatives, and any and all persons acting by, through, or under or in behalf of you or either of you, and any and all persons claiming to represent as substitutes or proxies any of the stockholders of the defendant the Colorado Fuel & Iron Company, and all stockholders of the defendant the Colorado Fuel & Iron Company, that you absolutely refrain and desist from holding or participating in any meeting of the stockholders in the defendant the Colorado Fuel & Iron Company on the 20th day of August, 1902, or any adjournment thereof or substitute therefor, and also from voting or attempting to vote any stock owned or controlled or claimed to be owned or controlled by the defendants in this action, or either or any of them, or by any stockholders of the defendant the Colorado Fuel & Iron Company, at the stockholders' annual meeting for the year 1902, on the 20th day of August, 1902, or at any other time, until the further order of the court, for any other purpose whatsoever than to adjourn said meeting."

This injunction was served at the moment of the meeting of the stockholders, and immediately after its service the chairman of the board of directors, presiding, declared the same adjourned without day, and refused to entertain a motion to adjourn the meeting to some future day in order to afford the stockholders an opportunity to apply to the court for a dissolution or modification of the injunction. The application for the injunction and its issue and service were so timed as to make it as effectual for all practical purposes as a final decree.

The original bill sets up the following among other grounds for the injunction:

"The plaintiff further alleges that no notice of the stockholders' meeting for the 20th day of August, 1902, or for the annual meeting of 1902, or for any other time, has been published in any paper in the city of Denver, in the state of Colorado, or in the county of Arapahoe, in said state, or elsewhere, and that such failure to publish said notice is contrary to the by-laws of the defendant corporation and the statutes of the state of Colorado in that behalf, and that there is no right of authority for the holding of said meeting on the said 20th day of August, 1902, or at any other time, without giving the notice required by the by-laws of said company and the laws of the said state. And the plaintiff further alleges that, as a result of the contentions of the opposing factions in the directory of said company, it is

impossible for the plaintiff, or any other of the stockholders of the company who are in harmony with the plaintiff, to ascertain who has a right to vote at the annual meeting for the year 1902, and that as a result of such controversies and contentions between the opposing factions in the directory of said company it will be impossible for the contending factions to agree as to who has a right to vote at said stockholders' meetings, and the result of the contentions between opposing forces will, as plaintiff verily believes, result in the election of two separate and distinct boards of directors for said corporation for the ensuing year, each of which boards will claim to have been lawfully and properly elected as directors of said company, and each will contend and claim to be directors of said company. And plaintiff further alleges that as the result of said controversies many persons who are stockholders in defendant company may, and probably will, be prevented from voting at the annual meeting for 1902, provided in the by-laws to be held August 20, 1902. And the plaintiff further alleges that each faction in the directory of said company threaten that, unless their views of who have a right to vote at the annual meeting of the stockholders for the year 1902 are complied with or carried out, that they will each elect a full board of directors representing their respective views of the manner in which the business and affairs of the said company should be conducted for the ensuing year."

The bill also alleges that the officers of the company failed to keep, or cause to be kept, the book required to be kept by section 269 of the General Statutes of the state as amended.

Plainly, there are but two parties to this controversy,—one the directors and stockholders who wish to retain the present management, and the other the stockholders who wish to displace the present management,—and all the persons on the one side make common cause against all those on the other. The original bill was filed in the name of "George F. Bartlett, for and on behalf of any and all stockholders of the defendant corporation who are similarly situated, and who may wish to join in this action," and it is quite obvious that the principal defendants in the cross-bill gladly availed themselves of the benefit of the injunction. They took no steps to have it dissolved or modified, and are at one with the plaintiff named in the bill, and may properly be included among those "similarly situated" with the plaintiff, for whose benefit the bill was brought. It will be observed that the chief ground upon which the injunction was asked and obtained was that the directors and officers of the company had neglected and refused to perform their legal duties as such officers, duties imposed upon them by the law of the state and the by-laws of the company and which they intentionally and willfully refused to perform for the very purpose of preventing the holding of the annual stockholders' meeting for the election of directors. They could not well be named as plaintiffs in a bill seeking an injunction on the ground of their own dereliction of their official duties, and hence they were made defendants to the bill; but they eagerly accepted the benefits of the injunction, which effected the purpose they had been struggling to accomplish, and for which their own illegal action had laid the foundation. The injunction accomplished the very object they desired, and, though named as defendants, they are in reality plaintiffs, and must be so treated.

The stockholders named as defendants in the original bill, who were opposed to the continuance of the present management, and who



were the only real adversary defendants, have filed a cross-bill supplemented by a motion asking for a modification of the injunction and other relief. In substance the cross-bill and motion ask that the injunction be so modified as to permit the holding, upon due notice to the stockholders, of a stockholders' meeting to elect directors; that such election be held and conducted in conformity to the law of the state and the by-laws of the company, except certain by-laws recently enacted, which are claimed to be void (but which the court holds are valid), and "that the court appoint some qualified and prudent person, or authorize and empower one of the masters in chancery of said court to take the charge, control, or direction of such meeting, and to conduct the same in conformity with the statutes of the state of Colorado, and the valid by-laws of said company, and in accordance with the order of the court." The cross-bill is clearly germane to the original bill. The original bill related to and dealt with the holding of a stockholders' meeting to elect directors of the company. That was its subject-matter. The cross-bill deals with that subject-matter, and nothing else. All else is merely supplemental to that subject-matter.

The court is asked to decide now certain questions as to the right of the stockholders to vote at the election. It declines to do so in view of the order it contemplates making in the case. The questions upon which a decision is asked may never arise. Moreover, it is obviously impossible for the court to anticipate the numerous questions that may be raised by the respective opposing parties, and decide them in advance. Under the by-laws, as they now stand, the decision of all questions, including questions touching the right of a stockholder to vote, would, in the first instance, rest with those defendants in the cross-bill who, under a recent by-law, have the right to preside at the stockholders' meeting. Every one of the defendants in the cross-bill, who are qualified so to preside under the by-law mentioned, are directors and officers of the company, who would be displaced by an adverse vote of the stockholders, and who were active in preventing, by means which the law cannot sanction, the holding of the annual meeting on the 20th of August. Those defendants would, in effect, be judges in their own case. The law, which in this respect is in harmony with the common sense of all mankind, declares that no man shall be judge in his own case, even though his adversary consents that he may be. The law deems it unwise to subject any man to the strain and temptation that would be put upon him by acting as judge in his own case; and a further reason for the rule is that self-interest insensibly blinds and warps the judgment of men of undoubted honesty and integrity. It is clear to a demonstration that the existing attitude of the opposing bodies of stockholders towards each other is such as to preclude, in all human probability, the holding of an election for directors which would be conducted in a fair, open, orderly, and legal manner. In the present state of feeling between these opposing bodies of stockholders, no presiding officer would be adequate to that task.

It was averred in the original bill that this condition of things existed at the time fixed for holding the annual meeting for the election

of directors, and this was one of the grounds upon which the injunction was asked and obtained. Neither the conditions nor human nature have changed since that time. The elements of discord that existed then are present now, multiplied and intensified by continued litigation. For these reasons, the court will appoint a special master as prayed for, invested with the powers and authority which will be specified in the order appointing him.

Of the power of the court to make such an order I entertain no doubt. It is supported by authorities cited on the argument, but, independently of those authorities, I should not hesitate to exercise the power in a case like this. The remarks of Mr. Justice Brewer in the case of *Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 47 Fed. 15, are appropriate in this connection. The learned justice said:

"I know, to one who is only familiar with the narrow limits and the strict lines within and along which courts of law proceed, the act of a court of equity in taking possession of a contract running for 999 years, and decreeing its specific performance through all those years, seems a strange exercise of power, but I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand. \* \* \* They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature, and do justice to every individual."

The stockholders of this corporation are legally entitled to have a meeting of stockholders called, at which they can express their choice for directors of the company, and the court will afford them an opportunity to exercise that right under conditions that will secure to each one of them legally entitled to vote, the right to do so.

The complainant's remedy at law is not adequate. The remedy at law would leave the parties free to renew the contest on the same and other like lines that have thus far stifled the voice of the stockholders.

The following is the order entered:

Now on this 2d day of October, A. D. 1902, the motion for a modification of the injunction heretofore granted in the original cause above entitled filed herein by the cross-complainants, John W. Gates, James A. Blair, John Lambert, John J. Mitchell, and Arthur J. Singer, having come on regularly for hearing, the plaintiff and respondent to the cross-bill, George F. Bartlett, appearing by his solicitor, A. M. Stevenson, Esq., the cross-complainants appearing by their solicitors, William B. Hornblower, Esq., Joel F. Vaile, Esq., and Charles W. Waterman, Esq., and the defendants and respondents to the cross-bill, to wit, the Colorado Fuel & Iron Company, David C. Beaman, Julian A. Kebler, John C. Osgood, Alfred C. Cass, John T. Kebler, Cass E. Herrington, John L. Jerome, William H. James, and Dennis Sullivan, appearing by David C. Beaman, Esq., Cass E. Herrington, Esq., and Charles J. Hughes, Jr., Esq., their counsel, and the court having heard read the original bill, cross-bill, and the affidavits, pleadings, and records offered in support of the said motion and in opposition thereto, and also including the original petition for removal of said cause, and the affidavits in support thereof and in opposition thereto, and also the pleadings and affidavits filed in that certain cause pending in this court wherein John J. Mitchell and others were complainants and the Colorado Fuel & Iron Company and others were defendants, and having heard the arguments of counsel, and the court being fully advised in the premises, it is by the court ordered and adjudged as follows:

First. That the original injunction heretofore issued in said original cause above entitled by the district court of the Second judicial district of the state of Colorado sitting within and for the county of Arapahoe, in said state, by order of said court dated the 20th day of August, 1902, be, and the same is hereby, modified as follows: So much of said injunction as undertakes to enjoin and restrain the stockholders of the Colorado Fuel & Iron Company, or any of them, from holding or voting at any meeting of said stockholders to be held as a substitute for the regular annual meeting called for the 20th day of August, 1902, be, and the same is hereby, vacated, and set aside, and a substitute meeting of the stockholders of said company is hereby ordered and directed to be called and held as follows: Such meeting shall be called by the board of directors of said company for the 10th day of December, 1902, at 10 o'clock in the forenoon, and the defendants herein composing said board of directors, namely, David C. Beaman, Julian A. Kebler, John C. Osgood, Alfred C. Cass, Dennis Sullivan, William H. James, John T. Kebler, Cass E. Herrington, and John L. Jerome, and all other persons who are directors of said company, and any persons who may be hereafter elected members of said board before such action shall have been taken, are hereby ordered and directed to call such meeting for the 10th day of December, 1902, for the purpose of electing directors of said the Colorado Fuel & Iron Company for the year ending on the third Wednesday of August, 1903, and for the transaction of such other business as may come before the meeting. And it is further ordered and directed that the defendant David C. Beaman, the secretary of said company, or any one who may be elected or appointed in his place prior to the carrying out of this order, shall send, or cause to be sent, to the stockholders of said company, the notice of said meeting required by the statutes of the state of Colorado, and the by-laws of said company, at least thirty (30) days before the date herein fixed for the holding of said meeting, and shall also publish, in accordance with the statutes of the state of Colorado, a notice of said meeting in one or more newspapers, as provided by law, at least ten (10) days before the date herein fixed for the holding of said meeting. And said the Colorado Fuel & Iron Company, its officers, agents, servants, attorneys, employes, and the directors of said company, are further ordered and directed in accordance with the by-laws of said company to cause the transfer books of said company in the city of New York, kept by the Knickerbocker Trust Company, transfer agent of said the Colorado Fuel & Iron Company, to be closed twenty (20) days before said tenth (10th) day of December, 1902, and to remain closed until after the meeting shall have finally adjourned.

Second. It is further ordered that Hon. Seymour D. Thompson be, and he is hereby appointed special master to be present at and supervise the meeting of the stockholders of said the Colorado Fuel & Iron Company hereinbefore directed to be held, and the said master so appointed shall ascertain and report to the said meeting of stockholders so to be held on said tenth (10) day of December, a list of all stockholders of said company having on said day the right to vote as such stockholders; and to enable the said master to make said report the board of directors of the defendant the Colorado Fuel & Iron Company shall cause, at the demand or request of the said master, that the books in the possession of the said transfer agent of said company shall be open to the inspection and examination of the said master, and the secretary of said company shall submit to the said master the stock books of said company kept or to be kept in the city of Denver, and from the evidence obtained from said books, or from such other evidence as the said master shall deem competent, the said master shall make up the list of stockholders aforesaid. The master is authorized to take testimony upon his own motion or upon the request of either party, and may hear and examine witnesses, and examine books, documents, and papers in the city of New York and in the city of Chicago, state of Illinois, and in the state of Colorado, and in such other places as in his discretion he may order and direct; provided, however, that the taking of testimony on the request of parties shall not be so extended or so used as to delay the convening of the said meeting for the election of directors on the day in this order designated, or to unreasonably delay the election of directors herein provided for. The said master hereby

appointed shall have full, absolute, and complete authority to determine who are entitled to vote at said election of directors, either in person or by proxy, and shall determine all questions of dispute that may arise at said meeting as to the right of any person to vote by himself or by proxy, and as to the validity of any proxy presented at the meeting, and as to the right of any such person as such proxy, and his decision shall be conclusive for the time being upon the said meeting, its presiding officer, the tellers of election, and all persons participating in the said meeting of stockholders. After the conclusion of said election said master shall declare the result of said election, and the persons by him declared to be elected directors shall at once be inducted into office for the time being, and the master shall report to this court the result of such meeting, and the names of the directors who may be elected thereat, the number of votes cast by the stockholders for each person voted for at said meeting for the office of director, and also any ruling made by the said master during the progress of said meeting to which any exception shall be taken by any stockholder or person claiming to be a stockholder or to represent any stockholder as proxy; but no exception to any decision or ruling by the said master shall delay or postpone the election of directors at said meeting, or be cause of adjournment thereof, but any question of difference shall be summarily disposed of by the said master at the time of said meeting.

Third. It is further ordered and adjudged that the board of directors of the defendant company shall, on or before the 20th day of October, 1902, cause to be made of record its resolution providing for the calling of the said meeting hereinabove directed to be called, and on or before the said 20th day of October, 1902, the secretary of the said the Colorado Fuel & Iron Company shall prepare the form of notice thereafter to be issued to stockholders, and the form of notice to be published in a newspaper as hereinabove provided, and on or before the said 20th day of October, 1902, the defendant the Colorado Fuel & Iron Company shall cause a copy of said resolution so by it to be adopted, and a copy of said notice or notices, to be transmitted and delivered to the said master hereby appointed for his consideration and approval, and the said master shall immediately consider the same. If he approves such resolution and notices, he shall indorse his approval thereon, and return them to the said the Colorado Fuel & Iron Company. If he does not approve the said form of resolution or said notice, then he shall direct the proper change or modification that, in his opinion, should be made in such resolution or notices, or both, and immediately upon receiving such instructions from the said master the board of directors of the said the Colorado Fuel & Iron Company shall cause the said resolution to be adopted, and the said notices to be prepared in accordance with the directions so made by said master, and have the same completed prior to the tenth (10th) day of November, 1902, so that the said notices to individual stockholders can be issued and delivered or mailed on or before said date, as required by the statute of the state of Colorado and by the by-laws of said company.

Fourth. It is further ordered that any party hereto may apply to the court or the judge granting this order for any further order in the premises, upon reasonable written notice to the solicitors of record in this cause.

By the Court.

Henry C. Caldwell,

Judge of the United States Circuit Court, Eighth Judicial Circuit.

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### In re GRANT et al.

(District Court, S. D. New York. September 2, 1902.)

#### 1. BANKRUPTCY—CLAIMS—REFERENCE—DECISION—REVIEW.

Where a claim in bankruptcy is referred to a referee, ordinarily his finding will be accepted, as he had opportunity of hearing the witnesses; but, where the special attention of the court is asked by reason of cer-

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¶1. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.

tain testimony which it is claimed must have been overlooked by the referee, his decision would be reviewed.

2. SAME—EVIDENCE—SUFFICIENCY.

Evidence in proceedings to establish claim against a bankrupt's estate reviewed, and held that an allowance thereof was erroneous in view of the uncertainty of the evidence presented by claimant, and particularly because alterations in his books introduced to establish claim.

R. Burnham Moffatt, for petitioner.

Guggenheimer, Untermeyer & Marshall, for trustee.

ADAMS, District Judge. This is a review of a finding by the Referee expunging a claim filed by Thomas B. Stearns in the sum of \$5,210.52 with interest from January 18, 1898, against the individual estate of Charles F. Grant, one of the bankrupts.

The claim arises out of a co-partnership formed the 1st day of September, 1884, between the said Stearns and Grant and one Sheldon for the purpose of carrying on a cattle business in the West, with headquarters at Durango, Colorado, and the principal controversy is with respect to the amount of salary which Grant was to receive for his services in conducting the business of which he had principal charge as manager and treasurer. It is not disputed that he was to have some salary. In the beginning, it was agreed that each partner should receive \$45 per month while working for the firm, as well as expenses, and that the treasurer should receive \$20 per month under similar circumstances. Sheldon retired in February, 1886, and the business was subsequently carried on by the remaining members, without any new general agreement, until 1898, when it was substantially closed. In the fall of 1886, Grant and Stearns met in Denver and an oral agreement was made between them respecting Grant's compensation thereafter. There were no witnesses to this agreement. It is claimed by Grant that it was agreed that he should have \$1,200 for the remainder of the year 1886 and \$2,400 per annum thereafter, without any conditions or limitations. On the other hand, Stearns contends that the agreement was that Grant should receive \$200 per month while he was engaged upon the business of the firm on the ranch. Grant's claim amounts to \$29,563.56, while Stearns only concedes to him \$8,050, making a difference of \$21,513.56, which with interest—and some minor matters which have not been pressed upon my attention—is the subject of contention. The referee has found in favor of Grant's contention and ordinarily his finding would be accepted, as he had the opportunity of hearing Grant and other witnesses testify, though not Stearns, whose testimony was taken by deposition in Colorado, but my special attention to the matter is asked by reason of certain testimony in the case which it is urged must have been overlooked by the Referee or was ignored by him because inconsistent with Grant's statements on the witness stand. The contention is that from Grant's own letters, from the books kept by him and from his own admissions when examined, it conclusively appears that his testimony with respect to the agreement is unworthy of belief.

The letters certainly are of a peculiar nature. In January, 1889, Grant became a partner in the firm of Grant Brothers, a New York stock brokerage firm, which became bankrupt in December, 1900.

In 1892 he became an active member of the firm and did not thereafter go West on the cattle business. Stearns was operating in stocks through this firm from 1892 until 1895 and made losses amounting to about \$11,000, which he finally settled in July, 1899. In the endeavor on the part of Grant to collect these losses and in connection with the cattle business, a voluminous correspondence took place between these disputants, extending over several years. In partial answer to the demands, Stearns endeavored, unsuccessfully until 1898, to obtain an accounting from Grant of the cattle business, in which he had put some \$6,800. In the urgent efforts of Grant to get money from Stearns, he made revelations concerning the methods of conducting the business of the stock brokerage firm which go far to destroy the credibility of all knowingly connected with them. These letters he persistently requested should be destroyed but they were not and are now partially relied upon by Stearns to confute Grant's testimony. It nowhere appears in these letters that Grant claimed a salary of \$2,400 per annum. When finally forced to account to Stearns in 1898, he then claimed such amount but Stearns promptly objected to any such allowance. While it is possible that an arrangement of the kind may have been made, it does not seem probable that it was in view of the provision for salary under the original articles and the nature and extent of the business, which were not such as to apparently warrant a salary of the amount claimed. On the other hand a provision for a monthly salary would have been suitable and likely for periods when Grant should be actually giving his entire time to the business. Moreover it seems highly improbable that if such an arrangement existed, Stearns would have permitted it to stand after 1892, when Grant became an active member of the brokerage firm in New York and was giving all his time to that business, while the cattle business was being cared for by a man named Pearse, who concededly was doing everything that Grant had previously been doing. This man was paid for his services at the rate of \$1 per head of the cattle he handled, and his expenses. Grant said he paid him this amount out of his own funds but this does not seem to be supported by anything beyond Grant's testimony. The whole question is whether Grant's statements can be relied upon. As I have before intimated, the atmosphere of the case is adverse to a favorable consideration of his claim but there are stronger reasons for discrediting him. The books of the cattle firm, kept by Grant, were produced in evidence. In his letters to Stearns, he gave as a reason for not making the statement, which Stearns repeatedly called for, that the books were not written up. He there stated that he intended to give them his attention as soon as possible and in the meantime was urging Stearns to send him money on the brokerage account. In his testimony he said that, except for a short part of the time, the books were written up year by year. When at the end of the case he was asked by counsel for the trustee to explain what he meant by the statements in his letters, he said he meant that the books were not balanced!!! It was testified by a competent handwriting expert that all entries in the books after January, 1888, were probably made within a short time of each other, not exceeding a period of two years,

and it is strongly urged on the part of Stearns that no entries were made by Grant until he wrote up the books on or about 1898 to fit a charge of \$2,400 for salary. The testimony of the expert, is not met by any corresponding testimony to overcome the theories advanced, and the general appearance of the books tends to corroborate it. But the evidence concerning the books affords something more definite than material for expert opinions. There seems to have been two distinct periods of work on the books, the first ending with entries dated in December, 1887, made in black ink, which has become faded, and the other commencing with dates in the same month, made in violet colored ink, which remains fresh in appearance. In the book of original entry, called the "Cash Book," prior to the ending of the black ink entries, there is an entry dated Dec. 31, 1886: "To C. F. Grant, credit a/c salary Jan'y 1st/86/Jan'y 1/87 2400." The "2400" is written in violet ink over an obvious erasure of some other figures, which a magnifying glass shows ended with "00." In the same book, prior to the ending of the black ink entries, there is an entry dated Dec. 31, 1886, "Expense a/c Salary C F Grant Jan'y 1st/86 to Jan'y 1/87, 2400." The "2400" is written in violet ink, over an obvious erasure of some other figures, similarly shown to end with "00." In the same book there are similar changes with reference to the salary for 1887. Grant was examined by counsel for Stearns with respect to these erasures and figures and said the salary as stated in purple was wrong, that it should be "1200" and by mistake he made it "2400"; he further said that he could not recall the occasion for these changes. On the next hearing, several days later, upon being examined by the counsel for the trustee, he attempted an explanation of the erasures and new entries. He said:

"A. In 1890 in going through my books at that time, I was going through my cash book and found that I had charged \$2400 of my salary in 1886. I turned back and by mistake I scratched out the year 1887 and after I got it scratched out I found I had the wrong year, as the cash book will show. It looked like the end of 1887, instead of that it was the end of 1888. I changed it back to \$2400 as it should be for the year 1887. Then I scratched out for the year 1886 the charge to salary of \$2400 a year—this is merely a cross-entry in my cash book—I crossed out the \$2400 a year on both sides of the account with the idea of putting it as it should be \$1200. I never knew until Mr. Moffatt showed me the other day, that by mistake I left it \$2400 as it originally was. I refer you to my ledger of my salary account, that will show that erasure there where I had it \$2400 for the year 1886, and changed it to \$1200 for 1886. I would like to show you the cash book. (Witness does so.) I state here is a cross entry made in my cash book, salary Jan. to Jan. 1st, 1887, as I thought it was the year 1886, and I erased that, and on the other side you will see the same thing, and made it \$2400. I started to change it to \$1200; I erased both— I changed it and found that after I started to fill it out, it was a mistake, it should be \$2400. Jan. 1st to Jan. 1st, 1888, \$2400. I thought I was working the year 1886. I then came back to 1886, pages 48 and 49, and erased this; this was originally \$2400 a year, and I made both erasures with the idea of changing it to \$1200, as it should be, but by mistake I put it just the same again, and I never knew of it until Mr. Moffatt showed it to me the other day."

At this time the expert had not been examined. When he was called upon to testify concerning the entries, he said, he could see that the original entries were "1200" not \$2,400, and he volunteered to prove it by the use of a chemical re-agent which he said would

temporarily bring back the original figures. At the next hearing, in the presence of the referee and all the parties, he applied the reagent and gradually the figures "1200" did appear. I do not see why full credit should not be given to the demonstration, even if the expert's theories with respect to the periods of writing may not be accepted. Nor do I see how Grant's testimony can be credited in the face of the circumstances I have mentioned, particularly with respect to these erasures and the substituted figures. His explanation is evidently not correct and the facts as they appear, that is the original entries being "1200" instead of "2400," in both years, are more consistent with a claim of \$200 per month while working on the ranch, which would doubtless include matters incidental to the ranch business, than an annual salary of \$2,400. The original arrangement was for an equal division of the profits, less such amounts as were allowed to the partners, who did the work, with their expenses, and I regard it as far from established that any subsequent arrangement was made which changed the spirit of the original agreement so as to permit one of the partners to absorb, without regard to what he was doing for the firm, such a large annual sum as \$2,400 out of a small business.

The decision of the Referee is reversed and the matter is remitted to him for further proceedings in conformity herewith.

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RANDOLPH v. WILEY et al.

(District Court, S. D. New York. October 6, 1902.)

**1. CHARTER PARTY—LAY DAYS ON LUMBER CARGO—RULES OF MARITIME ASSOCIATION OF THE PORT OF NEW YORK.**

A charter for a vessel to carry a cargo of lumber from Norfolk to New York fixed the rate of freight for rough lumber, and provided that "if any dressed lumber shipped one-fifth off as customary." It further provided that the lay days for discharging should be according to the rules of the maritime association of the port of New York. Rule 5 of such rules allows one lay day for each 25,000 feet of lumber. The cargo brought consisted in part of dressed lumber. *Held* that, in computing the lay days for discharging under the rule, a reduction of one-fifth should be made from the measurement of the dressed lumber, thus reducing it to its equivalent in rough lumber, measured by the freight paid, and presumably in bulk, no custom being shown that the reduction on dressed lumber was made in the rate rather than the quantity.

**2. SAME—DEMURRAGE.**

Under a charter fixing the rate of demurrage to be paid by the charterer at "customary" dollars per day, the rate recoverable for delay in discharging in New York is not governed by the rules of the maritime association of the port, in the absence of proof that the rate thereby fixed is the customary rate.

In Admiralty. Action against charterer to recover freight and demurrage.

James J. Macklin, for libellant.

Hyland & Zabriskie, for respondents.

¶ 2. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.



ADAMS, District Judge. This is an action brought by the libellant to recover a balance of freight of \$20.27 and six days' demurrage at \$49.20 per day, on a cargo of lumber transported by the schooner "T. Morris Perot" from Norfolk, Virginia, to New York in August, 1901. It is not disputed that the freight is due.

The controversy arises out of the terms of the charter party, made between the libellant, as master of the vessel, and the respondents, as charterers, which, *inter alia*, provides:

"The said party of the second part doth engage to provide and furnish to the said vessel a full and complete Cargo of Dry Boards, Rough and or Dressed and to pay to said party of the first part or agent, for the use of the said vessel during the voyage aforesaid \$2.25 and free wharfage per M delivered. *If any dressed lumber shipped, one fifth off as customary.*

"It is agreed that the lay days for loading shall be as customary and for discharging according to rules Maritime Association, Port of New York. If at a Sound Port, as customary. And that for each and every day's detention by default of said party of the second part, or agent, *customary* dollars per day, day by day, shall be paid by said party of second part, or agent to the said party of first part, or agent."

The underlined words were written, the remainder being printed.

The vessel arrived and reported on Saturday, August 17th, and was ordered to the Long Island Railroad Dock. The discharge of the cargo was commenced on the 20th of August and finished on the 10th of September. The cargo consisted of 375,487 feet, of which 138,659 feet were rough lumber and 236,828 feet were dressed lumber. The claim on the part of the libellant is that time for discharging should only be allowed in conformity with the provision for one-fifth off on the dressed lumber, the basis for the calculation of the freight, which would give the respondents 13½ days to discharge, and that the demurrage for six days is due at the rate of \$49.20 per day, that being the rate established by rule of the Maritime Association of the Port of New York. The respondents claim that the time for discharging should be calculated at 25,000 per day on the basis of the full cargo carried which would allow them 15½ days, and that it should be computed at the rate of \$15 per day, which, it is said, was the customary rate at the time.

The Rules of the Maritime Association in question, so far as necessary to be considered, are as follows:

#### Rule IV.

"Consignees shall have one full calendar day (Sundays and legal holidays excepted) after the vessel arrives and the captain or vessel's agent reports, in which to furnish the vessel with a berth where she can discharge. \* \* \*

#### Rule V.

"Lay days allowed to consignee for receiving cargo shall be as follows, viz: One day to furnish berth for vessel as provided in Rule IV, and one running day (Sundays and legal holidays excepted), for each 25,000 feet of lumber. \* \* \* The first half of every Saturday, not a full legal holiday, together with the last half, or portion known as a half holiday to count as a lay day. If vessel is ready to discharge cargo in questionable weather, consignee must receive same, but in case of failure of vessel through her fault to discharge the quantities per day as herein provided, consignees shall not be liable for demurrage, provided they have furnished berth or lighters as provided in Rules III and IV.

After the days herein provided have expired, consignee shall pay demurrage for every running day until vessel finishes discharging."

Rule VII.

"The charge for demurrage for vessel shall be at the rate of fifteen cents (15c.) per day per thousand feet board measure of entire cargo delivered. All fractions of a day, over one-half, shall be paid for as a full day, and one-half of a day or less be paid for as one-half of a day."

It is substantially agreed that Rules 4 and 5 were referred to and intended to be incorporated in the contract. The libellant contends that Rule 7 was also intended to be incorporated for the purpose of fixing the rate of demurrage, but the respondents deny that the rule has any application in the case and on the trial objected to its admission in evidence for that reason and it was received subject to the objection.

The questions to be determined are: (1) Was the provision for one-fifth off the dressed lumber to constructively reduce the quantity of lumber discharged for the purpose of computing the lay days or were they to be computed on the quantity actually discharged? (2) Was the rate of demurrage to be determined by the Maritime Association Rule 7 or by the ordinary methods of ascertaining the loss suffered by the vessel in consequence of the detention, under a provision for "customary" rates?

(1) It is shown here that the reason for the deduction of one-fifth of freight on dressed lumber is that when it is supplied instead of rough lumber, the vessel's carrying capacity is considerably increased and it is just, therefore, that the charterer should have the benefit thereof without additional charge and the parties have recognized the propriety of a deduction by their contract, but, in so agreeing, have they contemplated that the deduction is to give the charterers time for discharging in addition to what they would have had if all rough lumber was shipped? It is apparent in this case, for example, that if the charterers had shipped rough lumber only, that the quantity on board would have been reduced, but the vessel's freight would not have been reduced because, in that event, the rate of freight would have been \$2.25 on the whole cargo instead of \$1.80 on a part of the cargo. It may be, notwithstanding the inconsistency, that the parties intended the result claimed by the respondents should follow, but I think such intention should be clearly manifested, especially in an instrument prepared by the party claiming under it, as was the case here, and I fail to find it in the contract. It is agreed that the lay days for discharging should be according to the rules of the Maritime Association. Nothing appears in Rule 4 or 5 which throws any light upon the matter and the respondents ask no consideration of Rule 7 in their favor, so that a possible view that the provision therein for a computation on the "board measure of entire cargo delivered" was meant to cover an allowance of time for discharging according to the quantity delivered, need not be entertained. Moreover, it is doubtful if the rule could properly be so divided as to carry a provision for quantity without the accompanying provision for a rate. It would seem therefore that no further effect can be given to the provision for the rules than to include 4 and 5, and it follows that there is no evidence of intention to allow the charterers additional time for discharging in consequence of the shipment of dressed lum-

ber. Assuming that a deduction of a fifth in the rate represents a corresponding deduction in quantity for the purposes of time in discharging, I find that the quantity delivered, was for demurrage calculation,  $138,659 + 189,462 = 328,121$ . At 25,000 per day the time allowable for discharging was  $13\frac{1}{8}$  days. Between August 20th and September 10th, excluding rainy days when the vessel did not work, Sundays and Monday, September 2d, observed as a holiday, there were 18 days consumed in discharging. The libellant is therefore entitled to demurrage for  $4\frac{7}{8}$  days.

The respondents have sought to establish the existence of a custom governing the allowance of time in their favor and claim that the deduction of one-fifth is always made in the rate of freight and not in the quantity of lumber, so that the charterer should have not only the advantage of reduction in paying the freight but also the advantage of more time in discharging. It is evident that it would make no difference in the amount of freight to be paid whether the deduction should be made from the quantity of lumber or the rate of freight and the evidence establishes nothing more than a method of settling by some charterers on the best terms obtainable from vessels, illustrated in this case by an attempt at first to force the captain to settle the freight on a basis of 360,696 feet of lumber—with a reduction of a fifth on 239,596 feet of dressed—when in fact there were 375,487 feet on board, and to settle the demurrage on the basis of a half day's allowance when admittedly  $2\frac{1}{4}$  days were due.

(2) The contract, after providing for the ascertainment of the number of lay days by a reference to the Maritime Association Rules, proceeds to arrange for a rate of demurrage, by providing that for each and every day's detention, "customary" dollars shall be paid by the charterers, "customary" being written in a blank space in the printed clause. The parties by a reference to the Maritime Association Rules for the purpose of fixing the number of lay days and by then providing that the rate should be as "customary," obviously intended to exclude the rate contemplated by Rule 7, unless it was the customary rate. Testimony from expert witnesses was adduced by the libellant with the view of showing that it was the custom to rely upon the rule for the rate, but the testimony was contradicted and fails to establish the contention. It does not appear that the provisions of the Maritime Association Rules, in this connection, have become the custom, though sometimes used as a guide, but that on the contrary there has been a general contention among interested parties in this kind of business as to what rates should prevail when described as "customary." It is shown that when rates of demurrage for vessels of this character and in this kind of business are provided for by the charters, they are about \$15 per day. It also appears that the earnings of this vessel when employed in this kind of business were about the same. An allowance of \$15 per day will meet the requirements of justice here.

Decree for libellant for \$93.39 with interest.

## THE TEASER.

## THE TRANSFER NO. 14.

(District Court, S. D. New York. October 22, 1902.)

## 1. COLLISION—VESSELS MEETING—INATTENTION TO LIGHTS AND SIGNALS.

A tug with a car float on each side passing up East river in the channel between New York & Blackwells Island, in the early morning, held in fault for a collision with a barge coming down in tow of a tug on a hawser, which occurred on the New York side of the channel, on the ground that she was on the wrong side of the channel, and was negligent in failing to give proper attention to the lights and signals of the approaching vessels, or to promptly and decisively change her course to starboard as soon as they were seen coming almost directly head on.

## 2. SAME—TUG WITH TOW—EXCESSIVE SPEED.

The tug having the barge in tow also held in fault because she did not at once stop or at least reduce her speed when she found that the approaching vessel did not answer her signals, and apparently paid no attention to them.

## 3. SAME—INCREASED CARE REQUIRED OF TUG TOWING WITH HAWSER.

A vessel which incapacitates herself by her method of towing from performing an ordinary statutory duty to avoid collision must show that she has exercised an amount of care commensurate with the increased risk; and the fact that she has her tow on a hawser while going with the tide does not privilege her to continue with unabated speed in the face of an impending collision, but to be exonerated from fault she must at least have stopped her engines and reduced her headway to that given her by the tide.

## 4. SAME—BARGE IN TOW—ERROR IN EXTREMIS.

A barge in tow which has followed her tug up to the time she is placed in extremis through the fault of such tug and a meeting vessel cannot be charged with fault for a collision because of a slight variation of her course thereafter.

In Admiralty. Suits for collision.

James J. Macklin, for libellant.

Wing, Putnam & Burlingham, for the Teaser.

Henry W. Taft (Henry Galbraith Ward, advocate), for Transfer No. 14.

ADAMS, District Judge. This is an action brought by the owner of the barge David Wallace to recover damages caused to the barge by a collision in the East River, with a car float in tow on the starboard side of the steamtug Transfer No. 14, on the 25th day of March, 1901. The barge was in tow on a hawser, of about 45 or 50 fathoms in length, of the steamtug Teaser, and bound from Newport, Rhode Island, to Hoboken, New Jersey, through the channel between Blackwells Island and New York. The Transfer No. 14, with a float on each side, was proceeding through the channel from Jersey City to Harlem. The collision happened about 5 o'clock in the morning. It was before dawn, while the vessels' lights were burning and the navigation governed thereby. The tide was ebb and the weather clear.

The barge alleges that the Teaser, the barge following, was proceeding through about the center of the channel, and upon seeing No. 14

¶ 1. Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

and floats ahead, blew the tug three signals of one whistle each, to which the Teaser and barge conformed, but that no heed was paid to the signals by No. 14 and she came on causing the collision. Fault is charged against the Teaser for not slowing, stopping and sounding alarm whistles when the first signal to No. 14 was not answered. Fault is charged against No. 14 in not keeping a proper lookout; in proceeding at too high rate of speed; in not stopping and backing in time; in not answering the signals of the Teaser and in not giving any alarm whistles.

The Teaser alleges that the lights of No. 14 were seen about a mile away and the tugs were then proceeding about head and head; that she blew a signal of one whistle and ported her helm, to which No. 14 made no reply; that she repeated this signal twice and gave a signal of four short blasts and a long blast, which signals she repeated, to none of which did No. 14 make any reply, nor did No. 14 check her headway but came on first striking the Teaser with her port car float and then the barge with the same; that the place of collision was very near the New York shore. The Teaser adopts the charges of fault against No. 14 alleged by the barge.

Transfer No. 14 alleges that she was pursuing a course about 300 feet off the New York shore and when she reached a point off 61st Street, the Teaser's side lights and the lights of the barge were seen; that the Teaser gave a signal which was so faint that the master of No. 14 was unable to make out whether it was a signal of one or two whistles and he immediately blew a signal of one whistle to indicate his intention to pass the Teaser to port; that the Teaser did not reply to No. 14's signal but kept on without changing her course, and the barge instead of following her, sheered to port across the course of No. 14; that the Teaser passed down the river on the port side of No. 14 while the barge sheered across No. 14's bows and came in collision with the starboard bow of the float and then under the influence of the sheer continued across the river and went ashore on Blackwells Island. The No. 14 charges fault against the Teaser in that she did not keep to the starboard side of the channel pursuant to the provisions of Article 25, did not have a proper lookout, did not have her side lights brightly burning, did not stop and back in time to avoid collision, did not blow the alarm whistles nor other signals in time and did not keep her tow clear of No. 14. No. 14 also charges fault against the barge in that she failed to follow the Teaser but sheered out of her course, bringing about the collision.

There is no material conflict in the testimony as to the tugs having been substantially in a head and head position to each other for some time as they approached and it was the duty of each to port her helm and pass the other on the port side. The distance between Blackwells Island and the New York shore varies from 750 to 900 feet, and allowing a reasonable margin for navigation away from the shores there is an average navigable channel in the vicinity of the collision, somewhere in the neighborhood of 61st Street, of about 600 feet. Of this space, No. 14, with her floats, occupied about 100 feet. The Teaser was about 25 feet wide and the barge about 36 feet wide.

The ascertainment of the part of the channel in which the collision

took place is determinative of the question whether the tugs performed their respective duties to keep to the right. The witnesses for the Teaser testify that on seeing No. 14, she ported her helm and went within about 150 feet of the New York shore and that when the vessels were in close proximity, she ported again to avoid immediate collision and succeeded in escaping serious damage to herself though the port float struck her on her port side about 30 feet from the bow, with the effect of throwing her bow still further toward the shore, and then No. 14 and tow went on and struck the barge. The witnesses for No. 14 testify that when in the neighborhood of 59th or 60th Street she was proceeding about 300 feet off the shore, 100 feet nearer New York than the Island shore, and that the Teaser was in about the same position with respect to the shores. According to this testimony No. 14 was on the New York side of the channel, and I find that she was nearer the shore than she admits. She places the collision between 60th and 61st Street and only claims in her testimony to have seen the Teaser, off about 70th Street, when No. 14 was off 59th or 60th Street. In her answer she claims she was off 61st Street at the time. As the Teaser was going at least six miles an hour and No. 14 five miles an hour, they were, according to such locations, within about two minutes of collision when the Teaser and tow were first seen. The master, who was navigating No. 14, testifies that at this time he ordered the engine slowed and that he ported a half a point. I think the testimony justifies the conclusion that No. 14 was navigating so near the New York shore that, considering the space she and her tow were occupying in the channel, a collision was imminent unless she changed her course promptly and decidedly to the starboard when the Teaser and tow were some distance away. This she did not do. In fact the Teaser and barge were not seen until they were in close proximity. An attempt is made to account for the failure to see them sooner by alleging that the Teaser's lights were not burning brightly but the testimony to such effect is not of any value. The lights were burning properly and the fact that they were not seen sooner is also condemnatory of No. 14.

No. 14 was primarily in fault for the collision but a serious question remains whether the Teaser was not also in fault. She fulfilled her duty with respect to seeing No. 14 in time, in porting, in going to the right of the channel, and as to her lights and signals, but no claim is made on her part that she did anything to reduce her headway until in the immediate vicinity of No. 14, when she stopped and backed. It appears that she was going under one bell, which gave her the speed of about six miles an hour mentioned. Probably two miles of the speed was owing to the effect of the favorable tide, so that she was going through the water at the rate of about four miles. Her claim is that she could not stop and back sooner because the barge would have shot into her and there would have been danger of fouling the hawser in her propeller but it does not satisfactorily appear that she could not have, at least, considerably reduced her speed without subjecting herself to either danger and thus given No. 14 more time to perform her duty. Those navigating her saw that No. 14

was apparently paying no attention to her whistles but was, as they state, yawing back and forth, changing her lights to the Teaser, though not her general direction towards the Teaser, from which they concluded that the man at the wheel of No. 14 must be asleep. Under such circumstances, it is ordinarily the duty of a vessel to stop and back (*The Columbia* (C. C.) 25 Fed. 844, 23 Blatchf. 268), and I can not find that the Teaser has exculpated herself from fault because she had a tow on a hawser. When a vessel incapacitates herself from performing an ordinary statutory duty by such a method of towing, she must show that she has exhibited an amount of care commensurate with the increased risk which she assumes. *The H. M. Whitney*, 30 C. C. A. 343, 86 Fed. 697, 700. *The Galatea*, 92 U. S. 439, 23 L. Ed. 727, has been cited in support of the Teaser's contention that she was not required to stop under the circumstances. That was a case of collision near Hell Gate between a steam vessel going against the tide and barges in tow of a steam tug on a hawser going with the tide. There the steam vessels understood from the beginning what each intended to do and the fault was found to be with the vessel which failed to act in conformity with her duty to go to the right. Incidentally to that conclusion, it was said that if it were the duty of either vessel to stop, it was incumbent upon the vessel held in fault because she had the advantage of the opposing tide, whereas the other vessel could not stop in the favoring tide, meaning of course that she could not stop the headway resulting from the effect of the tide. It was explicitly said that the vessel might have stopped her engine, but it was held that such stoppage would not have prevented the collision. Obviously the evidence in that case was sufficient to satisfy the court that no harm resulted from the failure to stop the engine and I do not regard the decision an authority for the exoneration of a towing tug which continues with unabated speed into an impending collision, in the absence of convincing testimony that the failure to stop her engine or reduce her speed could have had no effect in avoiding it. The decision in *The Galatea* is with respect to the right of way as between an ascending and a descending vessel (*The Dasori* (D. C.) 47 Fed. 330, 331), but does not hold that there is a right of way on the part of a descending vessel which will result in bringing her tow into a collision with an ascending vessel. The Teaser must also be held.

If it be assumed, as claimed by the barge, that she was following the Teaser until the latter sheered towards New York, it would seem that the barge must have then sheered to the port across the bow of No. 14's starboard float because otherwise the collision between the starboard stem of the barge and the starboard corner of the float, which the testimony establishes, could not have taken place. It is not satisfactorily shown what the cause of such sheer was. The witnesses on the barge state that she attempted to follow the tug to the starboard when the tug changed in that direction in the immediate vicinity of No. 14 but that she could not steer so quickly as the tug and had not time to turn much, if any. It is suggested that the hard-a-porting of the tug threw her stern and her end of the hawser to the port, giving the barge a pull in that direction, which may ac-

count for the sheer. In any event, it being satisfactorily shown that up to that time the barge had followed the tug with reasonable accuracy, it would not be just to hold her for a slight change in the wrong direction when in extremis through the faults of other vessels.

Decree for libellant against both tugs, with an order of reference.

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### THE HYADES.

(District Court, S. D. New York. October 16, 1902.)

#### 1. SHIPPING—DAMAGE TO CARGO OF WHEAT—SEAWORTHINESS WITH RESPECT TO HATCH COVERINGS.

A steamer cannot be held liable for damage to a cargo of wheat from water, under the Harter act, on the ground of failure to use due diligence to make her seaworthy at the commencement of the voyage, by reason of the insufficiency of her hatch coverings, where the evidence showed that she was nearly new, that the wooden covers fitted closely, and were covered with two cotton duck covers, nearly new, and of better than the usual quality, properly secured, making a covering that is usually considered sufficient, and which was specifically approved by the underwriters' surveyors, under whose direction the loading was done as provided by the charter; it being further shown that, two days after she left Galveston with her cargo, she was caught in the storm which wrecked that city, and for nearly three days was unable to make headway, during which time the seas breaking over her tore some of the hatch covers loose, and she suffered injuries, by straining and otherwise, which it cost \$14,000 to repair. Under such evidence the damage must be attributed to perils of the sea.

#### 2. SAME—SEA PERILS—EVIDENCE.

The fact that one vessel passed through a storm without injury to her cargo is not evidence of much weight on the question whether another, sailing two days after her, was subjected by such storm to unusual sea perils.

In Admiralty. Action to recover for damage to cargo.

Wing, Putnam & Burlingham, for libellants.

Butler, Notman, Joline & Mynderse, for claimant.

ADAMS, District Judge. This is an action brought to recover damages alleged to amount to \$20,000 and upwards, by reason of a failure on the part of the vessel to deliver at New York some 29,000 bushels of wheat in the like good order and condition in which it was shipped at Galveston, Texas, on or about the 5th day of September, 1900. Other wheat was damaged on the voyage, concededly from sea perils, but the present controversy is limited to the damage which the cargo received under the hatches, which it is alleged in the libel resulted from the unfit and unseaworthy condition of the vessel, in that her hatches were not caulked, nor properly covered with tarpaulins as customary, only two canvas coverings (without tar or water proofing) having been put over the hatch sections, so that all the hatches leaked, as the seas swept over the ship.

The answer admits damage to the cargo, but avers that in and by the terms of the bills of lading, under which the cargo was shipped,

¶ 1. Loss by perils of the sea, see note to *The Dunbritton*, 19 C. C. A. 465.



and in and by the terms of the charter party referred to in the bills of lading, it was provided that the vessel should not be liable for loss or damage occasioned by causes beyond her control, by the perils of the seas or other waters, or by other accidents of navigation, or by unseaworthiness of the vessel even existing at time of shipment or sailing on the voyage, provided the owners of the steamer have exercised due diligence to make her seaworthy; and that the contract shipment should moreover be subject to all the terms and provisions of and all exemptions from liability contained in the Harter Act. It is further averred that by the terms of the charter party it was provided that the steamer should load under the inspection of the underwriters' agents and should comply with their rules. It is further averred, in substance, that the steamer was almost new and in all respects seaworthy for the carriage of the cargo in question; that she fully complied with the requirements of the contract in every respect, and that during the voyage she met with exceedingly violent weather, which is described in detail, causing perils of the seas, to which the damage of the cargo was entirely due.

The contract of shipment sustains the claims of the answer and the controversy in the case turns upon the question whether the damage was due to insecure hatches, as the direct and proximate cause, rather than to sea perils.

It would not be profitable to discuss the evidence at length. It is shown that the hatches were covered by two cotton duck covers, one of which was new and the other nearly so, both being in good condition. This number of covers is usually deemed sufficient to afford perfect security and was specifically approved in this case by the underwriters' surveyors at Galveston, who by the charter party were to supervise the loading of the vessel. Other reliable testimony appears to the effect that though three covers are sometimes used, they have not been deemed necessary in this trade, and that the third cover is ordinarily an old one, called a "chafer" and used for the purpose of protecting the others from wear, not with a view of affording additional security save as it may so serve. The covers in this case were made of duck, known as "hard No. 1." The evidence shows that it was more than ordinarily heavy and of the best quality and that such canvas has for many years been regarded by competent persons as a suitable material for hatch covers. The evidence also satisfies me that under ordinary circumstances two thicknesses of such canvas were ample to afford all reasonable security to the hatches. The covers are also criticised because they were not tarred or otherwise treated to render them absolutely impervious to water, but it is also clearly shown that it is not usual to tar or otherwise treat duck of this grade and weight because it is closely woven and is ordinarily impervious to water without treatment and there is testimony to the effect that the canvas is in fact injured by such treatment. I do not see how a charge of unseaworthiness can be sustained with respect to these covers under the circumstances of this case, even without regard to certain damage which they sustained from perils of the seas, because the evidence establishes that their use fulfilled all the requirements of due diligence under the Harter Act. Another criticism made upon the vessel's

hatches is that they were not made water tight by caulking or chinsing and testimony has been given on the part of the libellants that it is customary to close the seams in such manner, but on the other hand it appears that this vessel, of the most modern construction, had unusually high hatch coamings, which prevented the hatches from continuing submerged when water was held on deck, the bulwarks being the same height as the coamings. Moreover the hatch fittings were designed to afford security without resorting to devices necessary in vessels of other types. Wooden hatch covers about six or seven feet in length, four feet in width and three inches in thickness, were laid in tiers fore and aft in the coamings. These covers had straight and square edges, designed to fit closely without caulking and in fact they fitted so closely, that when they were put on in Galveston, it was necessary to use force to get them into place. They differed from covers designed for caulking in that the latter have a bevelled edge, in order that there may be room for the oakum used in caulking. These covers were securely bolted to fixtures in the coamings, which kept them steady, and over them the duck covers mentioned were carefully spread, the edges being dropped into iron lugs set on the coamings about two feet from the deck. Steel battens were then dropped into the lugs and wedged into position with oak wedges. Altogether, a method of protection to the hatches was formed which met the unqualified approval of the underwriters' surveyor at Galveston before the vessel sailed. Testimony has been given on the part of the libellants tending to show that the duck was not absolutely water tight after the vessel arrived in New York and that when here the hatch covers did not fit as closely as it appears they did when she left Galveston, but what happened after the event is not sufficient to establish lack of due diligence before the voyage commenced, especially in view of what the vessel had gone through with in the meantime, to which I will now advert.

The steamer left Galveston, Wednesday morning September 5th. The weather was then fair, though a local storm, called a "Norther," was expected about the time. The indications were that a storm was impending but there was none that unusual precautions would be required by a vessel of this character. It continued fair through that day and through the following day, though the barometer commenced falling rapidly at about 9 o'clock Thursday night. At midnight Thursday there was a gale. By 5 o'clock Friday morning a hurricane prevailed and the steamer could no longer make her course. This was the storm which devastated Galveston and its severity is so well known that the particulars of the ruin it wrought need not be referred to. From about 5 a. m. of Friday morning until 1 p. m. Sunday the steamer lay hove to, when for a few hours, during a lull, she was enabled to proceed but was then forced to lie to again. Excepting for the few hours mentioned, her engines during this time were reduced from a normal number of full speed revolutions of about 85, giving a speed of 9 knots, to from 60 to 65, which in ordinary weather would have given a speed of 6 or 7 knots, but which under the prevailing conditions were only sufficient to keep the steamer's head to the wind and instead of being able thereby to make any easterly headway towards

her destination, she was actually blown to the southward and westward. The result of her encounter with this terrific storm was that her steam and hand steering gear broke down, everything movable on deck was washed away, the ventilators fifteen feet above the deck, were carried away, rails were broken, a life boat and water tank were torn from their fastenings and carried overboard and other damages done, causing a general leakage and damage to cargo. It was afterwards found, when the vessel was dry-docked for repairs in New York, that, as a result of the storm, the vessel, though new and unusually strong, was so strained and damaged in her hull, that it cost some \$14,000 to make necessary repairs. During the stress of the storm, some of the wedges holding the steel battens in the lugs of the coamings became loose, the battens were bent by the force of the waves on deck and the canvas covers in some of the hatches were partly washed from their fastenings and torn. Efforts were made by those on board during the height of the storm to secure the loosened covers by means of spiking battens on top of the hatches, which was accomplished by the officers and men with the use of life lines, but they were only partially successful in keeping out the water.

It is sought to overcome the natural and probable effect of the storm by showing that the steamer Michigan left Galveston at about the same time as the Hyades, encountered the same storm and delivered her cargo of wheat in good order and it is urged that the result followed the use of three tarpaulins, instead of the two canvas covers used on the Hyades. One difficulty with the contention is that the Michigan did not by any means encounter the same perils that the Hyades was subjected to. She left Galveston September 3d, two days in advance of the Hyades and though she was doubtless in the outer extremity of the cyclonic hurricane and suffered therefrom in the shifting of her cargo and a consequent list, it is not shown that she was exposed to such extremely severe weather as the Hyades met with in passing through the center of the storm. Moreover, if the vessels had been side by side throughout the storm, the escape of one from damage would not afford evidence of much persuasiveness in determining whether the other was subjected to sea perils. The power and destruction of waves which cause wreckage on one vessel, can not be measured by the absence of injury from other waves to another vessel. Even in the absence of any injury to the other one, the question would still remain whether the injured vessel was subjected to extraordinary marine perils.

This seems to be a case where the damage should properly be attributed to sea perils rather than to any lack of due diligence in equipping the vessel and making her seaworthy.

Libel dismissed.

## UNITED STATES v. BOYD et al.

(Circuit Court, W. D. Missouri, S. D. October 6, 1902.)

No. 189.

## 1. OFFICIAL BONDS—CONSTRUCTION—BREACH.

A bond given by a public officer, as a consul general of the United States, conditioned that he will faithfully discharge the duties of his office, and faithfully account for and pay over all moneys which shall come into his hands under any law, must be construed strictly, in favor of the sureties, with respect to the duties and obligations secured, and it cannot be held a breach of such bond that he failed to return to the treasury a sum overpaid him on his salary through mistake.

## 2. PARTIES—MISJOINDER OF DEFENDANTS.

An action by the United States against the heirs of a deceased public officer to recover a sum alleged to have been overpaid him on his salary account, on the ground that they received distributive shares of his estate, cannot be joined with one against the sureties on his official bond to charge them with liability thereon for the same sum, not only because it involves a misjoinder of parties defendant, but also the joinder of an equitable with a legal demand.

At Law. On demurrer to petition.

William Warner, U. S. Dist. Atty., and A. S. Vanvalkenburgh, Asst. U. S. Dist. Atty.

Frank B. Williams and Thomas J. Delaney, for defendants.

PHILIPS, District Judge. The petition substantially alleges that on the 9th day of October, 1890, Sempronius H. Boyd was duly appointed by the president of the United States and qualified as consul general at Bangkok, Siam, at a salary of \$5,000 per year. He executed bond as such consul general, with the defendants Thomas J. Delaney and Robert J. McElhany as sureties. The condition of the bond, in so far as the same is material to this issue, is as follows:

"The condition of the above obligation is such that if the above-bounden Sempronius H. Boyd, appointed consul general of the United States at Bangkok, Siam, shall truly and faithfully discharge the duties of his said office according to law, and shall truly and faithfully account for, pay over, and deliver up all fees, moneys, goods, effects, books, records, papers, and other property which shall come to the hands of the said Sempronius H. Boyd, or to the hands of any person for his use as such consul general, under any law now or hereafter enacted, and that he will truly and faithfully perform all other duties now or hereafter lawfully imposed upon him as such consul general."

It is assigned for a breach of said bond that the said Sempronius H. Boyd drew drafts upon the United States for salary, and that he received as salary, for the period from July 1, 1893, to October 26, 1893, the sum of \$1,605.76, which was in excess of the amount of salary then due him \$2.50; and, further, that he charged and received as his salary for the period from July 12, 1892, to October 26, 1892, the sum of \$1,453.83, whereas there was due him on account of such salary only the sum of \$726.90; that during said period from July 12,

¶ 1. Liabilities of sureties for acts of officers under color of office, see note to Chandler v. Rutherford, 43 C. C. A. 222.

1892, to October 26, 1892, he was absent from his post of duty upon his statutory leave; that during such period of such absence it is provided by law and the existing consular regulations that when such consul general is absent on leave the vice consul officer acting in his place is entitled to one-half the compensation of the office from the day of assuming its duties, unless there is an agreement for a different rate. It is then alleged that during such absence the vice consul general acting in his place made no waiver or agreement for a different rate of payment than is provided in the regulations aforesaid, and he was therefore entitled to one-half the compensation of the office during said period, all of which was paid to the said Sempronius H. Boyd; that afterwards said vice consul brought suit against the United States for his compensation, and recovered therein the sum of \$726.90, which has been paid by the United States. It is then alleged that the said Sempronius H. Boyd has failed and refused to account for and pay over to the United States said excess of salary so paid him. After allowing upon said indebtedness a credit of \$27.78 on account of contingent expenses due him, judgment is asked for \$701.62. It is further alleged that said Sempronius H. Boyd died testate the 1st day of July, 1894, leaving as his heirs and personal representatives his widow, the defendant Margaret M. Boyd, and his daughter, the defendant Cordie B. Delaney; that said Margaret M. Boyd thereafter qualified as his executrix in the probate court of Greene county, Mo., on the 25th day of September, 1894; and that she was finally discharged therefrom on the 25th day of September, 1897. As grounds of recovery against Mrs. Boyd and Mrs. Delaney it is alleged that they received by inheritance from said Sempronius H. Boyd a large amount of property, both real and personal, and now hold the same. The defendants demur to the petition.

As the defendants Thomas J. Delaney and Robert J. McElhany are sued as sureties on the bond, no recovery can be had against them unless the acts alleged constitute a breach of the bond within the spirit and intent of its conditions. There is no claim made that the consul general had not faithfully discharged the duties of his office, other than the alleged failure to return to the government the excess of salary paid him. Recovery, therefore, on the bond can only be sustained on the ground that the overpayments come within that provision of the bond which required the consul general to "account for all moneys which shall come to his hands as such consul general."

It is among the well-established rules of law respecting the liability of sureties on such bonds that the liability "is not to be extended by implication beyond the terms of the contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation he is bound, and no further." *Miller v. Stewart*, 9 Wheat. 702, 6 L. Ed. 189. In short, the obligation of the surety cannot be extended to other subjects than those expressed or necessarily included in his contract; and the intent and latitude of the contract of suretyship must be ascertained by a fair and liberal construction of the instrument, in the face of what appears to have been the intention of the parties when the contract was made, to be gathered from the expressions contained therein and from the nature of the transaction.

So, when a bond is given by a public officer, such as a consul general, and his duties are prescribed by statute or regulations of the department, the terms and phrases of the bond are to be construed strictly with reference to the duty imposed. *Blair v. Insurance Co.*, 10 Mo. 566, 47 Am. Dec. 129; *People v. Pennoch*, 60 N. Y. 421.

As consul general representing the United States at Siam, certain fees and moneys would likely come to his hands as such consul general, in which he would have no personal interest except the amount of his authorized commission. Such moneys in his hands would be impressed with a public trust, to be accounted for and paid over by him to the treasury department of the United States. It was only such moneys as in the faithful performance of his official duties, to be rendered in an accounting of his stewardship, the undertaking of the bondsmen made them responsible for in the case of the consul's default. The matter of his salary, which was his individual perquisite, in its very nature could not have been the subject-matter within the object and purview of the bond. It was not necessary that the government should exact of its consul a bond for money the government should pay him for his salary. Such money when paid by the government was not to be taken into an accounting between him and the government. It could not have been anticipated by, or within the contemplation of, the sureties that the treasury department in remitting salary to the consul general would make a mistake and send him too much. The bond was not to cover the blunders of the disbursing officers of the government, but only the defalcations of the consul general as such in accounting to the government for moneys coming to his office in the course of his official duties.

Reading the allegations of the petition as a whole, the inference is clear enough that the overpayment to Mr. Boyd was a mere mistake of the officer of the disbursing department. Presumably the department at Washington would know when his salary was due and how much. The proper department at Washington was advised of Boyd's absence from his post, and that he must have left some one in charge thereof. It is not alleged that he neglected to advise the proper department of his absence, or that he practiced any deceit or fraud in obtaining the excess of salary. His bondsmen, in my judgment, are no more responsible for such overpayment than they would have been for money paid Boyd by mistake belonging to somebody else.

In *State v. Anthony*, 30 Mo. App. 638, 641, the court, speaking to a kindred principle, said:

"The sureties in the bond become bound to answer for the delinquencies of Bayer in his character of administrator, and not in his subsequent character of trustee or other custodian of the funds belonging to the minor heirs committed to him by an order of the probate court."

So here the sureties of Boyd became bound to answer for his delinquencies in his character as consul general, and not in his character as trustee; by implication, of the funds belonging to the United States, paid to him by one of its departments by mistake on account of his personal salary, not received or retained by him in his official capacity in the performance of a duty imposed upon him by statute or the regulations of the department.

Unquestionably Boyd or his legal representatives was liable in an action for money had and received for the amount so overpaid him by the government, but not in an action for a breach of his bond as consul general. If his estate under administration has been finally settled, and the executrix discharged, and his heirs as distributees received property from his estate liable for this debt, a separate appropriate action might lie against them for restitution. But, as such distributees were not parties to the bond, there is no legal connection or community of interest between them and the sureties on the bond, and therefore there is in law a misjoinder of parties defendant. And there is in the petition a mingling of matters of law and equity in the separate nature of the liability of the sureties and Boyd's heirs. The action on the bond is essentially an action at law for a breach of its conditions, whereas the liability of Mrs. Boyd and Mrs. Delaney, as heirs of the estate, is equitable in its character, and arises without any breach of the official bond of Mr. Boyd.

The demurrer is sustained.

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#### HAMILTON v. ST. LOUIS, K. & N. W. R. CO.

(Circuit Court, E. D. Missouri, E. D. October 14, 1902.)

No. 4,439.

#### 1. MASTER AND SERVANT—RAILROAD RELIEF DEPARTMENT—VALIDITY OF CONTRACTS.

A contract between a railroad company and its employes who voluntarily become members of its "Relief Department" that, in case of the illness or injury of an employe through the negligence of the company or otherwise, he may elect to receive the benefits provided by the relief department or to prosecute such claim as he may have at law against the company, and that his election to receive benefits shall operate as a release of his claim for damages, is not invalid as contrary to public policy.

#### 2. SAME—MISSOURI STATUTE.

Nor is such a contract affected by Rev. St. Mo. 1899, § 2876, which declares void any contract "made between any railroad corporation and any of its agents or servants, based upon the contingency of the injury or death of any agent or servant, limiting the liability of such railroad corporation for damages," since it does not limit the liability of the company, but enlarges it, by giving the employe the right to receive benefits from a fund to which the company contributes in cases where it would not otherwise be liable, while preserving to him his full right to prosecute any claim for damages on account of an injury if he so elects, after the injury has been sustained and he has had ample opportunity for counsel and advice.

At Law. On demurrer to answer.

A. R. Taylor and Norton, Avery & Young, for plaintiff.

H. H. Trimble, Palmer Trimble, and E. S. Robert, for defendant.

ADAMS, District Judge. This suit was instituted by the plaintiff who was a servant in the employ of the defendant company to recover damages for alleged negligence. The defendant pleads as an

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 167.

affirmative defense that prior to the time of the accident complained of the defendant organized a "Relief Department" contemplating the creation of a fund by voluntary contributions of its employes and by appropriations made and to be made by itself for the purpose of paying to the members contributing thereto, certain benefits in case of sickness or disability resulting from injury while in defendant's service, whether such sickness or disability resulted from defendant's negligence or not. It is alleged that one of the regulations governing the organization and administration of the "Relief Department" was: that in case of an injury to a member and after such injury shall have occurred the member may elect to accept the benefits provided for in the "Relief Department," or to prosecute such claim as he may have at law against the railroad company, and that the acceptance by a member of benefits for an injury shall operate as a release and satisfaction of all legal claims against the company for damages arising or growing out of the injury. Defendant alleges that it became obligated to any and all of its employes who became members of the "Relief Department" to maintain the fund and to guarantee the payment of the full benefits secured thereby to any member who might become injured in its services. It is further alleged in the answer that the plaintiff upon entering into the service of the defendant voluntarily became a member of the "Relief Department," paid all required contributions, and after his injury occurred, elected to accept the benefits accruing to him by reason of his membership in the "Relief Department"; that the same were paid to and received by the plaintiff, and that such election, payment and receipt constitute a settlement and release of all claims for damages arising out of the injury in question. The foregoing states substantially the main features of the "Relief Department," certainly enough of them to permit of an intelligent application of the legal questions arising out of them. To this answer a demurrer is interposed.

It has been so long and firmly settled that contracts like that involved in the organization and maintenance of a "Relief Department" of a railroad, especially when the railroad company guarantees that the benefits provided thereby shall be duly paid, are valid and enforceable obligations upon the railroad companies involved and their employes who become members of the "Relief Department," that plaintiff's counsel does not rely upon the old argument that such arrangements are against public policy in that they amount to an effort to relieve the companies from the consequences of their own negligence.

It has been held by a long line of cases including some of controlling authority upon this court that contracts like that in question are not only not opposed to sound public policy but are conducive to the well being of those whom they immediately affect. This is so held because the becoming a member of the "Relief Department" by an employe is entirely optional with himself and because his right to sue for damages resulting from the employer's negligence is reserved to him until after an injury is received, and even then until with full knowledge of all the facts surrounding his case, he makes his election whether to avail himself of the benefits secured to him by his membership in the department or to resort to his action at law for damages. *Railroad Co. v.*



Miller, 22 C. C. A. 264, 76 Fed. 439; *Otis v. Pennsylvania Co.* (C. C.) 71 Fed. 136; *Vickers v. Railroad Co.*, Id. 139; *Shaver v. Pennsylvania Co.*, Id. 931; *Martin v. Railroad Co.* (C. C.) 41 Fed. 125; *Donald v. Railroad Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492; *Maine v. Railroad Co.*, 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Johnson v. Railroad Co.*, 163 Pa. 127, 29 Atl. 854.

The foregoing cases with the numerous citations therein found disclose an entire unanimity of opinion upholding contracts like that relied on by defendant in this case against the charge that they are void as contrary to public policy.

But plaintiff contends that the contract in question is void because in violation of the provisions of section 2876, Rev. St. Mo. 1899. That section is as follows: "No contract made between any railroad corporation and any of its agents or servants, based upon the contingency of the injury or death of any agent or servant limiting the liability of such railroad corporation for any damages under the provisions of this act, shall be valid or binding but all such contracts or agreements shall be null and void." After a careful consideration of this section and the contract created by the organization and acceptance by the plaintiff of the provisions of the "Relief Department" in question, I have reached the conclusion that the contract in question does not fall within the spirit and meaning of the statute just quoted.

The contract in question does not limit the liability of the railroad company at all. On the contrary it enlarges that liability. It leaves to an employé, injured while in its service, all the rights of action he ever had either at common-law or by statute, to recover damages for any alleged negligence. After an injury has been sustained, the servant with full knowledge of all the facts and after an ample opportunity for counsel and advice may elect whether to resort to his legal action against the railroad company or to avail himself of the provisions of the "Relief Department."

In many instances like that of sickness resulting from no act of negligence on the part of the railroad company, or like that of casualties occasioned by the necessary and inevitable peril of the employment, the election is easy. A remedy is afforded by the contract involved in the "Relief Department" when none is available at law. In certain cases where liability at law is improbable the election is not difficult. In other cases where liability is uncertain, depending upon the accuracy of observation and memory of witnesses, the election is more difficult, but none the less available to the party injured. In such cases two remedies are open to him, one certain and immediate found in the provisions of the "Relief Department," the other uncertain and distant found in an action at law.

The contract in question neither constrains him to forego his legal action nor does it in any manner lessen the amount of recovery or limit the liability of the defendant in case he elects to resort to the courts for redress. I find therefore no reason for holding that the statute is violated by the contract pleaded by the defendant in this case. This same question has been before the courts both National and State in several cases wherein similar statutes of other states have been construed, and in every case, so far as my research has enabled me to

investigate, the statute has either been held inapplicable to such contracts or if applicable to be void because in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives persons affected by it of their property (that is liberty to contract) without due process of law. *Shaver v. Pennsylvania Co.* (C. C.) 71 Fed. 931; *Donald v. Railroad Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492; *Railway Co. v. Moore* (Ind. Sup.) 53 N. E. 290, 44 L. R. A. 638.

In the last-cited case the Supreme Court of Indiana distinctly overruled one of its former decisions (*Railroad Co. v. Montgomery*, 152 Ind. 14, 49 N. E. 582, 79 Am. St. Rep. 301), wherein it had held that a contract like that involved in the "Relief Department" in question was violative of a statute of Indiana like that of Missouri now under consideration and after citing many authorities justifying its change of opinion concludes thus:

"The contract forbidden by the statute is one relieving the company from liability for the future negligence of itself and employes. The contract pleaded does not provide that the company shall be relieved from liability. It expressly recognizes that enforceable liability may arise, and only stipulates that if the employe shall prosecute a suit against the company to final judgment, he shall thereby forfeit his right to the relief fund, and if he accepts compensation from the relief fund, he shall thereby forfeit right of action against the company. It is nothing more nor less than a contract for a choice between sources of compensation, where but a single one existed, and it is the final choice, the acceptance of one against the other that gives validity to the transaction."

I do not deem it necessary in this opinion to either analyze or cite the large number of cases to which my attention has been called, but in those already cited will be found a reference to many others which are of equal pertinency to the questions involved in this case. I have cited the case of *Shaver v. Pennsylvania Co.*, supra, because of its able and discriminating treatment of the general question now involved, namely; whether the statute in question was intended to avoid contracts like those now in question; but as I have not deemed it necessary for the purposes of this case to enter upon the question debated at the bar as to whether if applicable, it would be violative of the provisions of the 14th amendment of the Constitution of the United States, I do not wish the citation of the case to be construed as an approval of the conclusion reached namely; that the statute is unconstitutional. I place my conclusion in this case solely upon the proposition that the contract pleaded and relied upon by the defendant is not a contract limiting the liability of a railroad corporation for damages, and therefore not within the provision of section 2876, Rev. St. Mo. 1899.

The demurrer to the answer is overruled.

**N. K. FAIRBANK CO. v. WINDSOR et al.**

(Circuit Court, W. D. New York. September 10, 1902.)

No. 95.

**1. UNFAIR COMPETITION—PROFITS RECOVERABLE.**

Profits recoverable in equity for unfair competition are governed by the same rule as in cases for infringement of trade-marks, and are not limited to such as accrued from sales in which it is shown that the customer was actually deceived, but include all made on the goods sold by defendant in the simulated dress or packages, and in violation of complainant's rights.

**2. SAME—ALLOWANCE FOR COST OF MANUFACTURE.**

Where an article put up and sold in packages simulating those of complainant was manufactured by defendant in the course of its ordinary business, and so far as appears without increasing the expenses of such business, defendant is not entitled, in an accounting for profits wrongfully obtained from the unfair competition, to an allowance for the estimated cost of manufacture as a separate business.

In Equity. On exceptions to master's report.

Archibald Cox, for complainant.

Roberts, Becker, Messer & Groat (Tracy C. Becker, of counsel), for defendants.

HAZEL, District Judge. This is a hearing upon exceptions filed to report of a master appointed by a decree of court to take and state an account of profits diverted from the complainant through wrongful use by defendants of a certain package in imitation of complainant's. The decree declares that the packages of defendants containing soap powder simulated those of complainant, and that the sale thereof constituted an unlawful and inequitable competition in business. The established fraud, therefore, was such as deceived the public and wronged the complainant. The acts of defendants come directly within the scope of *Fairbank Co. v. R. W. Bell Mfg. Co.*, 23 C. C. A. 554, 77 Fed. 870, and cases there cited. I have carefully read the report of the master and the exceptions thereto, and have given careful consideration to the argument of counsel in support of said exceptions. No error is apparent which will justify disturbing either the application of the rule by which the master ascertained the profits or any finding of fact or legal conclusion. I believe it to be established beyond dispute that cases arising out of unfair competition are recognized as analogous to those of violations of trade-marks. The distinction is clearly defined in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997. This analogy admits of redress which in its general application in proper case constitutes a ground for relief in equity. Suits for violations of trade-marks or for unfair competition, when an intent accompanies the act, involve a fraud upon the public and on him whose property right is directly impaired. In either case redress may be had at law to recover damages or in equity to restrain infringement and to recover the gains and

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

profits which accrued to the wrongdoer by his adoption of a garb for his goods to which another has a prior and better right. In each class of cases the offender seeks to benefit by the reputation of the other, the object being to palm off his goods as the goods of the other. The nature and extent of the injury is substantially the same. The remedy for the enforcement or protection of a trade-mark right or against unfair competition involves the same mode of procedure and ends in the exercise of the restraining power of a court of equity, and the award of such damages as may have been sustained or the profits of the wrongdoer it is presumed would have accrued to the person whose rights were invaded. Judge Wheeler in *Milling Co. v. Rowland* (C. C.) 27 Fed. 24, succinctly states the rule by which profits are recovered where the goods were sold in infringement of trade-mark rights. He says:

"It is argued that the evidence does not show that the orator would have made this profit if the defendants had not. This might be true, and not affect the rights of the parties. If the defendants made profits by their invasion of the orator's rights, the orator is entitled to them whether the same profits would have been made by the orator or not, and not to any more if they would, for the same profits could not be made by both."

In *Lever v. Goodwin* (1887) 4 Rep. Pat. Cas. 507, a suit finally decided on the ground of unfair competition, it was contended by defendants, as here, that a complainant must be limited to a recovery of such profits as were actually and fraudulently diverted from him to defendant; that complainant must establish affirmatively a fraudulent sale to each purchaser; or, to state it more comprehensively, that the account should extend only to such profits as arose from the sale of the soap powder which could be shown to have actually deceived a purchaser. That position was not there sustained, nor can it be in the case at bar. It has never been the rule in assessing damages or loss of profits resulting from an unfair use of a trade-name or violation of a trade-mark. In the case last cited it was held, Lord Justice Cotton speaking for the court, that inasmuch as the sale of the goods to the middleman, so dressed as to deceive, was a wrongful act, the defendants must account in the profits which they have made in the sale of the simulated goods. See, also, *Edelsten v. Edelsten*, 1 De Gex, J. & S. Ch. 185, where it was held that the owner of a trade-mark will not be deprived of his remedy in equity even though it appear from the proofs that all who bought defendants' goods were aware that the goods were not of complainant's manufacture. In *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639, the court said that the difficulty was in ascertaining what proportion of the profit is due to the trade-mark and what to the extrinsic value of the commodity. As it was difficult of ascertainment, the owner of the trade-mark was awarded the whole profit. It appeared to the court that such a disposition of the profits was justified by reason of the fraudulent acts of the defendant. In *Untermeyer v. Freund* (C. C.) 50 Fed. 80, it was held that where a patentee's profits are mixed within an infringer's, so as to make it impossible to apportion them, the loss falls upon the guilty and not upon the innocent. The expression of the circuit court of appeals in the decision of the complainant's proceeding against the Bell Com-

pany, 23 C. C. A., at page 563, and 77 Fed., page 878 of the opinion, where a quotation is made from *Lever v. Goodwin*, supra, seems to indicate the adoption of the rule there stated in assessing lost profits.

The exception based upon the master's failure to allow 72 cents per box for manufacturing expenses is without merit. It appears clearly by the proofs that no one was employed by defendants solely in the production of soap powder. The men were employed to manufacture soap, and incidentally, at the direction of the defendants, put up soap powder in the infringing packages. The packages were then boxed and delivered to a middleman, who supplied the consumer. The manufacture of soap and soap powder was done simultaneously; the same receiving room for stock or raw material was used for handling both commodities; the business was not distinct; the accounts were not separately kept. It does not appear that there was any additional expense by reason of the manufacture and sale of the soap powder other than was allowed by the master. The language employed in the case of *Société Anonyme v. Western Distilling Co.* (C. C.) 46 Fed. 922, may with propriety be applied:

"When an unlawful business is carried on in connection with the defendant's regular business, and the same agencies are employed in doing that which is lawful and that which is unlawful, no rule of law of which I am aware requires any deduction for expenses in estimating the profits of the unlawful business. In this case the defendant was a distilling company. It has a place of business, a license for doing business, traveling salesmen, etc. The proof does not convince me that any additional expenses were incurred by the defendant in the manufacture and sale of Benedictine, other than such as the master has allowed. The manufacture of Benedictine was carried on in connection with its ordinary business by the usual number of employes. The unlawful venture increased the gross profits without swelling the gross expenses."

As the testimony of Gunnell, defendant's business manager, satisfies me that the manufacture of the soap powder was carried on without increasing the ordinary expenses of the manufacture of soap other than allowed by the master, no reason appears for disturbing the finding. The only questions which are deemed necessary to consider are those raised by the exceptions to the report of the master. Such exceptions are overruled.

The report of the master is confirmed, with costs.

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#### UNITED STATES v. LAIR.

(District Court, E. D. Arkansas, W. D. October 23, 1902.)

No. 2,339.

1. PUBLIC LANDS—SOLDIER'S ADDITIONAL HOMESTEAD—NATURE OF GRANT.

An application for the entry of a soldier's additional homestead, under Rev. St. § 2306, is not made under the homestead laws, but such grant is in the nature of a bounty to the soldier.

2. PRESENTING FALSE CLAIM AGAINST UNITED STATES—ACTS CONSTITUTING OFFENSE.

Under Act July 1, 1890 (26 Stat. 209), which authorizes any officer authorized to administer oaths for general purposes in the state, city,

or county where he resides to administer oaths to all affidavits and declarations to be made or used in any pension or bounty case, a notary public having authority to administer oaths under the laws of the state may take affidavits to be used in support of an application for the entry of a soldier's additional homestead, and the presentation of false proofs and affidavits, purporting to have been sworn to before a notary in support of such an application, if done willfully and fraudulently, constitutes the offense of presenting false evidence in support of a claim against the United States, within Rev. St. § 5438.

Prosecution under Rev. St. § 5438, for presenting false evidence in support of a claim against the United States. On demurrer to indictment.

W. G. Whipple, U. S. Atty.

Morris M. Cohn, for defendant.

TRIEBER, District Judge. The defendant was indicted under the provisions of section 5438, Rev. St. U. S., charged with having unlawfully, willfully, and falsely made and caused to be made a certain claim upon and against the government of the United States for the purpose of defrauding and obtaining from the United States 80 acres of the public lands of the United States as a soldier's additional homestead, under section 2306, Rev. St. U. S., on behalf of one John A. Black, a soldier of the United States in the late Civil War, which claim was caused to be presented by the defendant to the commissioner of the general land office of the United States, an officer of the United States. The falsity of the claim is charged to consist in the fact that the defendant certified as a notary public that the soldier, John A. Black, and two other parties as witnesses appeared before him and made the proofs as required by law, when in truth and in fact none of them ever appeared before him, and the affidavits thus certified to by the defendant were absolutely false.

The ground of demurrer is that the laws of the United States do not authorize a notary public to administer the oath in such cases, and for that reason the government could not have been defrauded, as no entry could be made for such additional homestead entry upon proofs verified before a notary public. It is conceded by the government that, if a notary public is not authorized to administer the oath in such cases, no officer of the government could have granted the application, and for this reason the indictment could not be maintained.

There is no law of the United States authorizing a notary public to take the proofs and administer the oath in homestead cases, but by the provisions of the act of congress of July 1, 1890 (26 Stat. 209), any officer authorized to administer oaths for general purposes in the state, city, or county where such officer resides is authorized to administer oaths to all affidavits and declarations to be made or used in any pension or bounty cases. The question, therefore, to be determined in this case is whether a soldier's additional homestead is to be treated as an application for a homestead under the homestead laws of the United States, or in the nature of a bounty or gift extended by the government to its soldiers in the War of the Rebellion.

In *Barnes v. Poirier*, 12 C. C. A. 9, 64 Fed. 14, this question was before the circuit court of appeals for the Eighth circuit, the question

being whether the right to land additional to a homestead, granted by section 2306, Rev. St. U. S., was assignable before the additional land was entered. Judge Sanborn, in delivering the opinion of the court, carefully reviewed all the legislation on that subject, and the conclusion reached by him was that this is not a homestead entry, but a mere gift or bounty. The learned judge in his opinion says:

"This brief review of the legislation which has resulted in the existing provisions of the homestead law clearly shows that the purpose and policy which inspired the grants in sections 2289-2291, 2304, 2305, were the very opposite of those which inspired that in section 2306. The purpose of the former was to induce the permanent settlement of the donee upon, and the continued occupation and cultivation by him of, the land granted. Hence the requirements of settlement, cultivation, and occupation for a long period of time before entry, and of the affidavit of the homesteader at the time of final entry that he had not alienated any of the land, and hence the inevitable conclusion that any sale or contract of sale of the right to enter the land or of the land to be entered under these sections was an evasion of one of the main purposes of the act, and was against public policy and void. *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272. But the beneficiary of the grant under section 2306 had already selected, settled upon, cultivated, and acquired his homestead from the public domain, and was presumably in the occupation of it before that grant was made. The purpose of the grant under that section surely was not to induce him to abandon his homestead, and make a new settlement on the new grant. It was rather to reward him for the services he had already rendered as a soldier in suppressing the Rebellion, and as a farmer in establishing his home upon, cultivating, and occupying that portion of the public domain he had already entered as his homestead. Hence it was that no settlement, no cultivation, no occupation, no affidavit of nonalienation, no affidavit at all was made a condition precedent to the enjoyment of the benefits of this grant or to the entry of the additional land under this section. The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of congress or in the dictates of an enlightened public policy that requires the imposition of any such restriction." 12 C. C. A. 12, 64 Fed. 17.

The same question came before the supreme court of the United States in *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179, and the same conclusion was reached by that court, citing with approval Judge Sanborn's opinion, and also that of the supreme court of Minnesota, from which court that case was removed to the supreme court of the United States by writ of error. The reasoning of the courts in those cases is so clear and convincing that it is useless for this court to add anything. If this right to an additional homestead is a bounty, then under the act of 1890, above quoted, a notary public is authorized to administer the oath, as the laws of the state of Arkansas, where he resided, vest him with that power.

The demurrer must therefore be overruled.

## In re HERZIKOPF.

(District Court, S. D. California. S. D. July 21, 1902.)

No. 1,587.

**1. BANKRUPTCY—INVOLUNTARY PETITION—VERIFICATION.**

Bankr. Act 1898 does not require a petition in involuntary bankruptcy to be verified by the creditor personally, but such verification may be made by his attorney, who has knowledge of the facts; and no other evidence of the attorney's authority need appear than the fact that he has been admitted to practice in the circuit or district court, as required by general order No. 4.

**2. SAME—PROCEDURE—OBJECTION TO VERIFICATION OF PETITION.**

Where the verification to a petition in involuntary bankruptcy by an attorney at law or agent is good upon its face, the objection that it was in fact without authority must be made before answering to the merits; otherwise it is waived.

**3. SAME—PETITIONING CREDITOR—QUALIFICATION.**

A creditor may be a petitioner in bankruptcy, notwithstanding the receipt of a preference which he has not surrendered.

In Bankruptcy. On review of report of referee.

Dunning & Craig, for petitioners.

Lawler & Allen, for certain creditors.

WELLBORN, District Judge. 1. The verification to the creditors' petition is, on its face, sufficient. In re Chequasset Lumber Co., 7 Am. Bankr. R. 87, 112 Fed. 56. See, also, In re Simonson, 1 Am. Bankr. R. 197, 92 Fed. 904, and Bank v. Craig, 6 Am. Bankr. R. 381, 110 Fed. 137. The bankrupt act does not require a petition in involuntary bankruptcy to be verified by the creditor personally, although, where the creditor is present, and the facts are within his knowledge, he doubtless ought to make the verification. Section 1 of said act, however, contains this definition:

"Creditor shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy."

General order No. 4, which is in line with said definition, is as follows:

"(4) Conduct of Proceedings. Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney."

This order seems to give to the attorney of a bankrupt or creditor power to do any act in the bankruptcy matter which the bankrupt or



creditor might do personally, and requires no other evidence of his authority than the fact of his admission to practice in the circuit or district court. The title or headlines to form No. 20 in bankruptcy is as follows: "General letter of attorney in fact when creditor is not represented by attorney at law." No form of authorization whatever is prescribed for an attorney at law, and this presumably for the reason that the fact of his being a practitioner of the court is all the evidence of his authority which the law requires.

Loveland, in his work on Bankruptcy, at page 152, says:

"The petition should be signed by the petitioning creditor or creditors, or their attorney or agent. It must be verified as to matters of fact by an affidavit under oath. Neither the statute nor the general orders require the petition to be signed or verified by the petitioners personally. It therefore seems that an attorney or an agent who has knowledge of the facts may make the oath. The rule was otherwise under the act of 1867."

That part of the bankrupt act of 1867, as amended in 1874, referred to by Loveland, is as follows:

"And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers." 18 Stat. 181, 182.

Read in the light of this clause, the case of *In re Sargent*, 21 Fed. Cas. 495 (No. 12,361), cited by the referee herein, in so far as it holds that where a verification is made by an attorney at law, his authority must be shown, means only that it should be made to appear by the affidavit, or otherwise, that the petitioning creditor is a nonresident of the district; and this fact, by the way, does appear from the affidavit in the case at bar. Moreover, said affidavit being positive in its terms, and not upon information and belief, it must be assumed that the facts were within the knowledge of the affiant, and this fulfills the requirement mentioned by Loveland in the quotation above given. Of *In re Blankfein*, 3 Am. Bankr. R. 165, 97 Fed. 191, it is only necessary to say that all that the case holds (while the language of the opinion may be broader) is that the clerk of an attorney at law cannot, without special authority, vote for a trustee at a creditors' meeting. Moreover, the decision was expressly rested, in part, upon local conditions existing in the district wherein the matter was pending.

2. Where the verification to a petition by an attorney at law or agent is good upon its face, but in fact was without authority, objection on that ground should be made before, and is waived by answering to the merits. *In re Simonson*, 1 Am. Bankr. R. 197, 92 Fed. 904; *In re McNaughton*, 16 Fed. Cas. 323 (No. 8,912); *In re Simmons*, 22 Fed. Cas. 152 (No. 12,864); and *Bank v. Craig*, 6 Am. Bankr. R. 381, 110 Fed. 137.

3. A creditor may be a petitioner in bankruptcy, notwithstanding the receipt of a preference which is unsurrendered. *In re Norcross*, 1 Am. Bankr. R. 644; *In re Cain*, 2 Am. Bankr. R. 378; *In re Bloss*, Fed. Cas. No. 1,562; *In re California Pac. Ry. Co.*, Fed. Cas. No. 2,315; *In re Stansell*, Fed. Cas. No. 13,293; *Rankin v. Railway Co.*,

Fed. Cas. No. 11,567. The finding of the referee, therefore, that J. J. Underhill and son were not qualified petitioners, is disapproved.

The conclusion and recommendation of the referee, that said Jacob Herzikopf be adjudged a bankrupt, are approved, and an order of adjudication will be accordingly entered.

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PRESERVALINE MFG. CO. v. HELLER CHEMICAL CO.

(Circuit Court, N. D. Illinois, N. D. June 3, 1902.)

No. 26,237.

1. UNFAIR COMPETITION—RIGHT TO RELIEF IN EQUITY—FRAUD OF COMPLAINANT.

The use by the manufacturer of an article, for several years after a patent therefor had expired, of advertising circulars containing the word "patented," or statements clearly implying that it was protected by a patent, which circulars were inclosed in the packages in which the article was sold, is such a fraud as will preclude relief in equity against unfair competition, although no such statements were made in connection with complainant's trade-mark, or on the packages themselves; it being impossible for the court to determine to what extent the value of complainant's business, which it is asked to protect, is due to such fraudulent action.

In Equity. Suit for infringement of trade-name and for unfair competition. On motion for preliminary injunction.

Moses, Rosenthal & Kennedy, for complainant.

Stein & Platt, for defendant.

KOHLSAAT, District Judge. The bill in this case seeks to restrain defendant from making use, in any manner or form, in connection with the sale of preserving compounds not manufactured by or for complainant, of simulations of complainant's labels, trade-names, trade-marks, and the word "preservative," used in connection therewith; and from sending out trade circulars of the kind in said bill set out; and from making use of any imitations of complainant's labels, trade-names, seals, symbols, letters, words, and designs, or using boxes, etc., calculated to deceive the public into believing that they are dealing with complainant's article of manufacture known to the public as "preservaline." It is apparent from the packages and circulars presented in the case that defendant has substantially appropriated complainant's trade-names, packages, and designs, as well as its trade circulars, and that complainant is entitled, in a proper case, to the relief prayed for in its bill, unless it is barred by its own acts from invoking the aid of a court of equity in the premises. Attached to and made a part of complainant's bill, as Exhibits A, B, C, D, and E, are five of complainant's trade circulars, each one of which sets out that "preservaline" is patented, and clearly implying that the same is protected by letters patent. This is also true of certain other circulars produced on the hearing. It seems that a pat-

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

ent for the composition called "Preservaline" was duly granted by the United States as patent No. 216,414, issued June 10, 1879. This patent expired, by reason of the expiration of a foreign patent, on July 3, 1892. It further appears that complainant used other circulars and advertising media which did not contain any claim that the article was patented. The packages themselves did not bear on their exterior any reference to a patent, but the circulars were inclosed within the packages. Counsel for complainant in their brief admit that "if, after the expiration of a patent, the complainant continues to so arrange his trade-mark as to use the word 'patented' so as to deceive the public into the belief that there is still a subsisting patent, the complainant is without relief"; but insist that the use of the word "patent" or "patentee" "in literature, without the use of the forbidden words in connection with a trade-mark, trade-name, label, or product," will not disentitle complainant to relief in equity. Applying this contention to the case at bar, it would be that because the objectionable words do not appear upon the package itself, but upon literary matter (advertisements and circulars), even though such literary matter is placed within each package, complainant will be entitled to the aid of a court of equity to prevent others from duplicating complainant's actions in the premises, notwithstanding such circulars do serve to deceive the public into the belief that there is still a subsisting patent. It is a well-established rule of law that one invoking the aid of a court of equity must himself be free from fraud and misrepresentation with regard to the matter in which he seeks relief. Therefore, if it appears that complainant in this case, at and preceding the time of the acts sought herein to be enjoined, was itself guilty of a fraud or fraudulent act calculated to impose upon the public in regard to the same transaction, then, no matter how impudent the act of defendant, a court of conscience will not lend itself to complainant's aid in securing to it the exclusive right to deceive the public.

Complainant insists that it has entirely refrained from the use of said circulars and advertising matter since April 11, 1902, except in connection with boxes theretofore packed. This action on complainant's part is of but little importance in arriving at the question here involved, since the value of a trade-name must rest upon the years of usage during which such value has been accumulating. There is nothing in the record to show, and very likely it would be impossible to determine, how far the circulars in question have entered into the creation of the property interest of complainant herein sought to be protected. The court cannot presume it is not a vital element of such property interest, since it has undoubtedly tended to the creation of a monopoly in complainant. For the purposes of this inquiry, the question we must deal with is, substantially, "was the use by complainant upon some of its advertising matter of the term "patented," or its equivalent, after its patent had expired, such a fraud on the part of complainant as to close the doors of a court of equity against it?" If it was not, complainant is clearly entitled to an order restraining defendant in the premises. The case does not come within the statute which provides a penalty for affixing to any

unpatented article the word "patented," for the purpose of deceiving the public, since there is no pretense here that the packages were so marked. Here the fraud, if any, appeared only upon the circulars. In *Cheavin v. Walker*, 5 Ch. Div. 850, the court say:

"It is a falsehood to represent that the patent is still subsisting. Above the inscription there is a medallion, consisting of the royal arm, surrounded by a circular band or garter, containing the words 'By Her Majesty's Royal Letters Patent.' That appears to me to be a representation that the patent is an existing patent, and on that ground alone I think that plaintiff ought not to succeed in the action."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 541-544, the court say:

"If a trade-mark represents an article as patented by a patent, when in fact it is not so protected, it seems to me that such a statement *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of a trade-mark to relief in a court of equity against one who pirated it."

These authorities are well sustained, and undoubtedly declare the law in such cases.

Complainant cites the case of *Cochrane v. MacNish*, 13 Rep. Pat. Cas. 100, recently decided by the judicial committee of the privy council, wherein the court construe the words "Manufactured in Ireland by H. M. Royal Letters Patent," placed upon the label containing the trade-mark, as intended to mean "manufactured in Ireland by means of patented machinery." Whatever may be said of the reasoning in that case, it is certain that the language of the present case, and the manner in which it is used, does not admit of any other construction than that the public is given thereby to understand that complainant's article is protected by an existing patent. It therefore remains only to determine whether complainant comes within the rule of courts of equity denying relief. The reason for such rule seems to be that any use of the terms "patent" or "patentee" which will cause the public to believe that a particular article is patented must necessarily have a tendency to deter individuals from the manufacture or handling of such article. The result of this will be to stifle competition, and to extend the monopoly granted by the patent beyond the term of such grant. It is my opinion that the skillful use of these terms upon circulars and advertising matter generally would, as a rule, have a greater tendency to impress the public with such belief than would their use directly upon a package or trade-mark. It is the result, not the manner of accomplishing it, which should be looked to. If complainant had used the word "patented" upon all its printed matter and circulars, therefore, in such a manner as would be calculated to convey the idea that the article "preservative" was protected by an existing patent, this case would come squarely within the rule above laid down. Does the fact that complainant does so only in connection with a part of such advertising matter change the situation? I do not think this is the law. The use of fraudulent matter in any considerable part of the advertising media tinges the whole with that fraud upon which equity looks with disfavor. The natural effect of the language used upon

the five circulars attached to complainant's bill is to mislead and deceive the public, and complainant cannot be heard to deny the intention of so doing.

The motion for a temporary injunction is denied.

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BUFFALO TIN CAN CO. v. E. W. BLISS CO.

(Circuit Court, W. D. New York. August 29, 1902.)

No. 36.

1. CONTRACTS—ASSIGNMENT—BREACH—PLEADING.

A complaint, in an action for breach of contract, alleging that the contract between defendant and plaintiff's assignor was duly assigned and transferred to the plaintiff, sufficiently alleges a transfer of the assignor's right of action to recover for breach of the contract.

Bissell, Metcalf & Riley, for plaintiff.

Latson & Bonyng, for defendant.

HAZEL, District Judge. This is an action at law for breach of contract. The complaint alleges that the contract between the defendant and plaintiff's assignor, the Erie Preserving Company, was duly assigned and transferred to the plaintiff. It does not state when it was assigned, nor does it expressly state that a chose in action for its breach had accrued at the time of the assignment. The demurrer interposed by the defendant is upon the ground that the complaint fails to state sufficient facts upon which to base the action. To maintain that position it is contended that the assignment, without showing on its face a transfer of the contract before or after the alleged breach, does not carry with it a right to recovery; that the complaint justifies the inference that the alleged breach antedates the assignment, and, therefore, the cause of action remains in the Erie Preserving Company, and has never vested in the plaintiff, its assignee. This objection is untenable. In the circumstances appearing by the bill, it would seem that the time and place for making the assignment, the consideration passing therefor, the intent of the parties, as well as such information as may be deemed material to establish plaintiff's status as a litigant, are matters properly proven on the trial. The inference to be drawn from the bill tends toward an impression that the defendant had knowledge of the intended formation of the plaintiff corporation at the time of making the contract, and that such contract would inure to plaintiff's sole benefit. This view is given added force by the manner in which it was agreed that the defendant should be paid for building the machinery and dies. Payments in cash and notes made by plaintiff were to have been accepted by the defendant. Assuming that the breach occurred prior to the assignment, what was there to transfer? The only value to the contract was a chose in action and damages recoverable for failure to perform. The cases cited by counsel for demurrant are not strictly in point. The case of *Waldron v. Willard*, 17 N. Y. 466, seems more nearly to apply. In that case the

¶ 1. See Assignments, vol. 4, Cent. Dig. § 221.

assignee sold all his interest in the goods sunk by the boat Wyoming. The goods in question had been sunk in Hudson river. The action was to recover damages for breach of the contract to deliver them. It was insisted that the assignment was in legal effect a transfer of the goods to the plaintiff, and not an assignment for damages by reason of nondelivery. After stating the rule that contracts are to be construed in the light of surrounding circumstances with the view to understand more perfectly the intent of the parties, the learned court said:

"Courts are not required to confine themselves to the exact signification of the terms found in the contract, when it is plain, from the situation of the parties at the time it was made, and the condition of the subject-matter of the contract, that a literal interpretation of the language of the parties would fail to give effect to their intention. It is upon this principle that extrinsic evidence is always allowable, to enable the court to place itself in the position occupied by the parties themselves when they contracted, that thus it may the better discern their real intention."

And further on:

"Parties to a contract are always to be supposed to have intended something, rather than nothing, by what they have said."

Applying this language to the case at bar, it would seem clear that the assignment referred to by the bill intended to transfer to the plaintiff a cause of action against the defendant for its failure to comply with the provisions of the agreement dated April 3, 1901. The demurrer is overruled with costs.

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In re ETHIER et al.

(District Court, E. D. Wisconsin. October 18, 1902.)

1. JUDICIAL SALE—GROUNDS FOR SETTING ASIDE.

A judicial sale will not be set aside except for gross inadequacy of price or circumstances impeaching its fairness. A subsequent offer of a better price than that realized cannot, alone, authorize a resale.

2. SAME—UNFAIR BIDDING—PREVENTING COMPETITION.

The stock of goods of a bankrupt firm was sold at auction by the trustee, a number of dealers in the same class of goods, having stores near by, being bidders. Neither of these desired the stock sold to a business competitor, but each preferred that it should be sold to an outside party, and removed if he did not purchase. After the known representative of each had bid what he stated was his limit, the stock was sold to an attorney who was supposed by the others to represent an outside bidder, but who was in fact bidding for one of the home firms, which also had its agent openly bidding in its behalf. Had his principal been known, his competitors would have bid more, and a larger price was offered after the facts became known. *Held*, that such concealment, under the circumstances, deprived the creditors of the benefit of fair competition, and vitiated the sale.

In Bankruptcy. On review of order entered by the referee vacating a sale made by the trustee at public auction of the bankrupt's stock of goods.

¶1. See Bankruptcy, vol. 6, Cent. Dig. § 370; Judicial Sales, vol. 31, Cent. Dig. §§ 77, 79.

Bloodgood, Kemper & Bloodgood, for trustee.  
Wm. Kaumheimer and W. H. Austin, for purchaser.

**SEAMAN, District Judge.** The object of the sale in question, under the order of the court, was to obtain the best price for the stock of goods, through open and unrestricted bidding; and a judicial sale so made will not be set aside except for gross inadequacy of price, or for circumstances impeaching the fairness of the sale. The fact of a better offer subsequent to the sale, however beneficial to the creditors, will not furnish ground to disturb the transaction, after confirmation, without misconduct in the sale amounting to imposition and fraud. *Graffam v. Burgess*, 117 U. S. 180, 192, 6 Sup. Ct. 686, 29 L. Ed. 839; *Herndon v. Gibson* (S. C.) 20 L. R. A. 545, and note of cases (s. c. 17 S. E. 145). So the offer by one of the unsuccessful bidders to bid \$500 more than the price realized cannot, alone, authorize a resale, though not without importance for reconsideration of the matter. The test in this case is whether persons intending to bid were prevented from bidding by deception at the sale, either on the part of the purchaser, or of which he is chargeable with notice. The testimony establishes that Schuster & Co. were the actual purchasers of the stock of goods, and that Mr. Kaumheimer acted in their behalf, under an express understanding that they were to have the benefit of his bid. This arrangement was unknown to the other bidders, but that fact would not be material, except for the peculiar circumstances of the case. In the absence of contract relation with other bidders in respect of the transaction, or other means of deception, the mere fact that Schuster & Co. were the undisclosed principal could not affect the validity of the sale to them, for no obligation would then rest upon them to make such disclosure. The undisputed circumstances, however, were these: The store of the bankrupts was located on Third street, and near it on the same street were Schuster & Co. and several other dealers in the same line, all competitors. Each of these rivals was anxious to prevent the other from taking this stock, and each, if he could not obtain it for himself, desired it to go to some distant location. Representatives of each were present at the sale,—Schuster & Co. by Mr. Herzfeld, one of their well-known agents,—and each made open bids, which were understood between them to be the limit of each, and each, including Mr. Herzfeld, expressly so announced. When their prices were exceeded by the supposed strangers, they dropped out of the bidding. Neither of the rivals of Schuster & Co. would have so withheld but for Herzfeld's representations. On these facts, I am constrained to the opinion that the deceptive conduct of Schuster & Co. deprived the creditors of the benefit to which they were entitled, arising out of the rivalry referred to, by way of enhancement of the sale value of the stock of goods, and that such conduct vitiates the sale.

The order of the referee is approved, accordingly.

## THE PATRIA.

(District Court, S. D. New York. October 24, 1902.)

1. **SHIPPING—NONDELIVERY OF CARGO IN CONDITION AND QUANTITY SHIPPED.**  
Evidence considered, and *held* to show that damage to cargo during a voyage resulted from sea perils, and not from any negligence for which the ship was liable under the bills of lading; also that it failed to sustain libellant's allegation that the full quantity received on board was not delivered.

In Admiralty. Action to recover for damage to cargo and for failure to deliver the full quantity received.

Carter & Ledyard, for libellants.

Benedict & Benedict, for claimants.

ADAMS, District Judge. This is an action brought to recover damages for failure to deliver certain calf skins in the condition in which they were shipped and for the non-delivery of others. The shipment was made at Marseilles, France, on the 5th day of April, 1901, on the steamship *Patria*, which reached New York and discharged her cargo about the end of the same month. No allegation is made in the libel as to any improper stowage on the part of the vessel or other unseaworthiness, but the burden is thrown upon the vessel to show that there was no failure of duty on her part leading to the damage. The steamship denies any liability therefor upon the grounds: (1) that there is no evidence that the skins were shipped in good condition; (2) that by reason of the perils of the seas encountered on the voyage, and notwithstanding proper stowage in all respects, certain casks of chloride of lime were broken and the contents stained, in a small degree, the skins in question, without any negligence on the part of the vessel, and (3) that the vessel was fully protected from the consequences of such damage by exceptions in the bill of lading.

The claimants contend that the evidence shows sufficient extraordinary weather to reasonably account for any damage that might have occurred during the voyage and that the damage did so occur, also that though some of the bundles were broken, they were made up again and all the skins received were actually delivered. The libellants, while not disputing the stress of weather encountered by the ship, contend that it appears the skins arrived in New York in good order and that some were damaged during the discharge by being brought into contact with some loose chloride of lime in the hold, for which the ship is liable (*The Germanic* [D. C.] 107 Fed. 294) and that all the skins received were not in fact delivered.

In the absence of negligence on the ship's part, the exceptions in the bill of lading, in connection with the proof of sea perils, are sufficient to free the ship from liability for damage, and I can not find sufficient evidence in the case to sustain the libellants' claim with respect to negligence in discharging. The evidence consists of a statement by the ship's first officer that some of the bales were dragged

¶ 1. Loss by perils of the sea, see note to *The Dunbritton*, 19 C. C. A. 465.



along the bottom of the hold in a net, but it does not appear that there was any substantial quantity of chloride of lime there at the time and the distance from where they were taken in the hold to the hatch was so short that very little damage, if any, could have been done in that way, even if it were proved that such a method were negligent, which is not the case. I find that the damage occurred by the breakage of some packages of chloride of lime during the voyage and that it must be ascribed to sea perils.

With respect to the claimed shortage, some of the packages were broken on the voyage and made up again by the ship before delivery. The libellants rely upon some testimony to the effect that as the invoice of the goods did not show that the number in the packages varied it should be presumed that there would be an even number of bundles to a certain number of skins and the same number of skins in each bundle. There is a conflict of testimony regarding the number of skins in the unbroken bundles and I do not consider the libellants' evidence sufficient to establish any shortage, in view of the uncertainty as to the number of skins shipped and proof tending to show that all were delivered which were received.

Libel dismissed.

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#### HANOVER NAT. BANK et al. v. CREDITS COMMUTATION CO. et al.

(Circuit Court, N. D. Iowa, W. D. October 23, 1902.)

##### 1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

A suit in equity by stockholders against the corporation, its directors and another stockholder, who owns a majority of the stock, to enjoin the defendants from making certain dispositions and uses of the property and assets of the corporation, does not involve a separable controversy between complainants and the defendant stockholder which gives the latter the right to remove the cause into a federal court on the ground of diversity of citizenship, where complainants and the corporation are citizens of the same state.

On Motion to Remand to State Court.

A. L. Beardsley, J. S. Huey, and Wright, Call & Hubbard, for complainants.

Taylor & Burgess, for defendants.

SHIRAS, District Judge. This suit in equity was commenced in the district court of Woodbury county, Iowa, and upon the application of John C. Coombs was ordered to be transferred to this court. The motion to remand presents the question whether jurisdiction over the case was rightfully conferred on this court by the proceedings for removal. The record shows that the Credits Commutation Company and the Combination Bridge Company, two of the defendants, are corporations created under the laws of the state of Iowa, and E. A. Burgess was when the suit was commenced and continues to be a citizen of Iowa. Under this state of facts, it is clear that the right

¶ 1. Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Mineral Co.*, 35 C. C. A. 155.

of removal did not exist in favor of all the defendants, as three of them were and are citizens and residents of the state and district wherein the suit was brought, and the right of removal can be predicated only upon the claim that the suit involves a separate controversy between the complainants and the defendant John C. Coombs, who is and was when the suit was brought a citizen of Massachusetts. In the petition for removal it is averred:

"That the said controversy is of the following nature, to wit: The plaintiffs, as stockholders only of the said Credits Commutation Company, have by their petition in equity brought suit against said Credits Commutation Company, said Combination Bridge Company, and all of said directors aforesaid, and also against said John C. Coombs, who was not at the time of the commencement of this suit and is not now either an officer or director of either of said defendant corporations, to enjoin and restrain all of the defendants from in any manner using, appropriating, disposing of, hypothecating, pledging, mortgaging, or selling any of the property of the said Credits Commutation Company or of the said Combination Bridge Company for the purpose of aiding in any railroad enterprise or enterprises or other alleged speculations, or from in any manner carrying out or adopting an alleged plan or purpose of said John C. Coombs to hypothecate, pledge, mortgage, or sell any of the assets or property of the said Credits Commutation Company, for the purposes of aiding or joining in any railroad enterprise or enterprises, or in any manner using any of the assets of either of said companies for said purpose or purposes, and from adopting or authorizing any scheme or plan which has for its purpose to use either the assets or credit of said companies in aid of any railroad enterprise or enterprises, or for any other alleged speculation, and from selling any portion of said assets except for cash or its equivalent at its true and fair value, and that your petitioner and the said plaintiffs are actually interested in said controversy, the plaintiffs owning 4,197 shares of the capital stock of the Credits Commutation Company, and this petitioner owning, as trustee, a large majority of the capital stock of said company, to wit, over 20,000 shares out of a total of less than 39,000 shares, and the Credits Commutation Company owns all the stock of the Combination Bridge Company."

It certainly needs no argument to show that the Credits Commutation Company is actually interested in a suit brought to restrain it and its officers from making certain uses and dispositions of its property, and the averment in the petition for removal is that the defendant Coombs, being the owner as trustee of a large majority of the capital stock of the company, is interested in this controversy.

This being so, it does not appear that there is a separable controversy in the case of such a nature as to enable the defendant Coombs to remove the suit into this court.

Being without jurisdiction, all this court can do is to remand the suit to the district court of Woodbury county.

## THE FRANCESCO.

THE F. W. MUNN.

(District Court, E. D. Pennsylvania. October 21, 1902.,

No. 36.

**1. ADMIRALTY—JURISDICTION TO AWARD COSTS—DISMISSAL OF LIBEL IN REM.**

Where a court of admiralty has jurisdiction of the subject-matter and the parties in a suit in rem, the fact that it dismisses the libel on the ground that no maritime lien arose under the facts shown does not affect its power to award costs against the libellant.

In Admiralty. Motion concerning costs.

Henry R. Edmunds, for libellant.

Horace L. Cheyney, for respondent.

J. B. McPHERSON, District Judge. The libellant objects to the entry of a decree awarding costs against the bark, on the ground that the court was declared to be without jurisdiction, and is therefore without power to enter a decree for costs: *Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; *Pentlarge v. Kirby* (C. C.) 20 Fed. 898. The objection, however, is, I think, founded upon a mistaken view of the situation. It is true that the court declared itself (116 Fed. 83) to be without "jurisdiction," but the jurisdiction spoken of was "to entertain the libel in question,"—that is, a libel in rem,—and was not jurisdiction either of the subject-matter or of the parties. The subject-matter was a maritime contract, the breach of an executory contract of towage, and the parties were within the territorial bounds of this district. The point decided simply was that the particular form of action could not be sustained, as the next sentence of the opinion goes on to say, and I can only regret that my somewhat careless use of the word "jurisdiction" may have misled the libellant's counsel: *The Monte A.* (D. C.) 12 Fed. 336.

The respondent is entitled to costs, and a decree to that effect may be entered.

¶ 1. See Admiralty, vol. 1, Cent. Dig. § 807.

## CENTRAL STOCK YARDS CO. v. LOUISVILLE &amp; N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. July 8, 1902.)

No. 1,070.

**1. CARRIERS OF LIVE STOCK—DELIVERY—STOCK YARDS.**

Where a railroad company has, by building stock yards, or by contract with a stock yards company, made adequate provision for the discharge of its duty as a common carrier with respect to live stock shipped over its line to a city, it is not required by the common law to make delivery of stock consigned to such city to connecting roads for delivery at other stock yards therein.

**2. SAME—DISCRIMINATION—INTERSTATE COMMERCE ACT.**

It is the duty of a carrier of live stock to provide reasonable facilities for the unloading and care of such stock; and where it has done so, either by building stock yards of its own or by contract with a stock yards company, its refusal to deliver stock to other stock yards in the same city is not an unlawful discrimination, in violation of section 3 of the interstate commerce act (24 Stat. 380).

**3. SAME—CONNECTING RAILROADS—INTERCHANGE OF TRAFFIC.**

In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made. Nor is such power conferred upon the courts by the interstate commerce act.

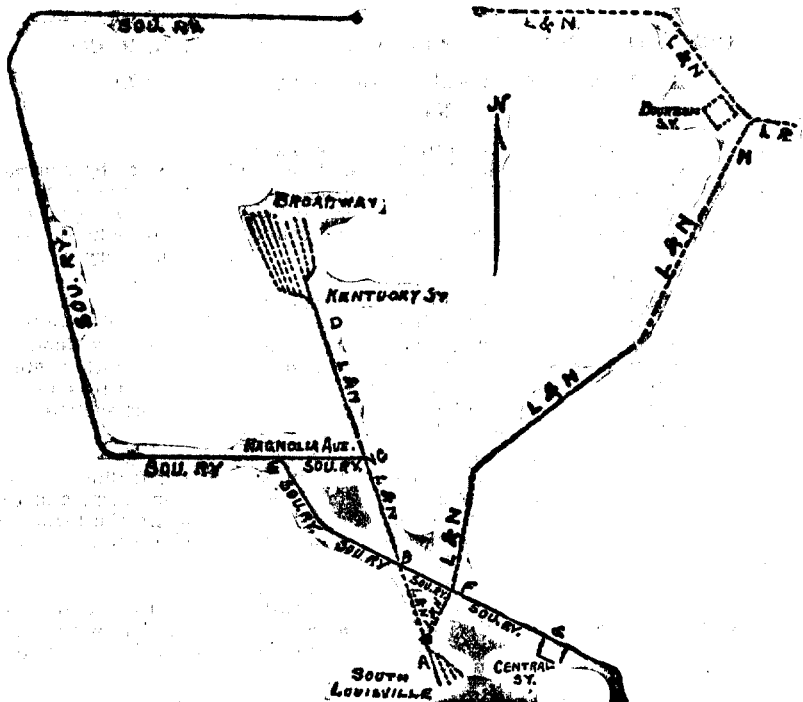
**4. SAME—INTERSTATE COMMERCE—STATE REGULATION.**

A state is without power to compel a railroad company to transfer cars of live stock to a connecting road at a point of connection within the state, where the shipment was received in another state, and is, therefore, a subject of interstate commerce.

## Appeal from the Circuit Court of the United States for the Western District of Kentucky.

This is a bill filed by the stock yards company against the railroad company seeking a mandatory injunction requiring the railroad company to receive, transfer, transport, and deliver shipments of live stock tendered to it outside the state of Kentucky, consigned or tendered to be consigned to any points of physical connection between its line and the line of the Southern Railway Company in Kentucky, and designated for the Central Stock Yards or its station in Kentucky; and in like manner to deliver, transport, and transfer such consignment to any person to whom it may be billed at said stock yards; and, further, to recognize the right of the consignor and the consignee to change at any of the stations of the said company the destination of said shipment, so as to make delivery in the manner agreed upon at a point of physical connection between the lines of the Southern Railway Company and the Louisville & Nashville Railroad Company for delivery to said Central Stock Yards; also seeking a temporary injunction and damages in the sum of \$3,000. The Central Stock Yards Company is a duly organized corporation authorized to conduct a general business in the state of Kentucky. The Louisville & Nashville Railroad operates in the states of Kentucky, Tennessee, Alabama, Georgia, Mississippi, Louisiana, Florida, Indiana, and Illinois as a common carrier. The Central Stock Yards Company has located its plant just outside the city of Louisville, where it has facilities for receiving, unloading, feeding, and caring for live stock. This plant is about nine miles from the terminus of the Southern Railroad in the city of Louisville. It is further alleged that the Southern Railway Company has established a station, known as the "Central Stock Yards," at or near the location of the plant. The situation may be shown in a general way by the rough draft herewith shown.

¶ 4. State laws interfering with interstate or foreign commerce, see note to *McCanna & Fraser Co. v. Citizens' Trust & Surety Co. of Philadelphia*, 24 O. C. A. 21-37, pars. 18-58.



- A.—South Louisville.
- B.—Fourth Street Crossing Southern Railway and Louisville & Nashville.
- C.—Magnolia Avenue connection.
- D.—Louisville & Nashville Kentucky Street Yards.
- E.—Junction of two Southern Railway lines.

- F.—Bergen & Meehan Switch.
- G.—Central Stock Yards.
- H.—Bourbon Stock Yards.
- RED LINES—Louisville & Nashville Railroad. [The red lines are indicated by the dotted lines.]
- BLACK LINES—Southern Railway.

The points of physical connection between the lines of the Southern Railway Company and the lines of the defendant are shown at F, B, and C of the diagram. The defendant company refused to receive stock from points outside the state of Kentucky, billed to the Central Stock Yards Company, or to any person in its care, asserting the right to deliver all live stock designated for Louisville passing over its own lines at the Bourbon Stock Yards, shown on the map at H, with which company the defendant has a contract,—the Louisville & Nashville Railroad Company agreeing that it would not lease, rent, or sell within the city of Louisville for the establishment of any other stock yards, or establish any other stock yards within or adjacent to said city; that it will deliver, and cause to be delivered, so far as it legally may, all live stock shipped over the lines of the defendant company consigned to the city of Louisville, and will load all stock for other persons at said city at said yards; providing that, if the terms of such agreement should be invalidated by any judgment or order of the court, or by legislative requirement, then the stock yards company should have no claims for damages against the railroad company arising out of the terms of the contract. The Central Stock Yards Company is a corporation, and was established by an agreement with the Southern Railway Company, making it the stock yards of that company in Louisville and vicinity. It is claimed that the complainant has a right to compel the shipment of live stock and transfer of cars consigned to the Central Stock Yards Company at one of the points of physical connection with the Southern Railway upon three grounds: (1) That such is the legal duty of the defendant company as a common carrier.

(2) Because of the requirements of the act to regulate commerce, passed by the congress of the United States on February 4, 1887, known as the "Inter-state Commerce Act." (3) By amended bill, that such is the duty of the corporation under the constitution and laws of the state of Kentucky. The circuit court dismissed the application for a temporary injunction, and afterwards dismissed the bill for want of jurisdiction in equity. Complainant appeals.

J. C. Dodd and W. M. Smith, for appellant.

Helm Bruce and Ed. Baxter, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge (after stating the facts as above). The discussion in this case has taken a wide range. In our opinion, it may be disposed in the solution of a few leading propositions, the first being: Is there a right, independent of a statute, to require the railroad company to receive the live stock for shipment to the Central Stock Yards, and to deliver the cars at a point of connection with the Southern Railroad in Louisville for transportation thereof? It is apparent from a consideration of the testimony that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company. It is true the location is just beyond the city limits, but the business to be transacted is the Louisville business in the sale and forwarding of stock in these yards. The contract through which the Central Stock Yards originated is in the record, and there we find an agreement between the Southern Railway Company and the Central Stock Yards Company in which is recited the desire of the railroad company to establish a general stock depot "for the receiving and delivery of stock at Louisville, Kentucky." After stipulations as to the reception and care of the stock, it is further provided that the railroad company will establish the premises of the stock yards company as its stock depot for the purpose of handling live stock to and from Louisville, and agrees not to sell, lease, or use, or license to be used, any part of its ground in or adjacent to Louisville for the establishment of any other stock yards, or otherwise facilitate the establishment of any other stock yards in the city, and will establish no other stock yards depot at or near said city. The railroad company further agrees to establish Louisville rates to and from the premises of the said company on certain lines. It is apparent from these stipulations of the contract that the parties understood that the Central Stock Yards was intended to be, as in fact it is, a Louisville stock yards, to be used, as is recited in the contract, in building up the live-stock business to and from Louisville. We have no question that the Central Stock Yard is as distinctly a yard for the transaction of the business of receiving, keeping, and selling of stock at Louisville as is the Bourbon Stock Yards, established for the same purpose by contract with the defendant company. The question on this branch of the case is thus narrowed to the consideration of the rights of the complainant to require of the Louisville & Nashville Railroad Company shipments and transfers to the Central Stock Yards Company, over the connection with the Southern Railroad, of live stock whose destination is Louisville. The peculiar duties of a common carrier of live stock are pointed out by Mr. Justice Field in *North Pennsylvania*

R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287. The animals cannot be turned loose, or left without food or shelter in cars standing on the railroad tracks or sidings. They must be placed in suitable quarters, where they can be fed and cared for under the charge of competent agents. The nature of the property requires these services, essential to the discharge of the duty of the carrier in the safe transportation and delivery of live stock. For this purpose it is the duty of the carrier to make provision by suitable yards and proper equipment and competent persons to manage and control the care and delivery of the live stock. We perceive no reason why this duty cannot be discharged by contract with proper persons or companies who shall undertake the same under the responsibility of the carrier. Such a contract was enforced in *Railroad Co. v. Struble*, 109 U. S. 381, 3 Sup. Ct. 270, 27 L. Ed. 970. Justice Harlan observed in *Stock Yards Co. v. Keith*, 139 U. S. 128-136, 11 Sup. Ct. 461, 464, 35 L. Ed. 73:

"It did not concern them [the complainants] whether the railroad company duly maintain stock yards or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under the obligation to the public to provide."

There is no showing of the inadequacy of the Bourbon Stock Yards Company in the matter of accommodations for receiving and caring for cattle. The defendant has there made provisions ample for the care of such stock with a company obligated to discharge the duties in this behalf required by the law of common carriers. Is the defendant obliged by law to make Louisville delivery at other points by making connections for other Louisville stock yards? We think this question must be answered in the negative. To all intents it was so answered by this court in *Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co.*, 14 C. C. A. 290, 67 Fed. 35. In that case the railroad company had entered into a contract with the Union Stock Yards Company, which made it the stock yards depot of the Louisville & Nashville Railroad Company at Nashville. A spur track had been run down Front street, in Nashville, for the accommodation of freight shippers not handling live stock. About 40 feet from this track the Butchers' & Drovers' Company established an independent stock yards. The Butchers' & Drovers' Company sought a mandatory injunction to compel the railroad company to build or allow to be built a side track connecting the spur track with the complainant's stock yards, there to deliver and receive cattle consigned or shipped by the complainant. The obtaining of the right of way and the expense of building the side track were not required of the defendant company, and are not elements essential to the disposition of the case in the opinion rendered by Judge Taft. The contention of the railroad company that, having established a live-stock depot in Nashville, for the reception and delivery of stock in that city, it could not be compelled to receive and deliver from another depot in the city, was sustained. Judge Taft quotes from the opinion of Judge Harlan in *Stock Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73, as follows:

"We must not be understood as holding that the railroad company in this case was under any legal obligation to furnish, or cause to be furnished,

suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling, or shipping live stock choose to establish yards. In respect to the mere loading and unloading of live stock, it is only required, by the nature of its employment, to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellant are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignors of live stock; and, if the appellee had been permitted to use them without extra charge for mere 'yardage,' they would have been without just grounds of complaint in that regard, for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But, as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receivers to receive and to deliver live stock from and to the appellees at their stock yards in the immediate vicinity of the appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation."

We think this language is no less applicable to the case under consideration. The Louisville & Nashville Railroad Company has by contract arranged for the discharge of its duties to shippers of live stock at the Bourbon Stock Yards. The proof does not show that these accommodations are inadequate, or the charges illegal. It would doubtless be convenient, and promote the business of dealers and shippers, if other facilities were afforded; but we find in the law nothing aside from a positive statute that requires more ample provision at the hands of the respondent.

It is further alleged in the bill that the refusal to make the desired shipping and transfer of stock to the yards of the complainant is a violation of section 3 of the interstate commerce act, which provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give undue or unreasonable preference or advantage to any particular person, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their respective lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The claim is that, having granted certain rights and privileges to the Bourbon Stock Yards Company, this section guaranties equal privileges to the Central Stock Yards Company. This construction of the act is not sustainable. It is the duty of the railroad company to provide reasonable facilities for the unloading and care of live stock. This duty it might discharge by itself furnishing sufficient facilities,



or it might contract with others to make such provision. The respondent has chosen the latter course. By contract with the Bourbon Stock Yards Company it has provided facilities for the care of stock received at Louisville. These facilities cannot be denied to some and afforded to others. But this is far from saying that it was the purpose of the law to dictate to common carriers the means by which it shall discharge its obligations to shippers. To hold otherwise would be, having regard to the present case, to require the railroad company to make connections with as many stock yards companies as may see fit to provide facilities equal to those furnished by the company or its agents. This would be carrying the act far beyond its terms and purposes. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C.) 37 Fed. 621, 2 L. R. A. 289.

These considerations dispose of this branch of the case. If it could be regarded as one involving the right to require one railroad to interchange traffic with another, the position of the complainant would be equally untenable. At common law a railroad company is only bound to transport freight to its own terminus. The rule is thus stated in *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291:

"At common law a carrier is not bound to carry except on his own line, and we think it quite clear that, if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of his contract; and if he holds himself out as a carrier beyond his line, so that he may be required to carry for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associate for doing his own work."

It is averred in the bill that the Southern Railway Company has notified the respondent that it would be, and now is, willing to be responsible from points of physical connection with the Louisville & Nashville Railroad for the delivery of such live stock and the collection of all charges on the same, and would promptly return to such points of connection all empty cars, and would account for all freight charges collected in the usual way. This may be true, and would possibly be a reasonable arrangement. But have the courts the right, in the absence of statute, to dictate to carriers the contracts they shall make in the interchange of traffic, and to require such to be carried out as the courts deem reasonable? The billing and transfer of freight from outside points over the two railroads is a matter of arrangement between them. The proportion of the joint tariff each shall receive, the handling of cars, the liability of one to the other, and other matters, are to be determined by the contract between the parties. Each controls its own railroad, and may determine for itself upon what terms it will unite in a joint tariff. No arrangement exists with the Southern Railroad for the transportation and delivery of cars of live stock to the Central Stock Yards, if that can be assumed to be a station on the line of the Southern Railroad; nor do we think a court of equity has the power to make one, and

supervise its execution; nor has this right been conferred upon the courts by the interstate commerce act. This doctrine is so thoroughly established as to require no more than the citation of the authorities in support of it. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C.)* 37 Fed. 567, 2 L. R. A. 289; *Little Rock & M. R. Co. v. St. Louis, I. & M. Ry. Co. (C. C.)* 41 Fed. 559; *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co. (C. C.)* 51 Fed. 475; *St. Louis Drayage Co. v. Louisville & N. R. Co. (C. C.)* 65 Fed. 39; *Allen & Lewis v. Oregon R. & Nav. Co. (C. C.)* 98 Fed. 16.

It is further alleged that the duty of complying with the complainant's demand rests upon the defendant company because of the requirements of the constitution of the state of Kentucky and the laws passed in pursuance thereof. Assuming, without deciding, that the Kentucky constitution and legislation require the defendant company to receive, deliver, transport, and transfer freight to any point that is in physical connection with the tracks of another company, so that the complainant has, as to traffic originating in Kentucky, the right to require that the shipment be received and transported in accordance with the prayer of the bill, the question remains, have the Kentucky constitution and statutes any operations beyond the limits of that state? The interstate commerce clause of the federal constitution has given rise to much litigation and frequent construction by the supreme court. It is thoroughly settled that the power of congress to regulate commerce is plenary, and no state has the right to regulate purely interstate commerce. On the other hand, the state has the right to make provisions as to matters within its own boundaries intended as aids to commerce, not thereby regulating interstate traffic. Without undertaking to reconcile or consider the numerous decisions, we may refer to *Mobile Co. v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. Mr. Justice Field, with his usual clearness, has called attention to the sound rules of construction to determine what is and what is not within the power of a state:

"Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce, as strictly defined, and its local aids or instruments or measures taken for its improvement. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adapt such a system. Action upon it by separate states is not, therefore, permissible." Page 702, 102 U. S., 26 L. Ed. 238.

It is within the power of a state to require connecting tracks between two railroad companies at an intersection for the transfer of cars used in the local business of such lines of railroad. This may

have been necessary for the accommodation of state commerce. *Railroad Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. So it is competent for a state to require a railroad company to stop a certain number of trains each day at stations having a certain number of inhabitants, within the state. Such regulations do not interfere with the delivery or transportation of passengers traveling between states in such wise as to be regulations affecting interstate traffic. The statute simply amounted to requiring three trains of the company to stop at the station named each day. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. Likewise a state may require a telegraph company to deliver a message. *Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105. But it is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do.

We reach the conclusion that no case was made justifying the relief prayed for, and that there was no error committed in dismissing the bill. Judgment affirmed.

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GIBBS v. McNEELEY et al.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1902.)

No. 797.

1. ANTI-TRUST LAW—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.

To render a combination unlawful under the anti-trust act of 1890 [U. S. Comp. St. 1901, p. 3200], it need not be one which by its terms refers to interstate commerce, but it is sufficient if its purpose and effect are necessarily to restrain interstate trade.

2. SAME.

An association of manufacturers of and dealers in red cedar shingles in the state of Washington, formed for the purpose of controlling the production and the price of such shingles, which are made only in that state, but are principally sold and used in other states, and which, by its action in closing the mills of its members, has reduced the production, and has also arbitrarily increased the prices at which the product is sold, is a combination in restraint of interstate commerce, and unlawful under the anti-trust law of July 2, 1890 [U. S. Comp. St. 1901, p. 3200].

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

The plaintiff in error brought an action to recover damages against the defendants in error under the act of congress known as the "Sherman Anti-Trust Act," of July 2, 1890 [U. S. Comp. St. 1901, p. 3200], and alleged in his complaint, as his first cause of action: That for more than 10 years he had

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12. See Monopolies, vol. 35, Cent. Dig. §§ 11, 13.

been a dealer in Washington red-cedar shingles at the city of Tacoma in the state of Washington, conducting a general business in such shingles, purchasing them of the various manufacturers thereof within the state of Washington, and selling them to purchasers in other states of the United States and in certain foreign countries. That his business was valuable; and that he was solely dependent upon it for his livelihood, and that he had acquired a wide clientage, and had transacted a business amounting to \$100,000 a year, and had derived an annual profit therefrom of \$3,000; that the said Washington red-cedar shingle is solely manufactured in the state of Washington, and has become an article of prime necessity and indispensable use to the people in the various states and countries named; and alleged that, during the first 10 months of the year 1899, 4,000,000,000 shingles were manufactured, of which 3,300,500,000 were manufactured for the purpose of selling and delivering to purchasers outside the state of Washington, and were so sold and delivered. That the defendant the Washington Red-Cedar Shingle Manufacturers' Association was a voluntary association of the various manufacturers and dealers in said shingles in the state of Washington, comprising a total of 108; that the association has a constitution and by-laws; that membership is secured by paying a certain initiation fee graded according to the number and character of shingle machines in use by the applicant for membership; that its officers are president, vice president, secretary, treasurer, and a central committee; that the defendants specifically named in the complaint are respectively such officers; that the powers of the committee were to hold meetings "and issue, from time to time, a minimum price below which all members agree not to sell shingles to dealers or wholesalers," "to establish a system of prices at which shingles must be sold to retail dealers," etc., "to order the closing down of all mills, and to take other necessary steps to curtail the output of Washington red-cedar shingles, when in their judgment the supply should exceed the demand." For a second cause of action, the plaintiff in error alleged, in addition to the facts above set forth, that on or about August 15, 1899, the central committee adopted a schedule of prices for shingles, whereby the members of said association were required to and bound themselves to sell at the price so fixed, to wit: Extra A, \$1.35 per 1,000, Clears, \$1.50 per 1,000, which price the plaintiff alleged was above the market price; the market price then being Extra A, \$1.20 per 1,000, and Clears, \$1.35 per 1,000. That by reason of the said increase in prices the plaintiff was unable to carry on his business and supply the natural and ordinary demand for such shingles, or to purchase shingles at any other than the price so fixed, and he was injured thereby in his business in the sum of \$1,200. For a third cause of action, the plaintiff, in addition to the facts above alleged, set forth that on November 11, 1899, for the purpose of further increasing the price of said shingles, the association ordered its mills to close down for the period of 60 days, which order was obeyed, whereby the trade in shingles was interrupted, and he was unable to purchase shingles with which to fill his orders, to his damage in the sum of \$1,000. For a fourth cause of action, in addition to the facts already set forth, the plaintiff alleged that the president, vice president, treasurer, and secretary, together with the central committee, for the purpose of destroying the plaintiff's business, published resolutions adopted at a meeting of the central committee, charging the plaintiff with endeavoring to injure the market for Washington red-cedar shingles, and with having no money invested in his business, and as being without credit and irresponsible, and not an honorable and legitimate dealer in such shingles, and that for the purpose of inducing all wholesale and retail dealers in shingles in the states and foreign countries aforesaid to refuse to buy shingles of the plaintiff, and to induce the manufacturers of shingles to refuse to sell him shingles, they printed and circulated through the mails the said resolutions, and published them in newspapers. And the plaintiff in error set forth in the complaint the names of 253 persons to whom such circulars were sent. He alleged that the result of the conspiracy was to destroy his business, to his damage in the sum of \$15,000. On February 2, 1900, the defendants in the action, by their attorneys, filed a general appearance with the clerk on behalf of all the defendants named in the complaint. The defendants McNeeley and Beckman subsequently appeared separately, and

demurred to each cause of action in the complaint for want of jurisdiction of the persons of the defendants, want of jurisdiction of the subject-matter, defect of parties defendant, and the insufficiency of the facts pleaded to constitute causes of action. Upon the last of these grounds of demurrer, the cause was presented in the circuit court before Hanford, District Judge, and the demurrer was sustained as to all except the fourth cause of action. 102 Fed. 594. Upon that cause the case afterward went to trial before Bellinger, District Judge, who directed the jury to return a verdict for the defendants in error upon the ground that the proofs did not sustain the causes of action, and that the combination described in the complaint is not one in restraint of interstate commerce, so as to give a right of action, under the provisions of the act of July 2, 1890 [U. S. Comp. St. 1901, p. 3200], to one who has been injured by a resolution, passed and circulated, denouncing him for cutting prices, and also upon the ground that in the opinion of the court the allegations in the fourth cause of action were insufficient to constitute a cause of action. 107 Fed. 210.

T. O. Abbott and T. L. Stiles, for plaintiff in error.

Charles O. Bates, Charles A. Murray, and John A. McDaniels, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case having gone to trial before a jury on the fourth cause of action, and having been determined adversely to the plaintiff in error on the facts, and it being conceded that the demurrer to the first cause of action was properly sustained, the question which is here presented is whether the facts alleged in either the second or the third cause of action in the complaint constitute a cause of action under the act of July 2, 1890, commonly known as the "Sherman Anti-Trust Act" [U. S. Comp. St. 1901, p. 3200]. The combination which is described in the complaint consists of a combination of manufacturers and wholesale dealers in Washington red-cedar shingles, who reside and carry on their business within the state of Washington, and sell and deliver goods to residents of other states. It is not charged that the defendants in error, or any of them, have entered into any combination or contract with residents of other states. The alleged right of the plaintiff in error to recover is based substantially upon the fact that the combination comprises all the manufacturers and wholesale dealers within the state of Washington, and that they have combined and conspired together to fix an arbitrary price to wholesale and retail dealers for an article of merchandise used in interstate commerce, below which no one is permitted to buy or to sell, and that the price so fixed marks a distinct increase of the market price as it had stood theretofore, and that the association has assumed and exercised, and will continue to exercise, the power to shut down all mills within the state at will, and for so long a time as it may deem necessary. Is this a combination in restraint of interstate commerce, such as is denounced by the statute? There can be no doubt that at common law it is an unlawful combination in restraint of trade. It has the effect to diminish production, abolish competition, and enhance prices. Its illegality is not relieved by the fact that

it was induced by the keen competition and the unprofitable condition of the shingle manufacturing business which existed before it was entered into, or by the fact that the prices fixed by the combination may have been reasonable. *Manufacturing Co. v. Klotz* (C. C.) 44 Fed. 721; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *People v. Milk Exchange*, 145 N. Y. 267; 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; *Harrow Co. v. Hench*, 27 C. C. A. 349, 83 Fed. 36, 39 L. R. A. 299; *Cravens v. Carter-Crume Co.*, 34 C. C. A. 479, 92 Fed. 479.

The anti-trust act goes as far, if not farther, than the common law, and declares unlawful all combinations in restraint of interstate trade. In order, therefore, to bring the combination which is under consideration within the interdiction of the act, it must appear that it is more than a mere combination in restraint of trade; it must involve the restraint of interstate or international commerce. It is urged by the defendants in error that merchandise is not subject to the power of congress to regulate commerce until it is in actual transit from one state to another, and that matters occurring prior to the commencement of this final movement are not matters of interstate commerce, but are within the authority of the state, and are wholly unaffected by other authority. *Coe v. Town of Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; and other cases are cited in support of that view. But in *Robbins v. Taxing Dist.*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694, it was said: "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce;" and the case of *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, is authority for the proposition that the power of congress to regulate commerce is not confined to goods that have begun their movement out of the state in which they are manufactured, but that it extends to negotiations and contracts made preliminary to the manufacture, sale, and shipment of goods in interstate commerce. The court in that case had under consideration a combination between manufacturers located in different states. The combination comprised six corporations, and it was entered into for the purpose of raising prices of steel pipe in certain designated states. Their method of business required the delivery of pipe by the seller at the place where it was to be used by the buyer, and included in the price the cost of delivery. By the terms of the combination, contracts were to be made, after public letting, at the home and in the state of the buyer. Requests for bids were to be submitted to a central committee, which was to fix a price, and the contract was to be awarded to that member of the combination who would agree to pay, for the benefit of the other members, the largest bonus. This was the method of business except in certain designated reserved states, in which the successful bidder was to be designated, and the price and bonus were to be fixed by the association. The agreement of the association restrained every defendant, except the one selected to receive the contract, from making a contract for pipe with the intended purchaser.

With respect to the sales in the states in which the mills of the defendant were situated, the effect of the agreement was to bind at least three, if not more, of the defendants to make no contract at all in those states for the sale and delivery of pipe in another state. In short, the agreement had the effect to restrain at least three, sometimes four, sometimes five, and sometimes all, of the defendants in interstate trade, which otherwise they would have been permitted to engage in, in selling in one state pipe to be delivered from another state at prices to be determined upon from competition and at market rates. There were other restrictions in the combination, not necessary here to be further specified. The court held that the association was a contract, combination, or conspiracy in restraint of trade, as the terms are understood in the act, and that the subject-matter of the restraint was not articles of merchandise or their manufacture, but contracts for the sale of such articles, to be delivered across state lines, and the negotiations and bids preliminary to the making of such contracts; all of which are interstate commerce. The court said:

"If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute."

The defendants in error rely upon the case of *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. That case arose upon a bill in equity filed by the United States under the anti-trust act to enjoin the defendants from continuing a combination which comprised substantially all the sugar refineries of the country for refining raw sugar. The bill alleged that the American Sugar-Refining Company had purchased the stock of four other sugar-refining companies with shares of its own, and that thereby it acquired almost the complete control of the manufacture of refined sugar in the United States. It was the object of the suit to cancel the agreements of purchase, to cause the redelivery of the stock to the former owners thereof, and to enjoin the further performance of the agreement. The court denied the relief which was prayed for, and held that the combination was not within the prohibition of the statute for the reason that the agreement related only to the manufacture of refined sugar, and not to its sale. The chief justice, in delivering the opinion of the court, said:

"Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly wherever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. \* \* \* The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state, and belongs to commerce."

The chief justice proceeded to say, further:

"What the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations, but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refin-

ing in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. \* \* \* There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree."

The purport of this language of the court is to mark a distinction between a restraint upon manufacturing and a restraint upon interstate commerce in a manufactured article, and to hold that the power of congress to regulate commerce extends only to the latter. If the defendants in that case had combined for the purpose of not only regulating the manufacture of refined sugar, but the price at which it should be furnished to purchasers in other states, a different case might have been presented. There was nothing in the case as it was presented to show that the combination contemplated a regulation of prices of merchandise which was to enter into interstate commerce, or a restraint of the trade in merchandise in such commerce. There was before the court only a combination to manufacture, which might or might not result in an increase of prices, and the court held, therefore, that commerce was only indirectly affected. Mr. Justice Peckham, in delivering the opinion of the court in the *Addyston Pipe & Steel Co. Case*, said:

"It is the sale and delivery of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the state makes the transaction a part of interstate commerce."

—And, distinguishing that case from the *E. C. Knight Co. Case*, said, of the combination in the latter case, that its direct purpose was the control of the manufacture of sugar; and added:

"There was no combination or agreement in terms regarding the future disposition of the manufactured article, nothing looking to a transaction in the nature of interstate commerce."

In these words the court marked the limit of the doctrine of the *E. C. Knight Co. Case*. The plain intimation from the language of the court is that, if there had been in that case a combination or agreement in terms regarding the future disposition of the manufactured article across state lines, there would have been added the essential element to make it a combination affecting interstate commerce.

The ground upon which the court held that the combination of manufacturers in the *Addyston Pipe & Steel Co. Case* restrained interstate commerce was the fact that it was made in contemplation of the transaction of future business between citizens of different states and the negotiation of sales, to be made in one state, of goods to be delivered therein from another. While there was in that case no particular contract for furnishing pipe or fixing its price in the contemplation of the parties to the combination at the time when it was made, the court referred to the fact that it was the purpose of the combination to abolish all competition, and said:

"The direct and immediate result of the combination was, therefore, necessarily a restraint upon interstate commerce in respect of articles manufac-



tured by any of the parties to it, to be transported beyond the state in which they were made."

The present case differs in important aspects from both the E. C. Knight Co. Case and the Addyston Pipe & Steel Co. Case. It occupies a ground intermediate between. The combination which it presents is more than a mere combination to manufacture, such as was before the court in the E. C. Knight Co. Case, and it lacks some of the features of the Addyston Pipe & Steel Co. Case, in that it contains no express provision for the transaction of business across state lines; it does not by its terms refer to the sale or delivery of shingles elsewhere than in the state of Washington. But can it be said that such sales and delivery were not within its contemplation, and are not directly affected by it? The defendants in error were engaged in manufacturing a product of which, as they well knew, more than 80 per cent. was to be sold, delivered, and used in states other than that of its manufacture. They were in the business of selling and delivering shingles to purchasers in other states. In fixing a list of prices they fixed it not alone for domestic trade, but for external commerce as well. The inevitable result of the combination is to enhance the price and restrain the trade of shingles in all the states. In the E. C. Knight Co. Case it was held that a monopoly to manufacture did not necessarily affect interstate commerce. The reason for so holding is apparent. From the creation of a monopoly to manufacture, it does not necessarily follow that interstate commerce in the monopolized article will in any degree be interfered with. The total production of the manufactured article and its price may, notwithstanding the monopoly, remain unaffected. In that case it was said, "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." But this cannot be said of a combination of manufacturers in one state who agree to arbitrarily increase the price and diminish the total output of a manufactured product which is made only in that state, but which is principally bought and used in other states. The intention to put a restraint upon interstate commerce in such a case is evident, and the restraint is not indirect, but direct, and it is the necessary and inevitable result of the combination.

We do not think that the act contemplates that the combination therein made unlawful must be one which shall by its terms refer to interstate commerce. It is enough if its purpose and effect are necessarily to restrain interstate trade. If it were otherwise, all combinations in restraint of interstate trade might be so expressed in words as to avoid the statute. The true test would seem to be, not what the agreement professes, but what it accomplishes. This combination must be dealt with in view of the known facts which surrounded it when it was formed, and which still attend it. It is impossible that the parties to it had in view only domestic trade. They must have had in contemplation the market which they had theretofore had, and which they would continue to have, and which, as they well knew, was principally without the limits of their own state. It is immaterial that all the parties to the agreement were residents of the same state. It is not the place where the parties reside that dis-

tinguishes the combination, and lends to it the features of a combination in restraint of interstate trade. A case in point is *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, recently decided by the circuit court of appeals for the Sixth circuit, in which the court held illegal under the anti-trust law, both as in restraint of interstate commerce and as tending to create a monopoly, a combination between a fuel company, a corporation of the state of West Virginia, and 14 corporations, persons, and firms of that state, who were independently engaged in producing coal and coke in a district on the line of a railroad. The combination stipulated that the company was to handle for a term of years the entire output of the members of the association, which was to be shipped to the western market over said road, and that it should sell the product of no competing mines, and it provided that a minimum price for the sale of the coal and coke should be fixed from time to time by a committee of the association, which price the fuel company agreed to pay, and in addition thereto agreed to obtain as large a profit as possible, and to account to the association for all thereof above a fixed sum per ton, which it was to retain as its compensation. We have not overlooked certain expressions of the court in the *E. C. Knight Co. Case*, where it was said that congress did not attempt, by the act of July 2, 1890, "to limit and restrict the rights of corporations created by the states, or the citizens of the states, in the acquisition, control, or disposition of property, or to regulate or prescribe the price or prices at which such property or the products thereof should be sold"; and where it was further said that contracts "to raise or lower prices or wages might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy." We think the court, in using this language, had in view combinations to raise prices which might be made without special reference to interstate trade, and which would only indirectly affect it. The combination in the case before the court is more than a combination to regulate prices; it is a combination to control the production of a manufactured article more than four-fifths of which is made for interstate trade, and to diminish competition in its production, as well as to advance its price. These features, we think, determine its object, and bring it under the condemnation of the law. The plaintiff in error is in the business of buying the manufactured article in the state where it is manufactured, and selling it to purchasers in other states. The acts charged against the defendants in error interfere with his "contracts to buy, sell, or exchange goods to be transported among the several states,"—contracts which are made and negotiated between the plaintiff in error and his customers in various states,—and the acts of the defendants are in restraint of the interstate commerce in which he is engaged. We think the complaint states a cause of action. We find no error in the ruling of the circuit court in denying the motion of the plaintiff in error for an order granting the default of all the defendants in error except E. J. McNeeley and Victor H. Beckman,

and granting Bates & Murray leave to withdraw their general appearance entered on behalf of all of the defendants in error, and to so amend the same as to make said appearance for and on behalf of McNeeley and Beckman only.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent with the foregoing views.

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PIKE v. GREGORY et al.

(Circuit Court of Appeals, First Circuit. October 16, 1902.)

No. 403.

**1. APPEAL BOND—EXTENT OF LIABILITY—INTEREST.**

An appeal bond in the usual form, given on appeal from a decree awarding to one of the parties a fund which has been paid into the registry of the court in interpleader proceedings and deposited at interest, does not bind the appellant, on an affirmance, to pay interest on such fund not awarded by the appellate court, in the absence of proof of misconduct on his part, like unreasonable or vexatious delay in prosecuting the appeal, where the appellee has received the fund, with its accumulations.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Thomas H. Talbot, for plaintiff in error.

Francis A. Brooks, for defendants in error.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

ALDRICH, District Judge. There being a dispute as to who was entitled to have certain funds belonging to the estate of the late Fred-eric A. Pike, proceedings were instituted, including interpleader, to determine the questions of right. During the pendency of such proceedings, and while the fund of something like \$37,000 was in the registry of the circuit court, and deposited under circumstances where the use thereof was added to the principal, the defendants executed appeal bonds containing the usual condition to prosecute to effect, and answer all damages and costs if there should be a failure to make the appeal good.

The final result of the litigation was favorable to this plaintiff, and on the 26th of September, 1896, she received, under a decree of court, together with her taxable costs, the fund in the registry, amounting to \$39,440.77, including something like \$1,500 which the fund had earned while in the custody of the law.

The plaintiff now claims that, as the defendants did not prevail upon appeal, she is entitled to recover from them, under the condition of the appeal bonds, damages as interest at the statutory rate from the date of the decree from which the appeal was taken until the final judgment upon or after appeal.

The question of interest was recently discussed by this court in *Hutchinson v. Otis*, 115 Fed. 937, where no interest was allowed.

We have not considered the distinct question whether interest on money detained or withheld by order of court can be recovered in a suit on a supersedeas bond unless it has been first awarded by the appellate tribunal in the original cause. This point has not been brought before us by counsel, and we have not found it necessary to give it consideration.

In the case at hand there was a fund about which there was a serious legal controversy. Pending the continuance of the controversy the fund was in the custody of the law by order of court, and earning interest. At the end of the litigation the prevailing party took the fund, with the accumulations of use.

The decree from which the appeal was taken was not a judgment or money decree against these defendants, but a decree adjudging to the plaintiff the fund in dispute. There is therefore very little, if any, analogy between the case under consideration and the cases upon which the plaintiff relies, which involved verdicts or judgments against the party who took the appeal, and which carry interest by force of law.

The grounds for recovery of interest have been stated in a general way to be (1) where the contract provides for it, (2) where it is given by statute; (3) as damages; (4) where the conduct of a party merits its allowance; and (5) where a party has in his possession a fund belonging to another, and makes interest thereon. This may not be a complete or strictly accurate statement of all the grounds, but it is sufficient to illustrate the general grounds upon which interest is allowed; and the plaintiff, upon the facts, does not bring herself within any principle which carries to her the right to recover.

The ground, if any, for recovery of interest as damages in such a case as this, unless it be first awarded by the appellate court, would be misconduct, like unreasonable delay through a vexatious prosecution of appeals or other proceedings, and there was no evidence to warrant submitting the case to the jury on that ground. Indeed, such ground was not even suggested as a ground of recovery, and the plaintiff placed her claim for interest squarely upon the provisions of the bonds. The cases upon which the plaintiff principally relies are not in point, for the reason that they relate to a right of recovery from an adverse party merged in a judgment, and to a situation where the interest is based upon and follows the judgment against the party, which is afterwards affirmed; while here the claim of the plaintiff for interest is not based upon any judgment against the party, but upon a contract or bond which does not express interest; nor does such a bond carry interest by implication, where the money upon which the interest claimed is not recovered from the party, but decreed to the plaintiff, through interpleader, from a fund in the custody of the law, together with its earnings. So far as the record shows, there was a controversy in good faith between the parties as to the distribution of an estate of a deceased person, and under such circumstances we see no principle of law or equity which imposes liability upon one of the contestants to pay interest upon the fund which was in the registry during the controversy, by order of court, or which entitles the other party to a greater use than the fund was earning, unless the controversy was pro-

longed to an extent where it can be said to be merely for delay, and that it was vexatious and unreasonable.

The plaintiff also relies upon rules 23 (3 Sup. Ct. xiii) and 29 (3 Sup. Ct. xvi) of the supreme court, and rules 13 (31 C. C. A. liii, 90 Fed. liii) and 30 (31 C. C. A. clxviii, 90 Fed. clxviii) of the circuit court of appeals for this circuit. These rules of court are intended to provide for reasonable security to the parties, and do not always determine the ultimate question of right between them; and we assume that neither the provision in the rules as to "interest" pending appeal, nor the provision as to "just damages for delay," was intended to establish the right of recovery of interest as damages in a case like this.

There being no liability of the defendants to pay interest upon the fund in question, in the absence of evidence of vexatious delay, and all the other conditions of the bonds having been complied with, there was no breach.

The judgment of the circuit court is affirmed.

WEBB, District Judge, concurred in the conclusion of the court before he resigned.

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#### THE GERTRUDE.

(Circuit Court of Appeals, First Circuit. July 29, 1902.)

No. 426.

**1. COLLISION—DANGEROUS METHOD OF TOWING—EXTRAORDINARY CARE REQUIRED OF TUG.**

The rule reaffirmed that an ocean tug, which places two tows on a single line covering in all 1,500 feet in length, will be held to the exercise of the extreme care to avoid collisions which such dangerous method of towing renders necessary.

**2. SAME—BURDEN OF PROOF TO ESTABLISH FAULT.**

The rule applied that a preponderance of the evidence is necessary to sustain a claim made by one vessel against another in a case of collision.

**3. SAME—SCHOONER AND TOW CROSSING.**

Evidence held insufficient to sustain the claim of a tug that a schooner was guilty of contributory fault for a collision with a tow, notwithstanding the presumption against the schooner arising from the fact that her deck was not properly manned, and that the testimony of her witnesses was contradictory.

Appeal from the District Court of the United States for the District of Rhode Island.

Samuel Park and Edward S. Dodge, for appellant.

Frank Healy (Archibald C. Matteson, on the brief), for appellees.

Before COLT and PUTNAM, Circuit Judges.

PUTNAM, Circuit Judge. This is a case of collision, in which the decision of the district court (112 Fed. 448) was against the

¶ 2. See Collision, vol. 10, Cent. Dig. § 275.

steamtug Gertrude, charging her with the entire damages, and she alone has appealed. She does not now raise any question as to her own fault, but she charges that the vessel with which she came in collision, the schooner Lottie, was also guilty. This sufficiently appears by the closing paragraph of the brief of the appellant, to the effect that the decree below should be reversed, and that one should be ordered that the Lottie recover but one-half damages.

The collision occurred about 10 o'clock in the evening of November 27, 1897, at a part of Long Island Sound which is thickly crowded with vessels. The Gertrude is described in her answer as a large and powerful seagoing steamtug, having in tow the barges J. R. Silliman and Busy, there being about 160 fathoms of hawser between the Gertrude and the Silliman, and about 75 fathoms between the Silliman and the Busy; the Silliman thus holding the intermediate position. The schooner was of about 155 tons burden, and was heavily laden with 2,900 barrels of lime. The tug and tow were proceeding easterly at the rate of about five knots. The schooner was proceeding westerly, closehauled, at about seven knots. The evening was fresh, but, with that exception, it was not other than an ordinary November night.

It will be perceived that the tug and her tow covered about 1,500 feet. We have several times urged on the attention of all who might come within range of our opinions the extremely dangerous character of this method of navigation, and the consequent extreme care to which we must hold a tug under these circumstances, although we have no power of prohibition, in the absence of congressional action. This case impresses us anew with the necessity that the courts should hold a firm hand, and, indeed, with the propriety of congressional interference. As the result of the collision, the Silliman was sunk, and all hands on board lost. What was the number of her crew has not been brought to our attention; but it appears that three men constituted the entire crew of the Busy, hardly more than a single watch, and that she had no resources for going to the relief of the Silliman, all of whose crew were drowned before her eyes. The Lottie was sunk with, as we understand, the loss of one life out of a crew of six.

In this case the deck of neither vessel was properly manned at the time of the collision. The tug was absolutely regardless of the rules which were laid down with reference to seagoing steamers in *The Oregon*, 158 U. S. 186, 193, 15 Sup. Ct. 804, 39 L. Ed. 943, and sequence, and enlarged on by us as applied to a tug and tow of the character at bar in *The Samuel Dillaway*, 38 C. C. A. 675, 98 Fed. 138, 141, 142. Indeed, so negligent were both vessels in this particular, and also so uncertain and contradictory among themselves were the witnesses in behalf of each, that, in view of what we have said at various places, especially in *The Samuel Dillaway*, at page 142, 98 Fed., page 675, 38 C. C. A., and in *The Columbian*, 41 C. C. A. 150, 100 Fed. 991, 997, as to the presumptions against proofs coming from vessels which disregard settled rules as to the proper manning of their decks, it is doubtful whether, if this case were one of new impression before us, we would not refuse to hold that either had

maintained the burden resting on it of proving the other guilty of fault. However, this is not open to us.

In *The Columbian*, *ubi supra*, we referred, at page 997, 100 Fed., page 150, 41 C. C. A., somewhat to our views with reference to the extreme rule first laid down in *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84, as to the presumption on the whole case against a vessel confessedly in fault, as the *Gertrude* was on the record before us. While we have never attempted to apply the rule as here stated, yet we called attention in *The Charles L. Jeffrey*, 5 C. C. A. 246, 55 Fed. 685, 686, to the proposition that "when one vessel makes a claim against another in the case of a collision admiralty courts are bound by the rule which forbids any other court from condemning any one in damages except in behalf of a party who supports his demand by a preponderance of evidence." The only question we have on this appeal is within the terms of this citation from *The Charles L. Jeffrey*, in that the issue before us is a claim on the part of the *Gertrude* against the *Lottie*, in respect to which claim we are forbidden from condemning the *Lottie* in damages unless the *Gertrude* supports it by a preponderance of the case. The learned judge whose decision has been appealed from was of the opinion that there is positive evidence that the *Lottie*, who was ordinarily bound to keep her course, did execute the only proper maneuver to avoid collision, and executed it promptly. It is not necessary to go to that extent. It may be that, if we undertook to do this, we would be confronted by the presumptions to which we have already referred, arising from the facts that the *Lottie's* deck was not properly manned, and that the testimony of her own witnesses are contradictory in serious respects as toward each other. However, giving all the weight that should be given to the presumption arising against a vessel on account of her lack in these respects, it is enough for us to say that we are not satisfied, on the whole case, that the *Gertrude* has sustained the preponderance which rests on her. We might go even further, and hold that the *Gertrude* put the *Lottie* in extremis, and therefore apply, as we applied in *The Columbian*, at page 994, 100 Fed., page 150, 41 C. C. A., the case of *The Umbria*, 166 U. S. 404, 420, 17 Sup. Ct. 610, 41 L. Ed. 1053, to the effect that, when a heavily laden schooner is shown to have been threatened by a tow like this at bar, "whatever she might have attempted might, for aught that she could foresee, have proved to have been the very thing she ought not to have done." Indeed, the whole line of reasoning in *The Columbian* with reference to the alleged fault on the part of the schooner *Ella M. Doughty*, especially so far as it relates to the effect of the facts of the insufficient manning of her deck and of the conflicting nature of her testimony, applies closely to the case at bar.

The decree of the district court is affirmed, with interest, and the costs of appeal are awarded to the appellee.

WEBB, District Judge, sat at the hearing of this cause, but resigned before it was decided.

## WM. G. ROGERS CO. et al. v. INTERNATIONAL SILVER CO.

(Circuit Court of Appeals, First Circuit. November 6, 1902.)

## No. 434.

## 1. UNFAIR COMPETITION—JOINT LIABILITY.

A person who establishes a business for the purpose of engaging in unfair competition with an older concern by reason of the similarity between his name and that used by such concern as a trade-mark, and afterwards transfers such business to a corporation in which he becomes a stockholder, is liable to be enjoined with the corporation with respect to a continued unfair competition.

## 2. PRELIMINARY INJUNCTION—VALIDITY—REVIEW ON APPEAL.

A temporary injunction ordinarily relates to conditions as they exist at the time it was ordered, and the fact that its terms may be broad, as applied to certain possible future contingencies, is not a ground for the reversal.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Samuel J. Elder and Edmund A. Whitman, for appellants.

Charles E. Mitchell and Hiram R. Mills (John P. Bartlett, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

PUTNAM, Circuit Judge. This is an appeal from an order of the circuit court directing an ad interim or temporary injunction. 113 Fed. 526. Except for two or three matters to which we will refer, the facts are stated in the opinion of the learned judge who disposed of the case in the circuit court, with whose conclusions, as well as with his reasons therefor, we are entirely satisfied.

It is claimed that the business inaugurated by William G. Rogers was bona fide, and that, being such, it stood after its transfer to the respondent corporation with all the same rights as before its transfer. There is nothing that shows any particular finding below on this proposition; but the very small amount for which all the assets of Rogers were transferred to the corporation, as well as some other facts to which it is not necessary to refer, establish, on the present record, beyond any reasonable doubt, that the purpose of Rogers, from the incipency of the business, was as stated in the complainant's bill, and was not bona fide, in the sense in which such an expression is used by the courts with reference to protecting established commercial or manufacturing interests. The circuit court was right in holding that Rogers was a joint tortfeasor with the corporation to which he assigned his apparent business interests.

The respondents also press upon us the question of laches. Laches is often fatal on an application for a temporary injunction when it would not be on final hearing. Of course, even where a complainant's right is clear, he cannot always, by the interposition of inter-

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper*, 30 C. C. A. 376.



locutory proceedings, suddenly arrest a commercial or manufacturing business which has been built up or inaugurated, with any considerable expenditure, during his silence, if he had been informed of the facts. The present case, however, shows that the complainant was vigilant in ascertaining the facts with reference to William G. Rogers, and that as soon as they were ascertained it proceeded promptly. It also shows that meanwhile no new commercial or manufacturing interests have been inaugurated, because all that was done was a continuance of an old manufacture under the name of the new corporation. In the present record there is no such case of laches as defeats the rights of the complainant, in other respects clear.

It is also maintained that the injunction granted by the circuit court, in so far as it relates to William G. Rogers, was too broad, in that it would prevent his pursuit of a legitimate business under some future contingencies. It is impossible for courts, with reference to proceedings of this character, to anticipate all future possibilities, so that temporary injunctions relate ordinarily to conditions as they exist when the injunction is ordered. Inasmuch as, notwithstanding an order of this character has been affirmed on appeal, the injunction remains subject to modifications or even dissolution by the circuit court (*Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276, 282), future contingencies can be taken care of in such way as justice may then require.

The order appealed from is affirmed, and the costs of appeal are awarded to the appellee.

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GERMAN INS. CO. et al. v. HEARNE.

(Circuit Court of Appeals, Third Circuit. October 10, 1902.)

Nos. 24-32.

1. CIRCUIT COURTS OF APPEALS—CERTIFYING QUESTIONS TO SUPREME COURT.

A circuit court of appeals has no authority to certify a case to the supreme court for decision, but only to certify questions or propositions of law concerning which it desires the instruction of the supreme court for its proper decision of the case.

2. SAME.

A circuit court of appeals has no authority to certify a question or proposition of law to the supreme court on motion of a party unless the judges consider such question doubtful, and can certify that they desire the instruction of the supreme court thereon, to enable them to determine it properly.

On Motion to Certify Cases to the Supreme Court.

For opinion, see 117 Fed. 289.

Before GRAY, Circuit Judge, and BRADFORD and McPHERSON, District Judges.

J. B. McPHERSON, District Judge. The motion before the court is in these words:

"And now, September 12, 1902, plaintiff, by his attorney, Willis F. McCook, moves this court to vacate and set aside the judgment directed to be entered in the said suits, and to certify the same to the supreme court of the United States for its decision."

In our opinion, the motion must be refused, for two reasons:

1. We are asked to certify "the same" (that is, either the "judgment" or the "said suits") to the supreme court for its decision, and this we have no authority to do. The sixth section of the act of March 3, 1891, creating the circuit courts of appeals (1 Supp. Rev. St. 903; U. S. Comp. St. 1901, p. 549), does not empower us to certify a "case" to the supreme court, but only to certify "any questions or propositions of law concerning which [this tribunal] desires the instruction of that court for its proper decision" (U. S. v. Union Pac. R. Co., 168 U. S. 505, 18 Sup. Ct. 167, 42 L. Ed. 559).

2. If the motion is to be treated as an application to rehear the cases, and, pending the rehearing, if this should be granted, to certify a question or proposition to the supreme court, we are equally without authority to grant such a request, because we cannot truthfully declare that the question or proposition of law that underlies the judgments recently entered in this court, but is believed by the defendant in error to have been wrongly decided, is a question or proposition concerning which we desire the instruction of the supreme court in order that we may properly determine it. The circuit court of appeals was unanimous in its opinion, and none of the judges who then constituted the court considered then, or now considers, that the point in controversy was so doubtful that instruction thereon should be asked from the ultimate tribunal. Of course, our conclusion may have been erroneous, but, so long as we believe in its soundness, we cannot properly give the certificate required by the act: *Watch Co. v. Robbins*, 148 U. S. 266, 13 Sup. Ct. 594, 37 L. Ed. 445.

The motion is denied.

DOWAGIAC MFG. CO. v. MINNESOTA MOLINE PLOW CO. et al.

MINNESOTA MOLINE PLOW CO. et al. v. DOWAGIAC MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. September 1, 1902.)

Nos. 1,719, 1,720.

1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

Where a new combination of old elements is such that it produces a new mode of operation and a beneficial result, there may be a patentable invention.

2. SAME—INFRINGEMENT—CHANGING FORM OF PARTS IN COMBINATION.

One does not escape infringement by changing the form of the parts of a patented combination without essentially varying the principle or mode of operation pervading the original invention.

3. SAME—EQUIVALENTS.

A patentee whose invention is meritorious, although he is not a pioneer, is entitled to a reasonable range of equivalents, measured by the advance he has made over older machines.

4. SAME—GRAIN DRILLS.

The Hoyt patent, No. 446,230, for an improvement in grain drills consisting of spring pressure rods and means of attaching the same, by which pressure is applied to the shoes, and they are raised from the ground, by means of a lever, was not anticipated and is valid. Claims 1, 2, and 3 *held* infringed by a device designated as the "McSherry Old Structure"; also *held* infringed by the "McSherry New Structure," made in accordance with the Swope and Moehring patent, No. 668,397.

Thayer, Circuit Judge, dissenting as to the latter holding.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Fred. L. Chappell, for plaintiff.

Charles M. Peck and Arthur Stem (George Heidman and Clarence E. Mehlhope, on the brief), for defendants.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

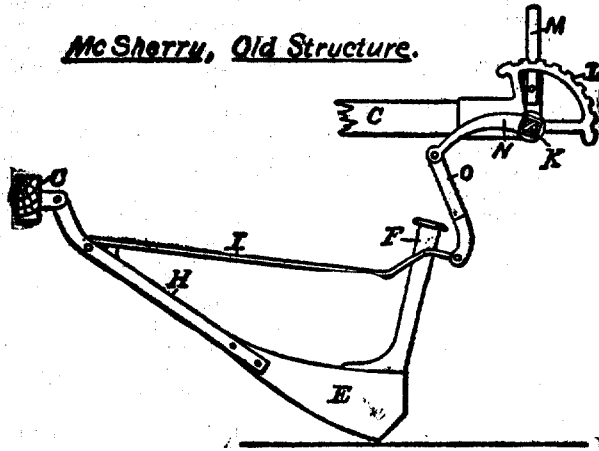
CARLAND, District Judge. This action was brought in the court below by the Dowagiac Manufacturing Company against the Minnesota Moline Plow Company and others, for the alleged infringement of claims 1, 2, and 3 of letters patent No. 446,230, issued February 10, 1891, to Will F. Hoyt. Two structures are involved in the suit, and are referred to in the record as the "McSherry Old Structure" and "Defendant's Second Structure." The circuit court held the McSherry old structure to be an infringement, and the second structure not to be an infringement. The Dowagiac Manufacturing Company has appealed from so much of the decree as adjudged the second structure not to be an infringement, and the Minnesota Moline Plow Company and others have appealed from so much of the decree as adjudged the McSherry old structure to be an infringement.

To defeat the claims of the Dowagiac Manufacturing Company, the Minnesota Moline Plow Company and others plead the invalidity of the Hoyt patent and no infringement. The patent in suit is for an improvement in grain drills. Claims 1, 2, and 3 of the patent are as follows:



The McSherry old structure is illustrated as follows:

McSherry, Old Structure.



"Defendant's Second Structure" is a patented structure under letters patent No. 668,397, issued to Swope and Moehring February 19, 1901. Fig. 1 of this patent is a side elevation of a grain drill, partly in section and with the rear wheel removed. Fig. 2 is an enlarged broken side elevation of the spring pressure and lifting mechanism as applied to the boot and runner of the drill. Fig. 4 is an enlarged detail side elevation of the forward connecting yoke for the spring rods and pressure arm. Figs. 1, 2, and 4 of the Swope and Moehring patent are as follows:

Fig. 1.

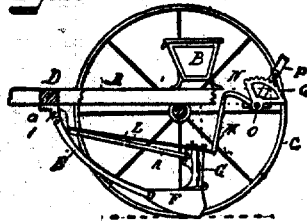


Fig. 2.

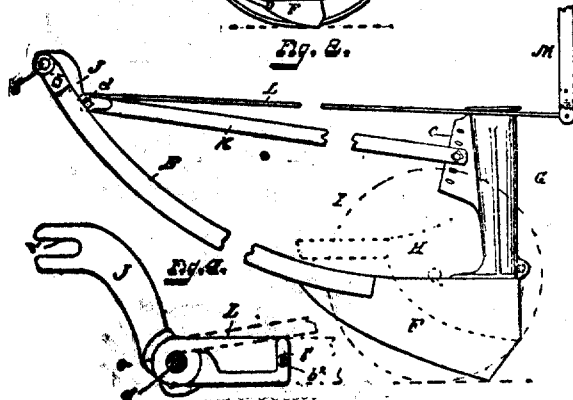


Fig. 4.



The function of the device in the Hoyt patent was to control the depth of the cut of the shoe by a regular pressure easily exerted by means of a lever, and by the same means to regulate the shoe in uneven ground, and to raise the shoe from the ground when not in use. The principle of the combination was old. The result attained old. But the means by which this principle was energized and this result attained were new. Moore in 1861 (patent No. 31,819) disclosed the principle, but used a flat spring lying upon the drawbar, one end of which was fastened to it, while the other was secured to a lever which operated the pressure; Santrock (patent No. 263,434, issued August 29, 1882) applied a single regulated spring to the drawbars for this purpose, one end of which was attached to the bars, while the other was fastened to a chain, which, after passing around a roller, was attached to a standard, which connected itself with the drawbar at the rear of the shoe; Carter (patent No. 57,862, September 11, 1866, and No. 284,376, September 4, 1883) disclosed a spring attached to the shoe operated by a rock bar lever, so as to press the shoe into the ground at will; while Elam & Boggs (No. 268,361, November 28, 1882) used a coiled spring upon a rod to perform the same service. There were many other patents disclosing this principle, but those which have been mentioned approach nearest to the combination in suit. No one of them discloses the device or combination of Hoyt, or anything near enough to it to take his improvement out of the category of inventions and relegate it to that of mechanical skill. While it is true that the mere bringing together of old elements found in older machines of the same or a kindred art, to perform the same functions and to effect the same mechanical result, does not constitute patentable invention, still, where a new organization of old elements is such that it produces a new mode of operation and a beneficial result, there may be a patentable invention. 1 Rob. Pat. § 155, note 4; *Dowagiac Mfg. Co. v. Superior Drill Co.* (C. C. A.) 115 Fed. 886. The testimony shows that the public by large purchases appreciated Hoyt's device; and, while this fact is not controlling, it is entitled to consideration, when commercial success is not shown to be due to other causes. *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272; *Lane v. Welds*, 39 C. C. A. 528, 99 Fed. 286; *Dowagiac Mfg. Co. v. Superior Drill Co.* (C. C. A.) 115 Fed. 886. We are clearly of the opinion that the Hoyt patent is valid.

We have now to consider (1) whether the claims of the patent in suit are infringed by the "McSherry Old Structure"; (2) whether they are infringed by "Defendants' New Structure."

The McSherry old structure consists of the spring pressure rods, which, by means of an eye formed on the forward end of each rod, are adapted to receive a bolt which passes through the draft rods near their upper ends; the bolt forming the pivotal connection between the spring pressure rods and the draw bars. Pivoted on the same bolt is a plate having lugs formed upon it, which lie between the spring pressure rods and the drawbars, and engage the latter, thereby transmitting the pressure of the spring rods to the shoe through the drawbars. The spring rods extend from their pivotal connection on either

side of, in contact with, and below the flange of the boot. This structure does not contain the clamping plates which constitute a part of the swinging head described in the Hoyt patent. Defendants invoke the principle that the absence from a combination of old devices of a single element is fatal to the claim of infringement. This principle, however, is qualified by another principle, which is that the absent element must be an essential one, and that the substitute for it must not be a mechanical equivalent for it. Now, the clamping plates which constitute a part of the swinging head, pivoted to the frame in Hoyt's patent, were essential only for the purpose of forming the pivotal connection with the frame and the bearings upon the drawbars, furnished by the lugs attached to them. The defendants' McSherry old structure secures the pivotal connections directly to the spring rods, instead of through the swinging head, and obtains the bearings upon the drawbars by the use of a stationary plate with lugs upon it. These are the plain equivalents of the swinging head and its pivotal connection. There seems to be no doubt that the McSherry old structure infringes the claims of the patent in suit. If there was a doubt, however, we should, upon principle of comity, affirm the decree below on this point, as the circuit court of appeals of the Sixth circuit, in the case of McSherry Mfg. Co. v. Dowagiac Mfg. Co., 41 C. C. A. 627, 101 Fed. 716, held this structure infringed the claims of the Hoyt patent.

The real question in the case is whether the defendants' new structure infringes the Hoyt patent. In this new structure the spring pressure rods are pivoted to the frame by slots in their ends, which embrace a bolt between the drawbars at their forward end, and extend from this pivotal connection on either side of the boot, where they are connected with a forked arm or lever, which operates in the same way as the spring rods in the device of the Hoyt patent. A separate bar of iron is pivoted to a bolt between the drawbars at their forward end, and extends back to the boot, where it is attached to a wing formed in front of the boot. The spring rods are provided with lugs on the inside, which engage with this third bar when they are pressed down, and this bar, through its connection with the boot, communicates this pressure to the boot and to the drawbars below. This device appears to us to be a plain modification of the combination and device of complainant's, whereby defendants seek to utilize every essential element of that combination. The essential elements of complainant's combination were (1) the spring rods; (2) their pivotal connection in front of the frame of the machine; (3) their connection in the rear to a lever, which would operate them; (4) their bearing, whereby the pressure resulting from forcing them down was communicated to the boot, and the drawbars. The defendants in their new structure used the spring rods. The method of pivoting the rods to the bolt in front by slots in their ends, instead of eyes, was the mechanical equivalent of Hoyt's method. The third rod and the lugs upon the spring rods are the mechanical equivalents of the spring head and the lugs upon that. They accomplish the same purpose by plainly equivalent mechanical means. The third rod, tied to the boot, with

the lugs bearing upon it, is the mechanical equivalent of the drawbars with the lugs bearing upon them. It accomplishes the same purpose by the same mechanical means, lugs upon a bar, and the change in construction is nothing but a mere variation produced by mechanical skill, and inspired by a desire to utilize the invention of complainants, without compensation. This question of mechanical equivalents is often well determined by considering whether the infringement is nearer to the patent in suit in its construction and means than those devices which are claimed to anticipate the patent. When this test is applied, it is perfectly plain that the new structure of the defendants more closely imitates the means used by Hoyt to accomplish the desired purpose, than anything found in the art prior to the patent to Hoyt. There is nothing in the prior art that comes anywhere near so close to an imitation of the complainant's combination. Indeed, it is very plain that defendants' new structure would never have existed, if Hoyt had not taught how to make it. It not only operates the principle in the same way that Hoyt did, but it uses plain mechanical equivalents for every essential element of Hoyt's combination. The fact that defendants' new structure is patented does not relieve them from infringement. *Clough v. Barker*, 106 U. S. 166, 27 L. Ed. 134; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939. By changing the form of the parts of complainant's combination, and not essentially varying the principle or mode of operation pervading the original invention, defendants cannot escape infringement. *Dowagiac Mfg. Co. v. Superior Drill Co. (C. C. A.)* 115 Fed. 886; *Cochrane v. Deener*, 94 U. S. 787-789, 24 L. Ed. 139; *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 137, 24 L. Ed. 1000; *Loom Co. v. Higgins*, 105 U. S. 585, 26 L. Ed. 1177; *Penfield v. Chambers Bros. Co.*, 92 Fed. 630, 34 C. C. A. 579; *Bundy Mfg. Co. v. Detroit Time-Register Co.*, 94 Fed. 524, 36 C. C. A. 375; *Ax Co. v. Hubbard*, 97 Fed. 795, 38 C. C. A. 423; *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 101 Fed. 716, 721, 41 C. C. A. 627; *Taylor v. Spindle Co.*, 75 Fed. 301, 22 C. C. A. 203; *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 707, 45 C. C. A. 544.

It is suggested that to hold that defendants' new structure infringes the claims of Hoyt's patent would extend the claims to an unwarranted degree. Hoyt, it is true, was not a pioneer; but, his invention being meritorious, he is not cut off from a reasonable range of equivalents, measured by the advance he has made over older machines. *Bundy Mfg. Co. v. Detroit Time-Register Co.*, 36 C. C. A. 375, 94 Fed. 524; *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 41 C. C. A. 627, 101 Fed. 716; *Penfield v. Chambers Bros. Co.*, 34 C. C. A. 579, 92 Fed. 639; *McCormick Harvesting Mach. Co. v. Aultman, Miller & Co.*, 16 C. C. A. 259, 69 Fed. 371; *Muller v. Tool Co.*, 23 C. C. A. 357, 77 Fed. 621.

The decree below should be modified, so as to charge defendants with infringement by their second structure, and, as thus modified, affirmed.



THAYER, Circuit Judge (dissenting). I agree with my associates that, in view of the decision by the circuit court of appeals for the Sixth circuit in the case of McSherry Mfg. Co. v. Dowagiac Mfg. Co., 41 C. C. A. 627, 101 Fed. 716, we should resolve such doubts as arise over the question whether the McSherry old structure infringes claims 1, 2, and 3 of Hoyt's patent No. 446,230, in favor of the Dowagiac Manufacturing Company; holding, on the strength of that decision and on grounds of comity that it does infringe. If the question was one of first impression, serious doubts would unavoidably arise as to whether the former structure infringed the latter, because Hoyt's patent, confessedly, does not cover a pioneer invention, but merely a new combination of old elements to accomplish a result which had previously been accomplished, and because, in the first three claims of his patent, Hoyt specifically claimed the clamping plates, PP', as an integral part of his combination, whereas the clamping plates, as such, are not found in the McSherry old structure. Nevertheless, as there is a marked similarity between the McSherry old structure and the Hoyt device, I am willing to concede, on the strength of the decision in the Sixth circuit, that Hoyt's method of pivoting the spring pressure rods to the bolt, which passes through the forward end of the draft rods, H, by means of the clamping plates, is not so essentially different from the method in which the spring rods of the McSherry old structure are pivoted to the same bolt as to free the latter structure from the charge of infringement. In other words, I am willing to concede that the equivalent of the clamping plates is found in the McSherry old structure.

While making this concession in deference to the decision in the Sixth circuit, I discover no sufficient reasons for holding that the McSherry new structure, with which we are chiefly concerned in the case in hand, infringes the Hoyt patent. The McSherry new structure not only dispenses with the clamping plates, but it employs an additional bar, by which the pressure on the spring rods is transmitted backward to the boot, and through that directly to the shoe. In the new structure the pressure of the spring rods is not upon the forward end of the draft rods, as in the Hoyt device and in the McSherry old structure; but the pressure is applied directly to the boot by the use of an additional bar. In the McSherry new structure no connection exists between the spring pressure bars and the draft rods. The mode of applying pressure to the shoe is essentially different from the method employed by Hoyt. The differences existing between the Hoyt device and the McSherry new device are so marked that the new structure cannot, in my opinion, be held to be an infringement of the Hoyt patent, unless we give to the claims of that patent a broader scope than they are entitled to in view of the state of the art. When the Hoyt patent was issued, what are termed "shoe drills" were in common use, and various means had been employed by the manufacturers of such drills for applying pressure to the shoes, and for elevating them when the operator desired to do so. The problem involved, in constructing convenient mechanism to depress and lift the shoe, would not seem to have been difficult or beyond

the reach of ordinary mechanical skill. The prior art shows various contrivances to accomplish this end, as in the Packham patent, No. 410,436, the Elam patent, No. 352,512, the Carter patent, No. 284,376, and the Santrock patent, No. 263,434, in all of which patents devices are disclosed for depressing and elevating the shoe by means of a lever within reach of the operator. Hoyt was not the first person to devise means for depressing and elevating the shoe. Others had done so with ordinary success. Besides, the fact that the McSherry new structure is made in accordance with letters patent No. 668,397, issued to Swope & Moehring, assignors to the McSherry Manufacturing Company, which patent was granted subsequent to the issuance of the Hoyt patent, shows that the officials of the patent office found enough of novelty in the McSherry new structure to differentiate it from the combination covered by the first, second, and third claims of the Hoyt patent. This latter consideration is not controlling; but it should be given some weight in a case like the one in hand, where the issue as to infringement is at least involved in grave doubt. The manner in which the doctrine of mechanical equivalents has been applied by my associates, to reach the conclusion that the McSherry new structure infringes Hoyt's patent, will, in my opinion, enable the owners of that patent to claim a monopoly of all devices in which spring press rods, pivoted to the forward end of a grain drill and actuated by a lever, are used to depress or elevate the shoes of the drill. I am satisfied that the patent in question is not of a kind which entitles it to such a broad construction. In view of the state of the art and the limited character of the claims, Hoyt should be confined quite closely to the combination of parts which he has described and claimed, thus restricting the monopoly within reasonable bounds. I concur in the views expressed by the learned judge of the circuit court, and think that his decree should be in all respects affirmed.

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DOWAGIAC MFG. CO. v. BRENNAN et al.

(Circuit Court, W. D. Kentucky. September 13, 1902.)

1. PATENTS—INVENTION.

The mere bringing about of pressure by the use of a spring in any form is not patentable at this late day, and it is only some mechanical device for applying such pressure in a new and useful way that can be the subject of a patent.

2. SAME—INFRINGEMENT—GRAIN DRILLS.

The Hoyt patent, No. 446,230, for an improvement in grain drills, conceding its validity, is for a combination of old elements, and is not infringed by a device made in accordance with the Christman & Munn patent, No. 497,864, which produces the same result, but by a combination of different elements.

In Equity. Suit for infringement of letters patent No. 446,230, for a grain drill, granted to Will F. Hoyt February 10, 1891. On final hearing.

Fred. L. Chappell, for complainant.

Staley & Bowman, A. E. Willson, and John R. Bennett, for defendants.

EVANS, District Judge. On February 10, 1891, letters patent No. 446,230 were issued to W. F. Hoyt for "certain new and useful improvements in grain drills," of which he subsequently made an assignment to the complainant. Two of the drawings accompanying his application and specifications are given, as they, in connection with what will be shown of the defendants' structure, will sufficiently illustrate the propositions upon which the court thinks the decision of the case must turn. They are his Fig. 2, declared to be "a perspective view of a portion of the drill embodying my improved features," and his Fig. 4, which he states "is an enlarged perspective of the clamping plates detached, between which the spring pressure rods of the shoe and covering wheel are adapted to be secured."

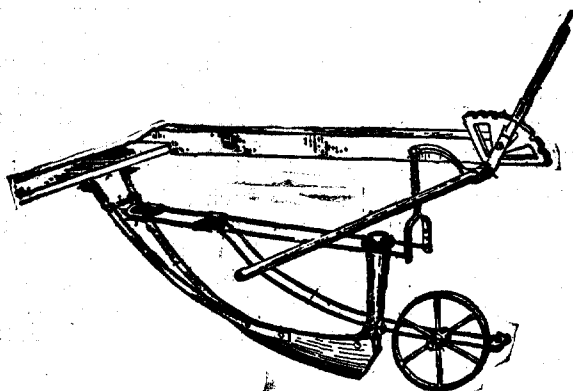
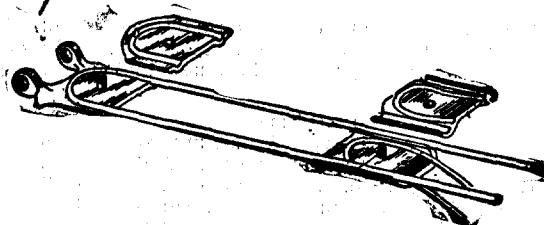
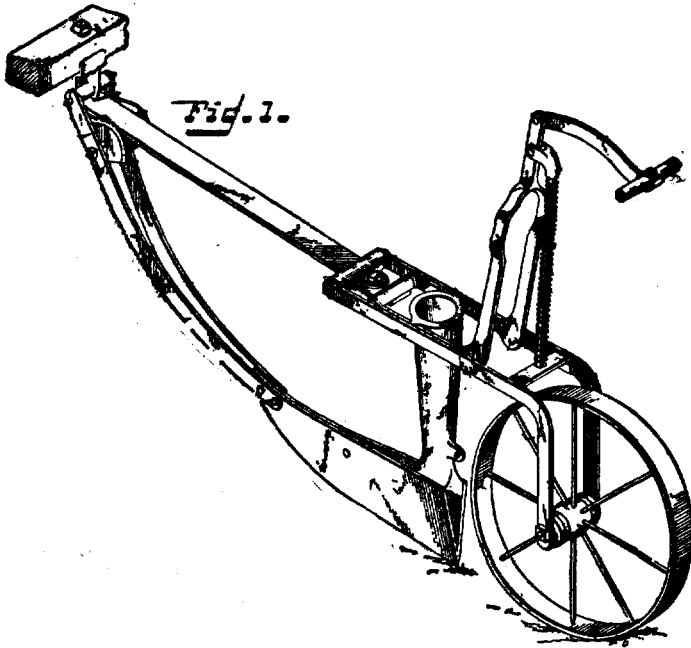


Fig. 2.

Fig. 2.



The defendants manufacture a grain drill of which the following drawing will give a perspective view sufficient to illustrate the parts in their structure which are controverted:



This suit complains of the infringement of the three first claims of the patent, which claims are as follows:

"(1) In combination with the transporting wheels and frame, the hopper, shoe, and draft rods, the latter having a pivotal connection with the frame, the clamping plates having a pivotal connection with the draft rods, the spring metal pressure rods attached to said plates, said rods extending rearwardly of the hopper, the forked arm coupled to said rods, and means for raising and lowering said arm, substantially as specified. (2) In combination with a frame of a grain drill, the hopper having a flange at the upper end, the shoe attached to the hopper, the curved draft rods leading from the shoe and having a pivotal connection with the frame of the machine, a swinging head located between the upper ends of the draft rods, spring metal rods attached to the swinging head, said rods extending back of the hopper and below the flange thereof, said spring metal rods being coupled to an arm, said arm having means for raising and lowering it, and means for locking the parts, for the purposes set forth. (3) In combination with the frame, hopper, shoe, and draft rods, the plates pivotally attached between the upper portions of said draft rods, said plates having the horizontal shoulders, said shoulders bearing upon the draft rods, the spring metal rods attached to said plates and passing rearward of and on opposite faces of the hopper, and means for applying pressure to the rear ends of said spring metal rods, for the purpose specified."

The very able arguments, both at the bar and in the briefs filed, took a wide range, but it is deemed unnecessary for the court to no-

tice in much detail any of the various points raised. It will only outline its views upon what appear to be the controlling questions.

If the case of *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 41 C. C. A. 627, 101 Fed. 716, decided by the circuit court of appeals of this circuit, had involved the same issues as this case does, it is obvious that the ruling in that case should be followed. That court, in its opinion, delivered through Judge Lurton, explicitly states two propositions, viz.: First, that the validity of the complainant's patent was conceded; and, second, that no question was involved on the appeal except that of infringement. So that in the case heard by the circuit court of appeals the defendant was held to have infringed a patent the validity of which it did not contest. In the case now to be determined the validity of the patent is assailed quite as vigorously as the charge of infringement is denied. Upon the first question, therefore, the opinion in the *McSherry Case* affords no aid, and, as the structure of the defendants in this case is also supported by a patent, and such presumptions as result from its issuance (*Illinois Steel Co. v. Kilmer Mfg. Co.* [C. C.] 70 Fed. 1012, and *Powell v. Mills Co.* [C. C.] 103 Fed. 476), and is quite different from that involved in the *McSherry* litigation, the opinion referred to is only partially instructive or authoritative. To establish the truth of the allegation of infringement, the burden is, of course, upon the complainant. *Rob. Pat. § 1041*; *Walk. Pat. § 532*. And, as the complainant's patent is for a combination of old elements, the opinion of the supreme court in *Prouty v. Ruggles*, 16 Pet. 336, 10 L. Ed. 985, is very cogent in its force and application in this connection as well as others. Has that burden been met and sustained by the complainant? is the first question to be disposed of. Having given the testimony the most attentive consideration, it seems to the court that the weight of it is in favor of the defendants on the issue of infringement. The expert testimony alone, to say nothing of the other evidence, would seem quite clearly to demand this conclusion. The preponderance of testimony on that issue, to say the least, is not on the side of the complainant. Equiponderance would not serve the complainant. Indeed, the conclusion would seem well-nigh inevitably to result from the evidence that the same combination of old elements which may be covered by the Hoyt patent, and which is claimed to have been new, is not to be found in the defendants' structure, either actually, or, as the preponderance of the testimony seems to show, in substantial equivalents, and that such parts as are found in common in each machine and the combination thereof are either old, or else are better covered by the patent No. 497,864, granted to E. Christman and Wm. G. Munn, and under which the defendants claim the right to manufacture it. The facts, to be more particularly adverted to further along, that seven years elapsed without suit, although the competition in the market between the two machines was active and continuing, and that W. G. Munn showed his machine to Hoyt in 1893, who made no claim of infringement, although he at the same time did assert that the *McSherry* machine was such, when considered in connection with the other testimony, are circumstances favoring

this conclusion. The mere bringing about of pressure as the result of the application or use of a spring, whether by means of a weight, a coil, a lever, a rod or rods, or a flat bar, and whether by means of a fulcrum or fulcrum block or otherwise, cannot be new or patentable at this late day. Such a result, achieved by some kindred means, or by some adaptation of some form of spring, is probably as old as mechanics. It is only some new device or mechanism, or some new combination of old elements, by which this perfectly familiar result can be accomplished in some new and useful way, that can be the subject of a patent. Rights acquired under such a patent must, no doubt, be subject to the rules announced in cases like *Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 260, 12 Sup. Ct. 643, 36 L. Ed. 426; *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. 236, 27 L. Ed. 979; *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Boyd v. Janesville Hay-Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; *Boydén Power-Brake Co. v. Westinghouse*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; and *Kelly v. Clow*, 32 C. C. A. 205, 89 Fed. 297,—and whether one mechanical device or combination, when viewed in connection with the prior art, is to be held and treated as the equivalent of another, may often be an extremely close, as well as important, question. It is so in this case, and the testimony of the mechanical experts on the subject is very elaborate and interesting. As has been indicated, it seems to the court that the weight of it is, if anything, with the defendants, rather than with the complainant, upon whom the burden rested. Certainly it may be greatly doubted whether all the elements of the combination claimed under the Hoyt patent are found in the defendants' machine. Complainant's counsel only contends for the combination (admitting that all the elements are old), and, if an important one is wanting in defendants' machine, infringement would not be established. *Prouty v. Ruggles*, 16 Pet. 336, 10 L. Ed. 985.

In his brief, on page 37, the learned counsel for the complainant says, "This patent is a patent for a combination, and is not for the particular elements," and on page 72 he says, "The elements are old, and, whether they were or not, for the purpose of considering these combination claims, must be assumed to be old, because it is a combination that is claimed, and not elements." These statements doubtless correctly represent the case, and make the expert testimony, and what the court has noticed in reference to the burden of proof, all the more suggestive. The testimony, especially that of Mr. Pope, makes the language of the supreme court in the case last referred to, and found on page 341, 16 Pet., page 985, 10 L. Ed., most pertinent. The court there said:

"The patent is for a combination, and the improvement consists in arranging different portions of the plow, and combining them together in the manner stated in the specification, for the purpose of producing a certain effect. None of the parts referred to are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the

manner described. And this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plow in the manner therein described, is stated to be the improvement, and is the thing patented. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts. The jogging of the standard into the beam, and its extension backward from the bolt, are both treated by the plaintiffs as essential parts of their combination for the purpose of brace and draft. Consequently the use of either alone, by the defendants, would not be the same improvement, nor infringe the patent of the plaintiffs."

See, also, 4 Rose, Notes U. S. Reports, p. 177.

There is no doubt that all the elements of the alleged invention are old. This, indeed, is admitted, as we have seen, by complainant's counsel. The claim is that Hoyt made a new and useful combination of those old elements, and the circuit court of appeals, in the McSherry Case, where the issues were such as conceded the validity of the patent, and logically excluded much investigation of the question of anticipation, while finding that Hoyt was not at all a pioneer in this field of investigation, held that his new combination was meritorious and useful, and that he was entitled upon that account, on the case as then presented, to a reasonable range of equivalents. Whether that court would apply the doctrine quite so broadly if the different issues and the fuller evidence offered in this case were before it, in connection with the ruling in *Rowell v. Lindsay*, 113 U. S. 102, 103, 5 Sup. Ct. 507, 28 L. Ed. 906, might possibly be matter of some speculation; but it is for that court, and not for this, to make limitations upon its rulings. We are bound by it as it stands. This much, however, this court may say: If the Hoyt patent, though only covering a combination of old elements, is entitled to the benefit of the rule of equivalents, as stated by the circuit court of appeals, so, apparently, are some, at least, of the previous patents brought in evidence in this case; and, giving those patents the benefit of the rule, there would appear to have been previous inventions which quite as certainly anticipated Hoyt's alleged invention as the latter did, if at all, that of the defendants. It seems to the court that in all the essential respects wherein it can be fairly claimed that the defendants' patent and the structure thereunder have infringed the Hoyt patent the latter had probably been anticipated. And it may be remarked that even a paper patent may be anticipatory of other inventions, or may supply ideas for them, and thus, at least, subvert the claim of originality. Neither the parallel spring rods, the clamping plates, nor the swinging head, which are claimed to be new, in fact appear in defendants' structure, and certainly all of them do not so appear in combination. The combination which contains these elements belongs to the complainant, but is not used by the defendants.

It cannot be assumed that the opinion in the McSherry Case requires that the device of parallel spring metal rods held together at one end by clamping plates and given a pivotal connection with the frame of the structure by means of a swinging head attached thereto, should, under complainant's patent, give to it a monopoly of means

for fastening or holding in a stationary position one end of every form of flexible lever or spring, nor that it should supersede or exclude others from the right to use every form of fulcrum. The lever and the fulcrum have, of course, been in everyday use for centuries. Primarily, they are employed in combination to pry or lift or move things that have great weight, but the lever may have a secondary or reflex use or operation when flexible and comparatively weak, and may then exert power or pressure in some direction by its mere elasticity. In that form it is commonly called a spring. This character of operation is frequently found in grain drills, the power being then exerted downwards instead of upwards. A mechanical device by which this result is accomplished by means of a combination of old elements is shown in the complainant's patent wherein the combination contains, among other old elements, the clamping plates, the swinging head, and the parallel spring rods long enough to extend back behind the shoe, and to the point where the power is applied, and not requiring a fulcrum block in its operation. The exertion of pressure on the shoe in this combination is brought about by the application of power to one end of the long and flexible spring rods (the other end being fastened to the frame), and the elasticity of the rods is adequate for the purpose without a fulcrum block. This combination has been maintained as patentable by the courts.

The defendants' device is also a combination of old elements. Instead of the elaborate device of parallel rods bent and confined together at one end by clamping plates through which and a swinging head it is fastened to the frame, the defendants' contrivance has a flat bar, which, by means of a hole near one end of it, wherein works a pin which extends downwardly from a plate which connects the draft rods, and constituting a very simple, and probably very old, mechanism, is put in pivotal connection with the frame of the structure, though not fastened to it. The simple mechanism referred to probably required nothing inventive in its construction (in this important respect differing also from complainant's), and it certainly does not include in it either a swinging head or clamping plates. In operating this device, any mere elasticity of the flat bar is not the thing relied upon. Instead a fulcrum block is introduced into the combination, and we have more nearly an example of the lever and prop exerting power downwards. This device has been passed upon by the patent office, but not, so far, by the courts. Both of these combinations seem to operate well in accomplishing a desired result, but does the ruling in the McSherry Case demand that we shall hold that the combinations are the same merely because they achieve the same result? One does it in one way, and by one contrivance, wherein the elasticity of long metallic rods is utilized without a fulcrum block. The other does it in another way, and by a contrivance wherein a flat bar operates as a lever upon a fulcrum block, the fulcrum block being absolutely essential to the success of this combination. Without it the defendants' combination is impossible. Does not the presence of the fulcrum block in the defendants' structure, together with the absence of the swinging head and clamping plates, so far and so cer-



tainly distinguish it from the complainant's as to make defendants' combination a different one from the complainant's, and bring it within the doctrine of *Prouty v. Ruggles*? It seems to me that this is fairly a test question, which must be answered in the affirmative, inasmuch as the swinging head, the clamping plates, and the parallel metal spring rods pivotally connected to the frame and extending back to the rear of the boot are all, in the language of the opinion in that case, "treated by the patentee as essential parts of his combination." This conclusion appears to be strongly supported also by *Eames v. Godfrey*, 1 Wall. 79, 17 L. Ed. 547. Even if the clamping plates and swinging head found in the complainant's structure perform functions analogous to those of a fulcrum, that does not make them together or singly a fulcrum in fact, nor impart patentability to a mere function. 1 Wall. 80, 17 L. Ed. 547. Indeed, it is not claimed in either of the claims of the Hoyt patent that anything in the combination therein described is a fulcrum, or is intended to operate as such. For this reason, if no other, we may not fairly inject into this case of a combination of old elements the pretense of equivalency to something not claimed in the patent nor used in the structure of the complainant.

It should be observed also that the two combinations neither depend upon the same principle, nor have the same operation, and, although they achieve a common result, they reach it by different routes. In one the mechanical principle of elasticity is relied upon as the essential means of obtaining spring pressure. In the other the principle is that of the lever and fulcrum, pure and simple, and any elasticity in the mechanism is merely secondary and incidental. And not only are the principles thus different, but so, also, are the operations which respond to them. Other portions of these grain drills being alike, the machines as a whole closely resemble each other, but that general fact is not material. Our investigations in this case must be confined strictly to the questions relating to those three or four elements which bring about pressure upon the shoe in the manner claimed in the patent to be new, those elements being principally the spring rods, the clamping plates, and the swinging head.

As I construe the opinion in the *McSherry Case* it was only intended by the court, in passing upon the two machines then under consideration, to hold that the combination of old mechanical elements or devices whereby spring pressure was brought to bear upon the shoe of the drill by means of parallel metal spring rods extending back of the shoe, and having pivotal connection with the frame by means of clamping plates and a swinging head, or the fair mechanical equivalents thereof, in combination with other old elements, and substantially as described in the claims of the patent to Hoyt, was not a mere aggregation of old elements, but was a meritorious invention, covered by that patent, and to the benefits of which the complainant was entitled. Giving effect to those views, the court held that the *McSherry* structure was an infringement of the complainant's patent; but this court, yielding fully to the authority of that decision as far as applicable, has reached the conclusion upon the

evidence that in fact there has been no such infringement in this case, where there has been a different combination of some, but not all, of the same old elements. The court is of the opinion that the simple means (certainly not a swinging head nor clamping plates) adopted by the defendants for pivotally connecting the flat bar in their structure with the frame of the machine was open to them, notwithstanding the patent to Hoyt; that, notwithstanding that patent, they might still use a fulcrum block for a prop upon which the flat bar in their structure might rest and perform its work of applying pressure or force, and that the combination of devices used in their machine was not the equivalent of that described in the complainant's patent. See *Rowell v. Lindsay*, 113 U. S. 103, 5 Sup. Ct. 507, 28 L. Ed. 906. Both the flat bar and the spring rods may alike be levers or springs, but it is not open at this late day to any one to acquire a monopoly in the mere use of a lever or spring for the exertion of pressure or force in any form. To determine otherwise would be to hold substantially that a right of monopoly of the mere production, per se, of spring pressure, could be conferred by letters patent, whereas only some new and useful mechanical contrivance to exert that pressure efficiently is entitled to that right, other necessary conditions existing. Both parties here claim such devices. As before indicated, if one combination of old elements is different in any substantial way from another combination, the two are not the same. In the opinion of the court, and for the reasons pointed out, the combination described and claimed in the Hoyt patent is substantially different from anything in defendants' structure, and the latter was, therefore, open to their adoption and use. Of course, the two structures, having so many old features in common, resemble each other, as all the later grain drills do; but, while the case is a close one, sometimes hovering along obscure lines, I have stated the matter in the way it has struck me after a great deal of reflection upon it.

As between the litigants in this action the improvements in grain drills embraced in the manufactures of each could probably, with justice to all parties and to the public, be respectively used by them without either infringing upon any lawful right of monopoly of the other. Both may be useful and meritorious, and, if so, there is room for both. It might be matter of regret if this or other litigation should destroy either.

It may be important to remark that the positive and practically undisputed testimony of W. G. Munn is to the effect that he exhibited the defendants' machine at the Chicago Exposition in 1893; that W. F. Hoyt was then in charge of the complainant's exhibit, which was near by; that Munn showed his machine to Hoyt, and talked it over fully with him; that they examined at the same time the McSherry machine, also on exhibition there; and that, while Hoyt emphatically denounced the latter as an infringement upon his patent, he made no such complaint or claim as to the defendants' machines. As to the defendants' machines no complaint was made either by Hoyt or by the complainant for quite seven years, nor until this suit was brought, in 1900, although in the meantime the two machines were

in the most active competition in the markets of the country to the knowledge of the complainant. From these facts, even if estoppel does not follow, it is certainly not unfair to draw the conclusion that both the complainant and the patentee, Hoyt, supposed during all that period that there was no infringement of their patent,—in this way somewhat supporting both the testimony to that effect of the defendants' expert, Mr. Pope, and whatever presumption arises from the granting of the patent without the suggestion, by the patent office, of any interference. These remarks apply to patent No. 497,864, issued to Christman & Munn May 23, 1893, and to the structures thereunder, and not to the earlier patent, No. 473,234, about which there was notice and correspondence with the complainant, which was conceded to infringe, and which was consequently abandoned by defendants. Meantime the McSherry Case progressed to judgment, and the pendency of that suit is urged as an excuse for not sooner bringing this action; but that suit, for several reasons already indicated, was not fairly a test suit. Possibly the general language used by the court in its opinion in that case might have encouraged some hope of success in other suits, but, while applicable and controlling in a similar case, it must be doubted, upon grounds already pointed out, whether it is applicable, except as to merely incidental questions, to the entirely different case now before us. At all events, the court, upon the proof, is of the opinion that the patent No. 446,230, issued to W. F. Hoyt, has not been infringed by the defendants, and that none of the infringements complained of in the bill are established by the testimony.

The question of infringement, however, is not the only important one in the case. It is true that the new combination covered by the claims of the complainant's patent must be held to have patentability. This is demanded by the McSherry Case, wherein that question of law was expressly so ruled. Whether there was invention in the Hoyt claim, as distinguished from mere mechanical skill, is a matter which seems also to be settled for this court by the decision in the McSherry Case. But the question of fact as to whether Hoyt was the discoverer of the combination described and claimed in his patent is open to investigation at the demand of the present defendants, who were not parties nor privies to the McSherry litigation. The solution of this question would require it to be ascertained whether Hoyt originally conceived the idea of the invention he patented; in other words, was he the "discoverer" of the combination he described? The testimony on the subject is conflicting, and any conclusion drawn from it might possibly admit of doubt. Certainly, in view of the disastrous consequences to the complainant if its patent be destroyed, the court would be most reluctant to hold the Hoyt patent void, unless it should become necessary to do so; and, as this court's judgment will most probably not be final, and can, I think, fairly and properly be put upon the ground of noninfringement, that necessity does not appear to have arisen. But the question is earnestly pressed, and while, in view of what has just been said, and in view also of the court's opinion that there has been no infringement

of the complainant's patent by the defendants, the court will not put its judgment upon any opinion it may have formed upon the issues raised by the amended answer of the defendants filed August 23, 1901, still it may not be amiss to note certain conclusions of fact to which the court's mind is very strongly inclined upon the testimony offered in support of that issue after giving it and the other evidence a very careful consideration. If that testimony is not to be entirely disregarded, it appears that in the winter of 1889-90 one Gaylord W. Denyes conceived the idea which ultimately materialized in the Hoyt patent; and not only so, but that he informed Hoyt of that conception. Without the adjudication in the McSherry Case, and especially in view of the prior art and previous patents, it might be, as insisted by the defendants, that the conception would not seem to require much, if anything, beyond ordinary ingenuity on the part of a skilled mechanic. We know, however, that many of the greatest inventions astonish us by their simplicity, and what looks like obviousness, after somebody has embodied the device practically. Assuming, as this court must, that there was invention, and not mere mechanical skill, who was the inventor—the first “discoverer”—of the new thing? Denyes seems at least to have indicated every idea that was new in what was afterwards described in the Hoyt combination and patented by him. Denyes explains why he did not apply for a patent, and we are not at liberty to reject this evidence, whether we think a person of more agile mind and differently situated would have done otherwise or not. Denyes worked for the complainant as foreman in one of its shops. He appears to have made drawings of the improvements on grain drills which he had conceived, and, if his testimony is to be credited,—although it is denied by Hoyt,—he showed them to Hoyt in the winter previous to the spring of 1890. It may be true that both Denyes and Hoyt at the time attached little importance to them, but under business impulses the latter was afterwards, namely, in the spring of 1890, called from Dowagiac, his home, to the Northwest, and in that region, he says, he studied the situation, and the objections to the forms of grain drills then in use there. In April of that year, and while on the train, as he tells us, “between Sheldon and Fargo, the thing” afterwards embodied in his patented invention “took shape in his mind.” The court is much inclined to think that, consciously or unconsciously, his memory went back, under these circumstances, to what Denyes had told him, and to what he was most probably shown by Denyes, and that the original idea of his device was, therefore, not his own, but that of Denyes. Whether Denyes got the idea from other patents is immaterial on this issue, and need not be considered. Upon the evidence the court is much inclined to the opinion that Hoyt, at all events, was not the original and first discoverer of the improvements in grain drills described and covered by the patent No. 446,230, mentioned in the bill of complaint. The evidence, in the court's opinion, conduces strongly to show that there was no inventive act on Hoyt's part which generated any new idea of a means to an end. If there was such an act or such an idea, it was most probably Denyes', and not Hoyt's. As

affecting the probabilities of this particular case it may be well to remember always that Denyes was a practical mechanic of many years' standing, while Hoyt was not. As appears from the latter's testimony, he was a clerk and bookkeeper only until some time in 1887, when, at the age of 31, he became secretary and superintendent of the complainant. How much this position led him or enabled him to study the mechanical arts before he went to the Northwest in April, 1890, does not appear.

It is the opinion of the court that none of the allegations of infringement set forth in the bill of complaint have been proved by the testimony offered in the case, and that no grounds for an injunction or for an accounting have been shown, and it results that the bill should be dismissed, with costs, and a decree to that effect may be prepared.

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### GENERAL ELECTRIC CO. v. BROOKLYN HEIGHTS R. CO.

(Circuit Court, E. D. New York. May 29, 1902.)

#### 1. PATENTS—INFRINGEMENT—ELECTRIC RAILWAY MOTORS.

The Bentley patent, No. 338,023, for a system of devices for regulating the current in connection with electric railway motors by the automatic application of a stop or lock to the operator's lever, by which he cuts out the resistance, whenever there is an excess of current, by means of a pawl attracted and held by a magnet while the excess continues, construed, and held not infringed by a device which automatically governs the cutting out of resistance, without action by the operator.

In Equity. Suit for infringement of letters patent No. 338,023, for an electric motor, issued to Edward M. Bentley March 16, 1886. On final hearing.

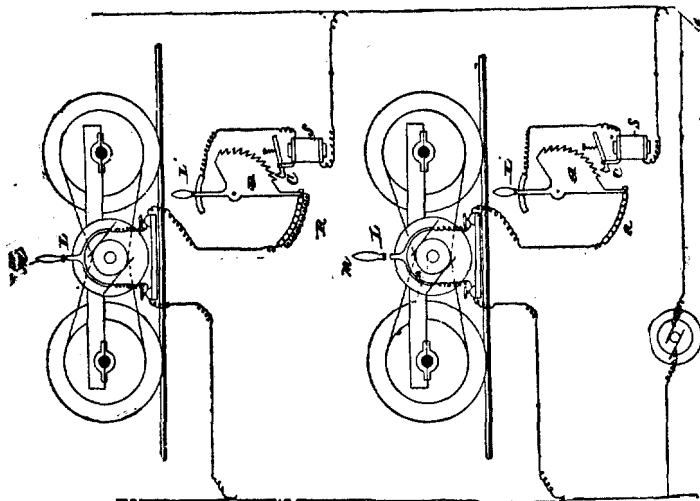
Betts, Betts, Sheffield & Betts (Frederic H. Betts and L. F. H. Betts, of counsel), for complainant.

Mitchell, Bartlett & Brownell (C. E. Mitchell, T. W. Bakewell, H. B. Brownell, and Thomas Ewing, Jr., of counsel), for defendant.

THOMAS, District Judge. This action involves the infringement of letters patent No. 338,023, issued March 16, 1886, which relate to electric motors,—especially those employed upon railroads. The inventor states the mischief which his patent was designed to remedy, as follows:

"My invention consists in certain devices whereby two or more electric motors may be run at varying speeds in multiple arc on the same circuit. This invention is especially applicable to electric motors employed for the impulsion of vehicles upon an electric railway. It is well known that when two or more electric motors are in multiple arc with one another, and run at variable speeds, those motors which run the more slowly will tend to absorb an undue portion of the current, while those which are running at a greater speed will be deprived of the necessary amount of current. This tendency is a source of danger to the slow-running motors, since the surplus of current is apt to be so great as to injure or destroy them. I therefore provide a variable resistance in the circuit of each motor, and also provide a catch or stop which will automatically prevent the removal of too great an amount of resistance from the motor-circuit."

Thereupon the mechanism is described in the language placed below the following figures:



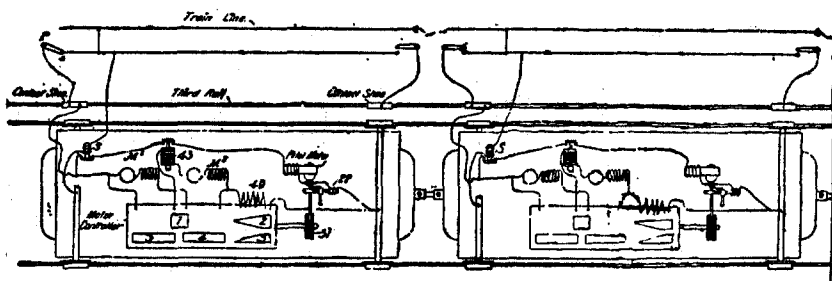
"In the accompanying drawing, M and M' represent two electric motors, connected, respectively, to the driving-wheels of two electric locomotives. Each motor is provided with a lever, L, for shifting the position of the commutator-brushes, and also with a lever, L', which controls an artificial resistance, R, in the motor-circuit. Both the commutator-brushes and the resistance may be controlled by a single lever, if desired. Upon each lever, L', is a toothed sector, A, concentric with the axis of the lever, and in each motor-circuit is an electro-magnet, S, whose armature has a pawl, C, adapted to engage with the teeth of sector, A, when the magnet is energized. The magnet, S, is adapted to respond only to an excess of current beyond a determined point. The operation of this arrangement is as follows: Suppose that the operator of the motor has brought it to a standstill by the insertion of the resistance, R, or by the movement of the brushes, or both. Should he now desire to start the motor under a heavy load, or in a situation where the motor may be blocked in any accidental manner, he would in the usual manner throw his lever, cutting out the resistance, R, and there would result a sudden flow of current through the motor, which would destroy it before it could overcome the inertia of its load or its block, were it not for the action of magnet, S. The magnet, S, becoming energized when the current reaches a predetermined maximum point, draws up its armature and interposes the pawl, C, in the path of any further movement of the resistance-lever, so that a driver will be warned that his current is too great, although he cannot by any degree of carelessness or haste permit the motor to be injured. Various modifications of this device may be employed, the underlying principle of them all being illustrated in the present device, wherein an automatic stop prevents too great a flow of current through any one of several motors in multiple arc."

Superadded are the claims, all of which are alleged to be infringed:

"(1) The combination, with an electric motor, of a resistance in circuit therewith, mechanism controlling said resistance, and an automatic stop for said mechanism. (2) The combination, with an electric motor, of a resistance in circuit therewith, mechanism controlling said resistance, and an automatic stop for said mechanism responding to an abnormal increase of current in the motor-circuit. (3) The combination of two or more electric motors in multiple arc on the same circuit, a resistance in circuit with each mechanism

controlling the same resistances, and automatic stops for said mechanism. (4) The combination, with two or more electric motors in multiple arc, of a resistance in circuit with each mechanism controlling said resistances, and automatic stops for said mechanisms responding to an abnormal increase of current. (5) The combination, with an electric motor, of a resistance in circuit therewith, mechanism controlling said resistance, and means for automatically controlling the movement of said mechanism."

More briefly stated, Bentley invented a system whereby a magnet in the main circuit, energized to a certain point, attracts and sets a pawl, which locks and makes immovable a lever with which the operator cuts out the resistance. With a reduction of the current to a desired point, the magnet relieves the pawl, and the operator continues his removal of the resistance. The complainant's invention is the automatic application of a stop or lock to the operator's lever, when and while there is an excess of electric energy, by means of a pawl attracted and held by a magnet while the excess continues. It may now be considered whether the defendant uses this or equivalent means for obtaining the same result. The defendant's device is described by one of its experts in the language placed below the following figure, to which it refers:



"The defendant is using a multiple unit system in which the cars are grouped in trains. There are two motors on a car, and two, three, or more cars for each train. On each car there is a motor-circuit containing the usual series multiple motor controller, and there is a local operative or controlling circuit through which the main controlling contacts are electrically actuated. There is a platform switch line, through which the switches on the platforms of all the cars are connected together, and there is a train or governing line which extends through every car on the train, whether such car is equipped with electrical propelling apparatus or not; for in a train of four cars only two need be electrically equipped for electric propulsion, while the others are provided with a train or governing line through which the entire motor or propelling power may be governed as a unit, although situated on the extreme ends of the train. \* \* \* There is the so-called 'third-rail,' which is the conductor extending from one end of the line to the other. Its potential or electro-motive force is 500 units; that is, 500 volts. There are trailing contacts, called 'contact shoes,' by means of which the electrical apparatus on the car or train maintains connection with the third rail and generator. The return circuit is through the rails upon which the cars travel,—the traffic rails. On each car there are two motors, M', M<sup>2</sup>. These motors are in circuit with a motor controller. A resistance forms part of this controller, and is designated 49. There are two running positions shown for the controller. The contact plates 1 and 2 indicate the line of commutation where the motors are connected in series with more or less external resistance. The contact plates, 3, 4, 5, indicate the second line of commutation, where the motors are connected in multiple arc or in parallel circuit with

more or less resistance. This motor controller has its moving contacts upon a barrel or cylinder, and geared to this cylinder through the worm-gearing, 31, is a small motor, called a 'pilot motor.' A brake is applied to the shaft of this pilot motor through the influence of a spring which operates to press a brake shoe into contact with a disc fixed to the armature shaft. The motor is included in a branch circuit or a local circuit in which are break points controlled by a relay, 43, in circuit between the two motors,  $M'$ ,  $M^2$ . In the pilot motor circuit is a magnet, 27, and its armature is attached to the brake shoe so that when circuit is complete in the branch containing the pilot motor the brake shoe is withdrawn, and when circuit is broken in the branch the brake shoe is applied by spring pressure as described. In this same branch circuit there is another relay, S. This is connected with the platform switch, P, and this platform switch controls all the motors on all the cars to a certain extent. By putting this switch in any one of three contact positions,—I have only shown one such position,—the pilot motor will run to a point where a certain line of commutation will be perfected by the barrel switch or motor controller. But if, during the run of the pilot motor under the initial or starting movement given it by the motorman, the circuit containing the motors,  $M'$ ,  $M^2$ , and the magnet, 43, becomes overloaded (that is, if the strength of current exceeds a predetermined safe maximum), the magnet, 43, breaks the branch circuit in which the pilot motor is located, and the magnet, 27, releases the brake shoe, which the spring applies to check as soon as possible the further advance of the pilot motor. The circuit of the pilot motor is broken, and a friction brake is applied to check its momentum as far as possible, and without further increasing the strength of current in the motor circuit. That operation might occur at one motor or another, or upon any one of the three cars. The motorman would not know of it. It is entirely automatic. The motorman receives no warning of it, and he is still free to manipulate his platform switch in spite of anything that the automatic mechanism can do. It is a simple safeguard against the possible erratic action of a motor, either from the slipping of wheels or from the overloading of any particular motor. The motorman's switch is not caught and held, as in Bentley's case, so that the motorman has warning."

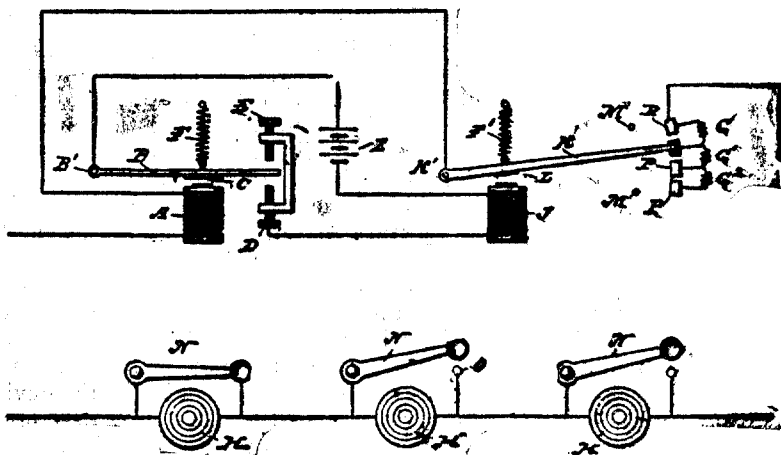
In short, the defendant uses a pilot motor to cut out resistance, which it does while the local circuit, in which it is, remains closed, and such pilot motor ceases to cut out resistance when the local circuit is opened, which happens when the strength of the main current becomes too great; and a magnet is used to close and open the circuit, and a brake magnet is used to stop the revolving pilot motor after its circuit has been opened and its motive power taken away, and to release it upon the return of such motive power. Hence the removal of resistance is stopped: (1) By opening the circuit which operates the pilot motor. That is the primary cause. (2) By arresting the inertia of the moving pilot motor. That is an auxiliary cause. But after it has once stopped, the resistance lever is not blocked for the purpose of preventing the removal of resistance. The withdrawal of the brake at such a time would not affect it. The operator is not stopped from turning his lever, nor is his lever obstructed, nor is there any reason for locking it, for he does not have to do in any way with the insertion or removal of resistance, save in the initial act of admitting the main current. Bentley contemplated a controller that should, at the will and at the instance of the operator, cut out or in resistance; and so the magnet applying a brake stopped him at a predetermined point. In the defendant's device the operator has nothing to do with the matter. To stay or release is, as to him, all alike. He neither inserts nor withdraws resistance, but a circuit normally open cuts out resistance by the operator stat-



ing; and, when this removal has proceeded sufficiently, a broken circuit stops the removal, aided in stopping acquired motion by a brake released by a magnet. It is true that the operator is just as helpless in the one case as in the other, but in Bentley's patent the conception was to arrest physically the arm of a careless or inefficient operator until such time as there was an automatic adjustment of the current. In the defendant's device the power that removes resistance cannot be improvident, for, beyond the instant when its duty has been nicely and fully effective, it is withdrawn. But compare the disenergizing of the brake magnet so as to let the brake drop on the revolving pilot motor, bereft of its motive power, with complainant's device. Defendant's brake magnet, disenergized, lets the brake on. Bentley's magnet, energized, locks the lever. Defendant's magnet, when energized, draws off the brake. Bentley's magnet, when disenergized, unlocks the lever. A magnet is used for each. In one case a magnet is empowered to stop and lock, and by losing such power it releases; while in the other a magnet, by losing power to hold the brake, lets it on, and by gaining power withdraws it. Hence Bentley uses power in the magnet to stop and hold, and loss of power to release; defendant uses power in the magnet to release, and loss of power to stop; and, while the brake is used to stop acquired motion of the pilot motor, it does not hold nor lock the lever. Its function in this regard will be discussed later. But in one case the hand of the operator is stayed; his machinery is locked; he cannot continue his work of cutting out; in the other the current being once turned on, the cutting in and out is done without reference to the operator.

The foregoing has been by way of description and differentiation, but further discussion and conclusion should await some examination of the prior art.

Letters No. 236,460 dated January 11, 1881, issued to Sawyer, are illustrated by the following diagram:

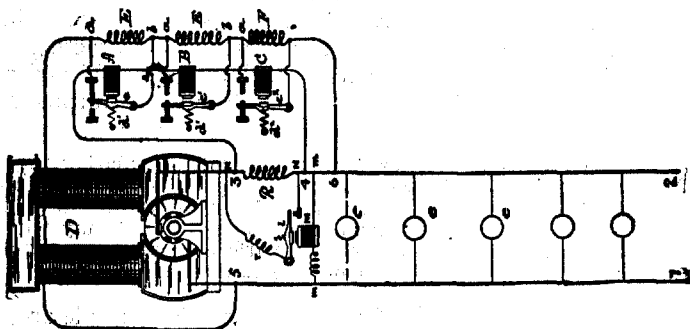


The throttle magnet, A, in a main circuit, attracts its armature attached to the lever, B, and thereby closes a local circuit, wherein a magnet, J, thereupon attracts its armature attached to a lever, K, whereby resistance is brought in. When there has been proper reduction in the current, the retraction spring attached to lever, B, withdraws it from throttle magnet, A, and opens the local circuit so that the magnet, J, has not power to resist the retraction spring that withdraws lever, K, and removes the resistance. What Sawyer did was to use a magnet in a main circuit to close and open a local circuit, wherein a magnet attracted or released a resistance lever, so as to bring in or cut out resistance as the state of the current required. The magnet, J, alternately holds and releases the lever, K, and admits or suspends the removal of resistance. Bentley interposes a pawl to block the lever, hold it at a standstill, and then release it. But Sawyer taught that a magnet and retracting spring could be used (1) to close and open a circuit; (2) to hold and release the lever that cuts in and out resistance. For what purpose? The specification states:

"Our invention relates to devices for automatically regulating the supply of electricity to a system of electric motors in which it is desired to obtain a uniform speed of rotation, as in autographic telegraph-instruments and other apparatus of precision; and it is obvious, of course, that it may with equal advantage be applied to the regulation of electric currents in any apparatus or for any purpose whatever of this or like nature."

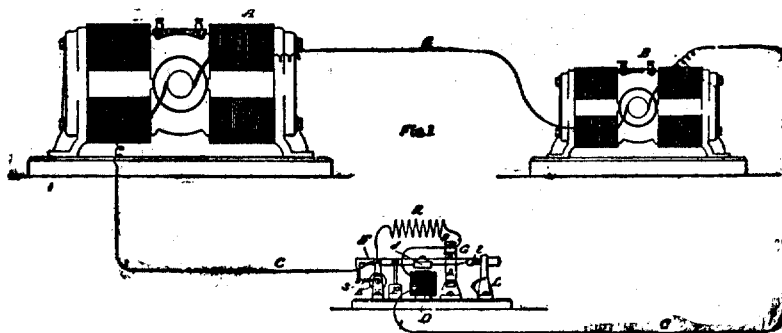
Now, what did Bentley do? Lest the motors in multiple arc, which run more slowly, should absorb an undue portion of the current, and those which run at greater speed be deprived of the necessary amount of current, resulting in injuring or destroying the slow-running motors, he provided a variable resistance in the circuit of each motor, and also a catch or stop which would automatically prevent the removal of too great an amount of resistance from the motor circuit. Sawyer did the same thing, save this: He did not use a catch or stop which blocked the resistance lever, but the magnet acted directly upon the lever, and held or released it. So far as the lever is locked by a pawl held by the magnet, Bentley does something in the way of automatically regulating the resistance lever that Sawyer did not do. If the lever, L', in Bentley's patent, were alternately attracted to and released by the magnet, S, without the interposition of the pawl, G, he, in a degree, would do what Sawyer does, by somewhat different means. But the pawl was better for Bentley's purpose, for he wished to lock the lever so thoroughly that the strength of the operator could not move it. Hence the use of the pawl may be regarded as an advance by Bentley. But the fact remains that using a magnet and a retracting spring to close and open a circuit, in which a second magnet should hold a resistance lever, or let it operate, is described with great simplicity in the Sawyer letters. The first claim of the Bentley patent and of Sawyer's patent both show (1) an electric motor; (2) a resistance in circuit therewith; (3) mechanism controlling said resistance; (4) an automatic stop for said mechanism in Bentley, and in Sawyer mechanism caus-

ing a constant vibration,—that is, intermittent holding and releasing of the lever to cut out and introduce resistance. In the defendant's device the throttle magnet is used, as in Sawyer's patent, to open and close the circuit, upon which the action of the resistance lever is dependent, while the brake magnet, when energized, draws away obstruction from the resistance lever, or allows the brake to return thereto, and is not wanting in strong resemblance to the action of the magnet, J, and lever, K, as shown by Sawyer. The use of a magnet in a multiple-arc-circuit, to open circuits that energize electromagnets so as to attract levers to introduce or to remove resistances, is shown in Edison letters, No. 264,661, dated September 19, 1882:



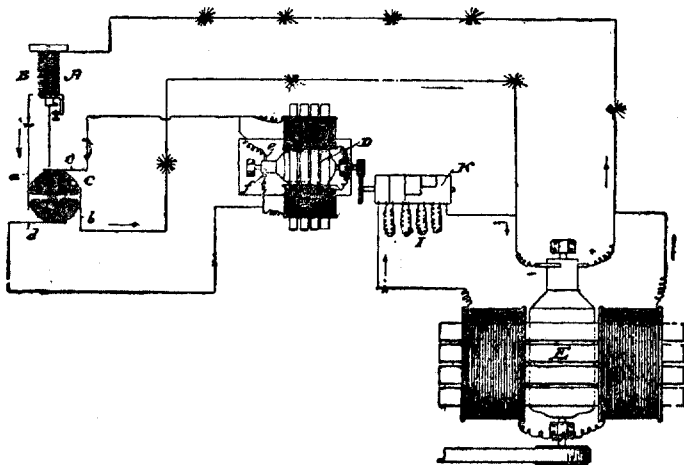
The levers, c and d, carry pawls, f and e, which engage ratchet wheels, b, which in turn move an arm, a, which introduces or removes resistance, accordingly as the lever, c, is influenced by the magnet, C, or the lever, d, is attracted by the magnet, D. Here is not a pawl automatically locking the resistance arm or lever, under the influence of a magnet, but a pawl that puts in resistance, and another pawl that removes it, but each pawl is connected with an armature lever, itself immediately dependent upon a magnet that is energized by a primary magnet, E, in the main circuit, opening and breaking the circuit. If the pawl introducing resistance held the ratchet wheel, and thereby the resistance arm, until the current was reduced, it would do precisely what the magnet and pawl effect in Bentley's patent; but instead of this there are two pawls. One automatically brings in the resistance as needed, and one cuts it out as required, and both bring the result. But at least the Edison device shows the use of magnets in main and subsidiary circuits to close circuits so as to bring in and remove resistance, and operating the resistance lever for that purpose. But still the resistance lever is not securely locked, as in Bentley's patent.

The Weston patent, No. 266,239, dated October 17, 1882, is as follows:



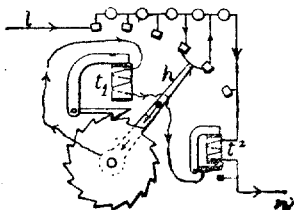
It shows a magnet in the main circuit, that, when the current passes a predetermined point, by attracting an armature, d, on a lever, F, through which the circuit passes, brakes the circuit, so that the current passes through a resistance and prevents injury to the motor.

In the patent of Levy, No. 286,834, of October 16, 1883, a throttle



magnet, A, in the main circuit, moves a switch, C, and thereby directs a motor, D, which rotates a controller, so as to bring in or cut out resistance, according to the strength of the current.

The Gale patent, No. 319,573, dated June 9, 1885, relates to lamps



or other electrical devices in series, and is intended to restore the circuit interrupted by accidental failure of one lamp. If a lamp burn out, all the lights would be extinguished, if it were not that the main circuit is broken, whereupon a relay magnet releases its armature and closes the circuit through a second magnet, which attracts a pawl and disengages it from a toothed wheel, which allows a lever to be actuated by a spiral spring, and to swing until it has reached two terminals, one on each side of the extinguished lamp. These the lever bridges and closes the circuit by making a shunt about the defective lamp. Thereupon the circuit, through the magnet, is broken, the pawl engages the ratchet wheel, and the lever is held in place. Here is a circuit opened by and closed by a magnet, and a pawl released from and allowed to engage a ratchet wheel to allow a lever to swing or to hold it. This illustrates that it was known that a pawl could be released from or allowed to block a ratchet wheel, carrying a lever, by means of a circuit closing upon the opening of the main circuit.

The five claims of complainant do nothing more than provide for an automatic stop for mechanism controlling resistance in circuit, with an electric motor, or two or more electric motors, in multiple arc, such stop responding to an abnormal increase of current. But it is evident that the prior art requires that the stop or catch be limited to one that physically engages the resistance lever so firmly that the operator cannot move it. The inventor dwells upon this, and the complainant's brief emphasizes this constraint put upon the operator, and the advantages thereof. It has already been seen that the defendant uses two co-operating means for regulating the resistance: (1) A pilot motor on a local circuit, opened or closed by varying conditions of strength of the main circuit; (2) a brake magnet releasing a brake or withdrawing it. The first way is totally unlike any suggestion of the Bentley letters, and, moreover, it was taught plainly by Levy, and, except the pilot motors, by Sawyer, Weston, and Edison. The second way (the use of the brake magnet to stop the movement of the resistance lever) was foreshadowed, but not reached, by Sawyer and Edison. Surely, arresting the removal of resistance by withdrawing the power of the pilot motor has no resemblance to the blocking mechanism that Bentley conceived and described. There is some resemblance between the brake magnet releasing the brake, and Bentley's pawl engaging the toothed sector, but it is very faint. What cuts out the resistance is the revolution of the pilot motor. What makes the pilot motor revolve is the local circuit. What takes away its power to revolve is the opened local circuit. What, then, do the brake magnet and brake do? They overcome quickly the inertia of revolution of the pilot motor. It is true that this sudden cessation of motion does prevent resistance, to an extent, from being removed; and if a brake be an equivalent for an engaging pawl, as it very well might be, the defendant's brake magnet and brake do something of the duty that the complainant does. But the coincidence of action is very slight. The vital purpose of the Bentley device is to stop instantly the moving lever, and hold it stopped against all effort of the motorman. The office of the defendant's brake magnet and brake is to stop the acquired motion. It neither stays the motorman, nor any substitute

for him. It has no relation to the motorman. It is a part of a nicely balanced mechanism, incapable of important error, inserting and removing resistance automatically with intended precision. In defendant's machine the brake plays an auxiliary, but necessary, part in stopping; but thereupon it holds nothing against any force applied to the resistance lever, because no force is applied to the lever. The vital conception of Bentley of disarming the motorman—of making him incompetent by automatically locking his lever and holding it locked—is practically absent from the defendant's device. The use of the released brake to overcome the inertia of revolution of the pilot motor is the nearest approach to Bentley's locking device, but this is not an automatic stop, within the meaning or intention of the Bentley patent. The defendant's entire system is radically unlike that of Bentley; its purpose is different, although both involve regulation of the current; and it makes use of the art prior to Bentley, save in the mere matter of the arresting brake. Although Bentley's device was used on a car about 1885 for a short time, it has proved of no commercial or practical value. Nobody seems to have conceived that it could do any useful thing in the modern railway service. It should not be employed at the expiring limit of its useless life to thwart the valuable benefits of defendant's device, now in extensive use, and of which there is no evidence that Bentley had the shadow of perception.

The bill is dismissed.

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UNITED SHOE MACH. CO. v. THOMAS G. PLANT CO. et al.

(Circuit Court, D. Massachusetts. October 1, 1902.)

No. 1,113.

1. PATENTS—INFRINGEMENT—HEEL-NAILING MACHINE.

The Raymond patent, No. 619,707, for a heel-nailing machine for attaching the heels on boots and shoes, construed, and *held* not anticipated, and valid; also infringed as to claims 23, 24, 42, 43, and 44.

In Equity. Suit for infringement of letters patent No. 619,707 for a heel-attaching machine, granted to Freeborn F. Raymond February 14, 1899.

Elmer P. Howe and Richardson, Herrick & Weave, for complainant.

J. S. Rusk, for defendants.

COLT, Circuit Judge. This bill in equity is brought for infringement of the Raymond patent, No. 619,707, dated February 14, 1899, for an improvement in machines for attaching a heel by nails to the heel-seat of a shoe. The heel is commonly made up of two parts,—the heel-blank, composed of several layers of leather pressed together, and a single piece of leather called the "top-lift," which is spanked on to the projecting ends of the nails on the bottom of the heel, so that the nails do not show in the finished heel. The heel-blank is often "loaded" in a separate machine, which means that the holes are driven

through it, and the nails driven part way into these holes, with their ends projecting. Prior to the patent in suit, there were two types of heeling machine in use, known, respectively, as the "McKay Machine" and the "National Machine." In the McKay machine the shoe was placed in an upright position on the jack with the heel-seat above the heel-blank and heel-block. A loaded heel-blank, with its projecting nails, was placed on the heel-block, which had a series of holes to receive the nails. In the lower part of the heel-block was an upright nail driver projecting from a driver-bed. The heel-block was held away from this bed by a spring. The shoe was brought down upon the heel, thereby forcing the heel and heel-block downward against the pressure of the spring, so that the driver forced the nails through the heel-blank and into the sole of the shoe. The shoe was then carried up again with the heel attached thereto, leaving the ends of the nails projecting. A plate was then turned over the surface of the heel-block, and the top-lift was applied to the plate. The heel was then brought down upon the top-lift, whereby it was spanked into place upon the projecting nail ends. In the National machine the shoe was held upside down upon a jack, and an unloaded heel-blank was placed over the heel-seat. This machine was organized with a rotary head above the heel-seat, having projecting arms which carried the awls, nail drivers, and top-lift spanker. After the heel-blank had been placed over the heel-seat, a templet containing a series of holes was brought over the heel-blank, and a set of awls upon one arm of the rotary head descended through the templet and made the holes in the heel-blank. The awls then ascended, and the nails were dropped into the templet holes. A gang of drivers upon another arm of the rotary head then descended, and drove the nails through the heel-blank and into the heel-seat. The drivers were then retracted, and the spanker arm carrying the top-lift descended, and spanked the top-lift on to the projecting ends of the nails. In the Raymond machine, covered by the patent in suit, the jacked shoe is placed upside down, and the heel-blank is applied to the heel-seat from above. The machine has a rotary head having one or more pairs of arms, one arm of each pair being furnished with drivers and a heel-block, which are substantially like the old McKay machine, and the other arm with the top-lift carrier and spanker. A loaded heel-blank is placed bottom down on the heel-block while the arm is in its upward position. The arm then carries around the heel-blank until it is over the heel-seat, bottom up, whereupon the nail-driving operation takes place. The rotary head is again rotated, and the next arm carries around the top-lift, and then spansk it on. In the preferred form set forth in the patent the machine has six arms. In the claims in issue, however, the machine is limited to a single pair of arms. The new feature in this machine is the carrying around of the heel-blank on the arm of a rotated head from one accessible position where it can be readily attached to the heel-block to another position where it is nailed to the heel-seat of the shoe. A heeling machine so organized with a single pair of arms upon a rotary head, and carrying upon one arm a heel-blank and driving mechanism, and upon the other arm the top-lift and spanker devices, seems to possess the advantages over prior machines of simplicity,

accuracy, and increased efficiency. Claims 23, 24, 42, 43, and 44 are in issue. It is sufficient to refer to claims 24 and 42:

"(24) In a heel-nailing machine, the combination of a pressure-head having a wide opening extended through it, a shaft extending across said opening, and a rotary head carried by said shaft and having two arms, loaded heel-attaching devices, of the character specified, attached to one of said arms, and a top-lift carrying, holding, and spanking device attached to the other of said arms; the said rotary head being adapted to be turned so as to permit the loaded heel-blank and the top-lift to be applied to their respective attaching devices through the upper part of the opening in said head, or when they are uppermost, and to permit them to carry said loaded heel-blank and top-lift and to attach them successively when they are in their lowest position, as and for the purposes described."

"(42) In a heel-nailing machine, as a means for attaching a heel-blank to a boot or shoe and a separate top-lift to the attached heel-blank, a vertically-reversible head having two arms, one of which arms is adapted to carry and attach the heel, and is provided with nail-drivers and a nail-block arranged on said arm so as to be movable toward and from it, and the other of which arms is provided with top-lift-applying devices."

The important feature of claim 24 is the provision that "the said rotary head being adapted to be turned so as to permit the loaded heel-blank and the top-lift to be applied to their respective attaching devices through the upper part of the opening in said head, or when they are uppermost, and to permit them to carry said loaded heel-blank and top-lift and to attach them successively when they are in their lowest position, as and for the purposes described." So, in claim 42, the important part is "a vertically-reversible head having two arms, one of which arms is adapted to carry and attach the heel, and is provided with nail-drivers and a nail-block arranged on said arm so as to be movable toward and from it, and the other of which arms is provided with top-lift-applying devices." It is contended that these claims are void for want of invention in view of the prior art. This contention is founded upon the old McKay and National machines, to which reference has been made; and especially upon the prior Raymond patent No. 329,951. This latter patent is for an auxiliary device to the National machine, which in no way involves the specific feature or mode of operation of the patent in suit. After the heel had been attached to the shoe, it was customary to drive additional nails by hand for purposes of ornamentation and more securely holding the heel-blank. The purpose of this earlier Raymond patent was the construction of an auxiliary device for doing this work automatically, as clearly appears from the specification:

"It is very common in manufacturing boots and shoes to first attach the heel-blank by a gang or group of nails simultaneously driven, and to then spank on the top-lift to the heads of the attaching-nails, or to other nails which have been left projecting for the purpose of receiving it, and then by hand to drive additional nails through the top-lift, either for the purpose of more securely holding it in place to the heel-blank, or for purposes of wear or ornamentation, or for all these purposes. This last-named nailing has always been done by hand after the removal of the boot or shoe from the attaching-machine. It is very desirable that means should be provided whereby either holes should be made in the heel for these additional or auxiliary nails after the heel has been attached, but while it is yet in the heel-attaching machine, or that before the removal of the boot or shoe from the machine, but after the heel has been attached, the additional nails be



automatically driven; and I have herein described means for accomplishing both these objects."

Although the different parts or elements which make up the claims in issue, such as a rotary head with arms and driving and spanning mechanism, were old, I do not find in the prior art the combinations covered by these claims. I find no suggestion in the prior art of the employment of a rotary head with two arms, one of which carries and attaches the heel-blank. By reason of this last feature the claims cover, in my opinion, new and patentable combinations.

The second defense is noninfringement. The defendants' machine has an oscillating head with two arms, one of which has appliances for carrying and attaching the loaded heel-blank, while the other has appliances for carrying and spanning on the top-lift. It cannot be denied, therefore, that, in its general features and mode of operation, the defendants' machine corresponds with the machine of the patent in suit. This defense rests upon the ground of the difference in the form of heel-attaching appliances. The heel-attaching device of the Raymond machine is described in claim 23 as "comprising a group of drivers at the end of the arm and a yielding heel-block attached to the arm, and into which the drivers extend." The defendants manufacture two forms of the Woodward heeling machine. In the first form the heel-attaching devices comprise a group of drivers at the end of the arm and a yielding heel-block attached to the arm, and into which the drivers extend; in the second form the spring-pressed heel-sleeves must be regarded as the equivalent of the spring-pressed heel-block of the patent in suit.

Decree for complainant.

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### H. C. WHITE CO. v. WALBRIDGE et al.

(Circuit Court, D. Vermont. October 29, 1902.)

#### 1. PATENTS—INFRINGEMENT—TAKING PART OF INVENTION.

The exclusive right granted by a patent is invaded whenever any substantial part of the invention for any of its purposes, though not the whole for all of its purposes, is taken.

#### 2. SAME—STEREOSCOPE.

The White patent, No. 548,149, for a stereoscope, showing a construction to more effectually exclude the light from the hood, discloses invention, and is valid; also *held* infringed.

In Equity. Suit for infringement of letters patent No. 548,149, for a stereoscope, granted to Hawley C. White October 15, 1895. On final hearing.

Franklin Scott, for plaintiff.

George A. Mosher, for defendants.

WHEELER, District Judge. This suit is brought for alleged infringement of patent No. 548,149, dated October 15, 1895, and granted to Hawley C. White, assignor to the plaintiff, for a stereoscope. The specification sets forth that:

"The invention relates to the construction of the several parts of the common hand stereoscope, and constitutes an improvement in the method of making and putting together the several parts, whereby a more convenient and durable 'scope is produced. As 'scopes have heretofore been constructed, the front end of the shaft has been cut off flush with the front side of the lens-frame, and the hood has been carried around only to the edge of the broad part of the shaft, so that there was a considerable opening on each side of the nose of the observer for the admission of light to the eyes from below, which would interfere with perfect vision. I have devised several varieties of hood to obviate this interference of light from below, of which this is one. The edge of the hood and end of the shaft are shaped to conform to the contour of the face, so that when the instrument is held to the face all parts of the edge of the hood and end of the shaft will fit the face. By carrying the shaft across the lens-frame, as shown, and holding the ends of the hood in rabbets or grooves, a much firmer structure is obtained, and the hood is held from curling or warping out of shape,—a thing it is liable to do, as it is generally made up of veneers transversely laid up in glue."

The claims in question are for:

"(1) A stereoscope, consisting of a lens-frame, a shaft attached thereto, which extends forward of the said frame and is recessed to fit closely the nose and cheeks, and a hood, which extends around the said frame to the sides of the said shaft, and is supported thereby, the front part of the said shaft being practically a part of the said hood, the said hood being also provided with extensions for fitting against the temples, to combine with the said recessed shaft in forming a dark chamber, substantially as set forth. (2) A stereoscope, consisting of a lens-frame, a shaft attached thereto, which extends forward of the said frame and is recessed to fit closely the nose and cheeks, and a hood, which extends around the said frame to the sides of the said shaft, and is supported thereby, making the latter practically a part of the said hood, substantially as set forth. (3) The described improvement in stereoscope consisting of a lens-frame, a shaft extending forward of the said frame, and a hood extending around the said frame to the sides of the said shaft and supported thereby; the front edges of the hood and the front end of the shaft being cut to fit the shape of the face of the observer, substantially as set forth."

Hoods for instruments that excluded the light from below—which is a useful effect—had been made before; but the extension of the shaft shaped to fit the nose and face and adapted to support the hood does not appear to have been used before for that or any purpose. These former hoods were clumsy, and had not been well adapted to practicable and successful 'scopes. The invention made darker chambers within the hoods more feasible, and came immediately into extensive use, and the patent for it seems to be valid for what it covers.

The more important and difficult question is as to infringement. In the defendants' 'scopes complained of the shaft stops at the lens-holder, as before, and a piece of veneering shaped to fit the nose and face, and curved to lie at each end within and upon the lower edges of the hood, is fastened to the shaft there. The patent cannot be valid for excluding the light from below and forming a darker chamber within the hood, for that would be old, but only for the means by which the darker chamber is formed and maintained. The defendant does not extend the shaft bodily beyond the lens-holder for excluding light from below and supporting the edges of the hood, but adds another piece extending from the end of the shaft, and supported by the edges of the hood, for excluding the light. This piece does not sup-

port the edges of the hood, which is one object of the patented invention; but does exclude the light from below, which is another object, by what for this purpose is an extension of the shaft, in the same way. Splicing out the shaft to exclude the light is the substantial equivalent of extending the shaft bodily for the same purpose, and this part of the invention appears to have been appropriated by the defendant. The exclusive right granted by a patent is invaded whenever any substantial part of the invention for any of its purposes, although not the whole for all its purposes, is taken. It is argued with force and plausibility that these claims are, by their terms, limited to 'scopes with hoods supported by the extension of the shafts; but the contact of the defendants' extension piece with the hood is the full equivalent of that of the extension of the shaft of the patent with the hood for support in excluding light from below, and the limitation does not seem to apply to these claims in respect to this object. The extension piece becomes practically a part of the hood, as in the first claim the extension of the shaft is said to be. The defendant appears to have taken the idea of the patent in constructing the infringement.

Decree for plaintiff.

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NUTTER et al. - MOSSBERG et al.

(Circuit Court, D. Massachusetts. October 14, 1902.)

No. 1,288.

1. PATENTS—SUIT FOR INFRINGEMENT—APPLICATION TO REOPEN CASE PENDING APPEAL.

Where during the term at which a decree was entered finding the validity and infringement of a patent, but after the allowance and entry of an appeal, the defendant presents newly discovered evidence, which in the opinion of the court would have entitled him to a reopening of the case if presented before appeal, it will on application request the return of the record from the circuit court of appeals to permit further proceedings to be taken.

In Equity. Suit for infringement of patent. On application to the court pending appeal to request the return of the record for further proceedings. See 116 Fed. 488.

J. E. Maynadier and G. A. Rockwell, for complainants.

Wm. R. Tillinghast and Benjamin Phillips, for defendants.

BROWN, District Judge. Within the term at which the decree was entered, but after the allowance and entry of an appeal, and while the appeal is still pending, the defendants make application to this court to request the circuit court of appeals to return the record to this court for further proceedings, or for leave to file a supplemental bill in the nature of a bill of review.

It is conceded that the defendants have newly discovered evidence in the Hale & Tolman bicycle bell, which was in somewhat extensive use for more than two years prior to the date of the patent in suit, and that they are not in default for failure to make an earlier discovery of this evidence. In support of this application, the defendants rely upon

Roemer v. Simon, 91 U. S. 149, 24 L. Ed. 384; Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 39 C. C. A. 677, 99 Fed. 1003; Id. (C. C.) 108 Fed. 82; Marden v. Press Co., 15 C. C. A. 26, 67 Fed. 809; Id. (C. C.) 70 Fed. 339.

As the situation of the case in the court of appeals seems to call for an immediate decision, I feel constrained to dispose of this petition as speedily as may be, and without such full consideration as the important question of practice would under other circumstances receive. Had this newly discovered evidence been presented after decree, and before taking of an appeal, I am of the opinion that I should have ordered the case to be reopened. While I am not satisfied that the Hale & Tolman bell anticipates what is described in the patent in suit, I am convinced that it would have so changed the prior art as to have presented different questions from those argued, and upon which the opinion was based.

This court, therefore, will follow the practice suggested in the authorities cited, and, upon the application of the defendants, will request the return of the record for further proceedings in this court which shall not prejudice the defendants' right of appeal.

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#### HARP v. CHOCTAW, O. & G. RY. CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. August 1, 1902.)

##### 1. CARRIERS—RIGHT TO LIMIT AND REGULATE BUSINESS.

In the absence of charter or statutory provisions affecting its right, it is competent for a railroad company to determine for itself within what limits it will act as a common carrier, what business it will engage in, what means and methods of transportation it will employ, what goods it will carry, and between what points and under what circumstances and conditions it will receive the same, subject always to the limitation that it must act in good faith, reasonably, and not arbitrarily or capriciously, and without discrimination; doing for all under like circumstances what it does for any one.

##### 2. SAME—DISCRIMINATION IN FURNISHING CARS—DIFFERENT MODES OF LOADING.

The refusal of a railroad company to furnish cars to the owner of a coal mine, to be loaded by wagons on its commercial tracks in its yards at a station at a time when the business of the road was unusually heavy, necessitating the constant use of such tracks, and its supply of cars was insufficient to handle its traffic, while at the same time it furnished cars to other mine owners on their own private tracks, to be loaded by tipples, was not unreasonable; nor did it constitute an unlawful preference or discrimination, either under the common law, or the statutes of Arkansas, which prohibit any preference or discrimination in the furnishing of cars.

##### 3. SAME.

The action of a railroad company in furnishing cars to be loaded by wagon on its tracks at a station with coal for shipment in one direction to points within the state, while it refused to furnish cars to be so loaded for interstate shipments in the opposite direction, was not an unlawful discrimination against a shipper, where the order applied to all persons alike.

##### 4. SAME—RAILROADS—OBLIGATION TO BUILD PRIVATE SPUR TRACKS.

A railroad company is under no legal obligation to construct a spur track from its line to a coal mine for the private benefit of the owner in

shipping his product; nor can it be held liable in damages for unlawful discrimination because of its refusal to build such track, although it had permitted to be built, and assisted in building, similar tracks to other mines.

On Directing Verdict for Defendant.

Hill & Brizzolara, for plaintiff.

E. B. Peirce, for defendant.

ROGERS, District Judge. Gentlemen of the Jury: I am constrained by my view of the law of this case to instruct you to return a verdict for the defendant. The far-reaching importance of the case, as well as its somewhat novel features, have induced me to consume more time than is usual in its consideration. Every shipper and every railroad company in the state is interested in the questions of law involved, and the decision, of course, affects immense interests. It is therefore due counsel, the jury, and the court that I state my reasons for the course to be pursued. There is fortunately very little conflict in the evidence, and it is gratifying that in such conflict the witnesses on both sides have deported themselves with unusual candor and fairness. Any differences may be fairly attributed to the infirmities of memory, inaccuracies of speech, and misunderstandings at the time as to what was said, rather than to any disposition to pervert facts.

It was urged that the Conatser Case, 61 Ark. 562, 33 S. W. 1057, governed this case. A very careful review of that case leads me to doubt its application to the facts at bar. At all events, I am not willing to base my action on that case. Conatser held cotton at Ozark, Ark. He wanted to sell for cash to buyers on the ground. He could not sell unless cars could be had upon which to ship it. He applied to the railroad company for cars. They were not furnished. Hence the cotton could not be sold. Cotton declined, and he sued the railroad company for the difference between the price he could have sold for, had the cars been furnished, and the price he did sell for after it declined. The court held, on his own evidence, that he was not a shipper, but a seller, of cotton, and that he had no cause of action against the railroad company, and dismissed his suit. In the case at bar, plaintiff had a coal mine. He could not sell his coal or ship it without cars. He applied for cars. They were not furnished. He had orders for all the coal he could mine, for \$1.25 per ton, free on board the cars at Hartford, where his mine was located. It cost him 96 cents per ton to mine and load it on the cars. He sued for the difference between the cost and selling price. What was his legal status? The plaintiff was to load the coal and bill it out to the purchasers, who purchased free on board cars after billed out. It did not appear that Conatser was to load cotton or bill it out, or that he intended to do either. And this is the distinction between the two cases. I do not think, on more mature reflection, that the Conatser Case is applicable to the facts in the case at bar.

The material facts of the case are these: When the defendant railroad company was extending its line from Howe, Ind. T., east through the state of Arkansas, it intersected the Arkansas state line about a

mile from the old town of Hartford, in Sebastian county, Ark., where it owned a large body of coal land, and there laid out a new town. The old town of Hartford was a mere village, of no commercial importance, and only a few persons resided there. Shortly after the road was put in operation at that place the railroad company permitted some one to work a strip pit on its land near the station, and load coal by wagons on cars standing on its switches at the station. Very soon thereafter the plaintiff began working an old mine in the vicinity, which had been opened and worked for local supply before the railroad was constructed, and he, too, loaded by wagon on the same switches. One of his witnesses, Rogers, who was working a small mine near by, did the same thing. This arrangement as to plaintiff and Rogers continued until August 14, 1901. In the meantime the defendant railroad had sold its coal land, including the strip pit above referred to, and two large coal companies had been organized and had opened mines at Hartford, and another was at the time in full operation a mile or two off, equipped with private switches and tipples for quick loading. These switches were built in this way: The coal operators and the railroad authorities agreed where the switches should be put in. The operator furnished the right of way, the ties, and did the grading. The railroad company furnished the iron and laid the rails, and, after it was constructed, controlled the switches. In the fall and winter of 1900-01, the business of the road had increased abnormally by reason of large crops and the immense development of coal and other products along the line, and also because it was constructing large eastern and western extensions of its line. Hartford, which for business amounted practically to nothing in the beginning, had become a large shipping point for coal, and its commerce had increased in proportion; indeed, it had increased all along the line. Some time in the spring or early summer of 1901 (the plaintiff's evidence tends to show, about the 14th of August, 1901) the defendant company notified the plaintiff that the loading of coal on its commercial tracks at Hartford could not be continued, and that the company would not receive or ship coal except by car loads, and the cars to be loaded on the private switches of the coal operators and by tipple. The undisputed evidence is that the demand for cars at that time was much greater than the supply, and the company then had given orders for nearly one-third as many new coal cars as it then had in use, and they could not be had; that to continue the loading of coal cars by wagon on its commercial switches at Hartford was necessarily slow, and thereby had a tendency to reduce the maximum shipping facilities of the road, and, moreover, delayed and interfered with its commercial traffic, and rendered dangerous the operation of the road to defendant's employés, the persons employed in loading the cars from the wagons, and the traveling public; that these were the reasons that the practice of loading cars on the commercial tracks in defendant's yards at Hartford was discontinued. The undisputed evidence shows that, at the time the notice was given, no other persons on its entire line, except plaintiff and the witness Rogers were loading cars on the commercial tracks at its stations. True, both at Hartford and at Red Oak some cars were loaded from strip pits by wagon, but always on the private

tracks of the operators; and this was not allowed, except temporarily, to enable the operator to open his mine, and for the reason that a tippie could not be used until the stripping was stopped, and what is called the "slope" was begun. Soon after the defendant railroad company gave the notice referred to, plaintiff, Harp, began negotiations with various officers of the company to secure some method of loading his coal. These negotiations resulted in nothing. The testimony in relation to these negotiations is very confusing as to dates, and quite conflicting in detail. It is not perceived that it is very material to the questions involved; but the plaintiff, Harp, insisted that a switch should be put in running from his mine, and intersecting the ground set apart for the company's station track yard. This the defendant company refused to do. Suffice it to say they failed to agree upon any point at which the company should put in a spur track to plaintiff's mine. Meantime plaintiff, Harp, and his witness, Rogers, who was similarly situated with reference to his coal operations, brought the matter to the attention of the state railroad commission, and the state railroad commission brought about a conference with the defendant railroad authorities. It was ascertained by the defendant company that the state railroad commission held the view that it was compelled to furnish Harp and Rogers equal facilities with other shippers of coal, notwithstanding the method in which they were conducting their business. Accordingly, in October, 1901, for prudential reasons, the defendant company offered cars to plaintiff and all other persons at Hartford, destined for eastern points in Arkansas, on the theory that the state railroad commission had no jurisdiction as to cars going west, and engaged in interstate commerce. Later, in January, 1902, the commission having decided the defendant must furnish cars destined west, it for the same prudential reasons complied with that order. At this time plaintiff had no coal orders for western points, the season for coal shipping being about closed. The plaintiff brought suit in this court for the difference between the cost of putting the coal free on board the cars at Hartford, which was 96 cents, and the value of the coal free on board cars at Hartford, which was \$1.25, for the full capacity of his mine from August 1, 1901, to February 15, 1902.

On this state of facts, two questions arise: First. Was the refusal of the railroad to furnish cars to plaintiff on its commercial tracks in its yards at Hartford, to be loaded by wagons, while at the same time it furnished cars to other mine owners on their private tracks, to be loaded by tippie, such a discrimination against plaintiff as the law condemns? Second. If not, was the railroad company, under the facts stated, compelled by law to put in a switch for plaintiff's convenience at such place as he required, or at any other place?

It was conceded and there seems to be no diversity of authority on the subject—both the decisions of the courts and the text-writers concurring—that the rule is that a common carrier, so far as concerns the receipt and transportation of goods, however it may be as to freight rates, must, where the conditions and circumstances are identical or substantially similar, treat all shippers alike. It cannot furnish facilities to some shippers, and deny them to others, unless

there is a difference in the conditions and circumstances, such as makes the discrimination a just one. Public policy forbids that carriers shall be permitted to favor one shipper, or one class of shippers, in discharging the general duty to accept and carry goods, to the prejudice of others. 4 Elliott, R. R. § 1468. The same author says:

"The general rule that a railroad company is under a duty to carry goods properly offered for transportation is, as we have indicated, subject, among other limitations and qualifications, to the limitation that its obligation extends only to the kind of goods the company undertakes to carry. In other words, railroad companies are common carriers only as to those goods which are of the kind usually or professedly carried. \* \* \* A further qualification of the general rule is that railroad companies are common carriers to the extent only of those means and methods of transportation which they own, use, or hold out to the public." 4 Elliott, R. R. § 1466.

In *Railroad Co. v. McDonough*, 21 Mich. 195, 4 Am. Rep. 466, Judge Christiancy, in delivering the unanimous opinion of the courts, stated the doctrine as follows:

"It has been frequently held, and seems to be well settled, that companies incorporated under charters which simply permit, but do not require, them to undertake the business of common carriers, become such, as to any particular kind of property (though such as comes within all the reasons of the law of carriers), or as to any particular portion of their route, only so far as they hold themselves out as such to the public, and are under no obligations to carry otherwise or other kinds of property than they publicly profess to carry. *Oxlade v. Railway Co.*, 15 C. B. (N. S.) 680; *Johnson v. Railway Co.*, 4 Exch. 367; *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186, 206, 56 Am. Dec. 68; 2 Redf. Railways, 116."

The authorities cited furnish apt illustrations of the principles announced.

In *Oxlade v. Railway Co.*, *supra*, the case was decided under an act of parliament known as the "Cardwel Act," which provided:

"That every railway company," etc., "shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic," etc.; "and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

But the court in that case held:

"There is no obligation on any railway company, whether at common law or under the railway traffic act of 1854, to carry goods otherwise than according to their profession. Therefore it is competent to them to restrict their coal traffic to the carriage of coal for colliery owners from the pit's mouth to stations where such colliery owners have sales or depots appropriated to them for the reception and sale of their coals, and to decline to carry coals from station to station, or for coal merchants; such an arrangement being essential to the regulation of the large traffic in that article, and the company not being common carriers of coal."

This decision was afterwards confirmed in 1 C. B. (N. S.) 454.

The act of congress constituting the charter of the defendant company imposes no duties whatever upon the defendant company in reference to receiving or transporting freight or passengers, or as to the furnishing of facilities therefor. Such matters were left to be



governed by the law of common carriers. Under the principles announced, and under the common law, and even under the Cardwel act in England, which, as will appear, is much broader and goes much further than the statute law of this state, it is clear that it was within the power of the defendant company to determine for itself the means and methods of transportation which it would employ or hold out to the public, as well as the character and kind of goods it would carry, or profess or hold itself out to carry, and under what conditions it would accept and receive the same for transportation, and from and to what points it would transport articles received for transportation. To illustrate: Suppose some one had driven up to the station at Hartford and shoveled out on defendant's platform a wagon load of mine-run coal or slack, and offered it for transportation, and demanded that it be transported to Booneville, Ark., and delivered to John Smith, accompanying his offer by the freight charges. Was the company bound to accept it and transport it? Suppose a dozen different mine operators at Hartford, operating 100 wagons for loading coal on cars, should demand of defendant that 50 cars a day be set out on its switches and side tracks in its yards at Hartford, to be loaded with coal from wagons. Is the company, under the law, compelled to grant the request? If so, the same thing may be done at every station for every person demanding it, and for every purpose, for coal has no imperial rights over lumber, cotton, stone, or merchandise; nor has the coal operator any rights superior to the lumber dealer, the cotton speculator, the operator of the marble quarry, the agriculturalist. The common law made none. The statutes make none. All are to be treated alike. The answer to these questions, therefore, is that if the defendant company is engaged in carrying coal, or permitting it to be loaded in its yards, in the manner stated, for one person, it cannot lawfully deny it to another; but if it does not hold itself out as doing that kind of transportation, and is not in the habit of doing it for anybody, then no one has any right to complain. The questions put, therefore, resolve themselves into this: Who shall have control of the operating of the road,—the company or its customers? Who shall determine what the railroad will transport,—the company or the shippers? Who shall say to what points the company will transport goods,—the company or its customers? Who shall say what the means and methods of transportation shall be,—the company or its customers? In short, who shall determine what the business of the company shall be and how it shall be carried on? Solved by the principles of the common law and common sense, it must be the company, as all will agree that no railroad could be operated at all by those who patronize it.

It is not intended to be said that duties and obligations cannot be imposed by statutes on corporations. They owe their existence to the state, and the state may impose, by their charters, such terms as it sees fit, or deny charters altogether. It is only meant to say that where, by the charter, no such duties or obligations are imposed, railroads may determine for themselves what business they will engage in, what means and methods of transportation they will employ, what goods they will carry, and between what points and under what

circumstances they will receive them, subject always to the principles of the common law already announced, so far as applicable to the point in hand, and also, within proper limits, to the police power of the state, from which power the state cannot part, and may exercise at its will, within constitutional limitations. Of course, the general rules stated are rules to be kept within the bounds of good faith and fair and reasonable conduct on the part of common carriers. They may not arbitrarily, whimsically, or capriciously, and without reasonable grounds, deny transportation simply because they have it in their power to do so; neither could they, under like circumstances, make changes not in good faith as to what they will carry, where they will carry it to, or the means and methods to be employed; but to hold that, within the principles stated, they cannot enlarge or curtail the class or kinds of articles they would carry, or determine the means and methods to be employed or to be held out to the public, would be, in the absence of statutory regulation, to take from the carrier the conduct of its own business, and subject it to its customers. It must not be forgotten that the principles just stated are subject, always, to this principle: That what it does for one it must do for all under like circumstances. Naturally all its interests will induce it to do all the business it can safely do, of all kinds, which afford it a just remuneration, so that its selfishness is at last the greatest security the customer has for getting his business done.

The question recurs whether the company discriminated against plaintiff and in favor of other persons in refusing to furnish plaintiff cars on its commercial tracks in its yards at Hartford, to be loaded by wagons, while at the same time it furnished cars to others at Hartford on their own tracks, to be loaded by tipples. I do not think this an open question. If the cars furnished other coal operators to be loaded on their own tracks had been permitted to have remained there unloaded for a month, they would not have interfered in the slightest degree with the general business of the road, except to withdraw from active use the cars then so much in demand; nor would such cars on the private tracks of the operators have involved any danger either to the employes of the mine, the servants of the railroad, or the traveling public. But every car standing on the commercial tracks of the company in its yards, to be loaded by wagons, is, in the very nature of things, an impediment to the rapid dispatch of business, involving switching, wear and tear of the rolling stock, and danger to the road's servants, the employes of the coal operators, and to the traveling public, to all of whom the road is responsible for delays, and injuries resulting from carelessness and the improper conduct of its business. Moreover, in the very nature of things, cars could not be loaded as rapidly by wagons as by the tipple; and therefore the former involved, to some extent, delays in loading cars, which, in view of the then inadequate supply, the road could ill afford. The conditions under which plaintiff was operating his mine were not, therefore, the same, or substantially the same, as those of other mine operators. They were radically and essentially different. I do not think it reasonable to say the

road was without authority to regulate its affairs in matters of that kind. To say that it has not is to affirm that its whole commercial traffic is to be impeded, and its traveling public, and its own employes and those of the coal companies loading cars in its yards by wagons, shall be subjected to increased dangers from accidents, in order to allow one man the privilege of doing what, manifestly, competent railroad management would condemn. I cannot conclude otherwise than that the action of the defendant company in thus denying the loading of cars on its tracks in its yards was not only legal and reasonable, but manifestly in the interest of the safe, expeditious, and proper conduct of its business, and that in so doing there was no unjust discrimination against plaintiff.

But it is urged that by our statute it is made the duty of the defendant company to provide some place at which a mine owner, under the conditions and circumstances occupied by the plaintiff, could load his coal, either by wagons or by a spur track. This statute says that it shall be unlawful for any person or corporation "to make any preference in furnishing cars or motive power," and it requires that all persons and corporations "shall furnish, without discrimination or delay, equal and sufficient facilities for the transportation of passengers, the receiving, loading and unloading, storing, carriage and delivery of all property, of a like character carried by him, them, or it." But is it a preference to furnish cars to a coal company which has provided a track of its own upon which the cars shall be loaded, and refuse cars to a person to be loaded by wagon on its commercial tracks at its depot? The word "preference," as used in this statute, necessarily implies that one has been preferred over another similarly situated. If this were not so, then it would follow that to refuse to give one man cars under any condition, and give them to another under any other condition, would constitute a preference; and the result would be that every man, without reference to his facilities for doing business, or the amount of business he expected to do, should have cars given to him, and then the right of the railroad company to manage and control its own methods and means of transportation, and to hold out to the public under what conditions and circumstances it would do business, would be wholly withdrawn. It cannot be fairly said that the statute in this regard, as applied to this case, has made any change whatever in the law; nor was the plaintiff in this case discriminated against at all when the railroad refused to furnish him cars under the circumstances stated, and granted cars to others who had conformed to the conditions which were imposed for the shipment of coal.

But it is said that in October the railroad company receded from this order refusing plaintiff cars to be loaded by wagons on its commercial tracks at Hartford, to this extent: that it offered to furnish cars to be loaded by wagons on its commercial tracks at Hartford, destined to points of shipment east of Hartford, in Arkansas, and that in so doing it held itself out as transporting coal of persons to be loaded from wagons into cars standing on its commercial tracks at Hartford, and that therefore there was a discrimination, because defendant refused to furnish cars for the transportation of such coal

to points west of Hartford. Waiving the circumstances under which this was done, the answer to this proposition is this: That whatever change was made in the order applied to all persons alike, and therefore there was no discrimination against the plaintiff.

It is said that later, in January, 1902, the order referred to was rescinded in toto, and that cars were then offered for points destined both east and west. It is not contended, however, that plaintiff may recover by reason of that revoking order, because it was of the order revoked that he complained beforehand, and, moreover, after that time he does not claim any damages because of the failure to furnish cars. It may be said, also, that when, in January, 1902, the order was finally revoked, it applied to the plaintiff as well as to all other persons, and therefore there was no discrimination as against him.

I am of the opinion that there is no reasonable and fair view which can be taken of this case upon which any discrimination or preference, whether undue or unreasonable or not, can be predicated.

But it is insisted that, when the old method of loading cars was discontinued, some other facilities should have been provided by which plaintiff could have loaded his coal; that is to say, the defendant company should have put in a spur track for his benefit on the same conditions it put in tracks for others. If this were true, the question would arise where, and under what conditions and circumstances, this spur track should be constructed. The very nature and character of the railroad business necessarily implies that the power could only be lodged in the railroad company itself, or in some tribunal created by law. Manifestly the coal operator could not be allowed to determine that question. If it belonged to one coal operator to compel the company to furnish a track to his mine, it belongs to every other operator to do the same thing; and the result would be that in a coal region there would be as many spur tracks along the company's road as there would be coal mines, and these compelled to be put in by the railroad company without reference to its convenience or the safety of its operation. That this is not the law is, in the opinion of the court, conclusively established, by reason of the fact that, in a country where these operations have been going on for half a century, no case has been cited or can be found which holds that doctrine. In this respect the laudable industry and research of eminent counsel has not been rewarded by the discovery of a single case or text-writer supporting that doctrine. But there is the very best authority to the contrary, and it underlies this whole case, and uproots it, from any standpoint from which it may be viewed.

The constitution of Nebraska provides that:

"Railways heretofore constructed or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." Article 10, § 4.

And by section 7:

"The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph, and rail-

road companies in this state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises."

In pursuance of this constitutional provision the legislature of Nebraska passed an act which will be found set out in a note on pages 404, 405, 164 U. S., 17 Sup. Ct. 130, 41 L. Ed. 489.

The statute of Nebraska of 1887 (chapter 60, §§ 1-3)—

"Prohibits and declares to be unlawful all unjust and unreasonable charges made by a railroad company for any services rendered in the transportation (which includes all instrumentalities of shipment or carriage) of passengers or property, or in connection therewith, or for the receiving, delivering, storage, or handling of such property. The demanding or collecting, directly or indirectly, by a railroad company, from any person, of a greater compensation for such service than it demands or collects from any other person for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is declared to be unjust discrimination. It is also made unlawful to give any preference or advantage to, or to subject to any prejudice or disadvantage, any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever; and railroad companies are required, according to their respective powers, to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such contracting lines. By paragraph 17, upon complaint in writing concerning any lack of facilities or accommodations furnished by a railroad company for the comfort, convenience, and accommodation of individuals and the public, or concerning any unjust discrimination against any person, firm, corporation, or locality, either in rates, facilities furnished, or otherwise, the board of transportation, whenever, in its judgment, any repairs of, or additions to or changes in, any portion of the road, rolling stock, stations, depots, station houses, or warehouses of a railroad company, are necessary in order to secure the safety, comfort, accommodation, and convenience of the public and individuals, or any change in the mode of conducting its business is reasonable and expedient in order to promote the security and accommodation of the public, or to prevent unjust discrimination against persons or places, is directed to order the railroad company to make such repairs, additions, or changes." 164 U. S. 413, 414, 17 Sup. Ct. 134, 41 L. Ed. 489.

Under the constitution and statutes of Nebraska, one Hollenbeck and others appealed to the state board of transportation of that state to compel the Missouri Pacific Railroad to permit them, for their own private use, to erect an elevator on its right of way for the storage and shipment of grain, on the ground that others were granted a like privilege, and their elevators were insufficient to accommodate shippers, and that the refusal to grant them the same privileges and facilities was a violation of the statute and an unjust discrimination, etc. A hearing was had before the state board of transportation, and the relief sought was granted. The railroad company refused to comply with its order. Thereupon the state of Nebraska, under the act, filed its suit to compel the railroad company to conform to the order of the state board of transportation. The railroad resisted, and the supreme court of Nebraska construed its constitution and the statutes, and sustained the state board of transportation. The case was carried by writ of error to the supreme court of the United States, where the supreme court of Nebraska was reversed. In doing so, that court said:

"To require the railroad company to grant to the petitioners a location on its right of way for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company, for the accommodation of its own business, or for the convenience of the public. This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States."

A similar, but more analogous, case, in its details, came before the interstate commerce commission in *Mt. Vernon Milling Co. v. Chicago, M. & St. P. Ry. Co.*, 7 Interst. Com. R. 194. There the complaint was for an alleged unjust discrimination, in not permitting a location on its side tracks for a grain elevator, while it granted the same privilege to others under the same circumstances; and, secondly, in not constructing a switch for plaintiff, as it had done for others engaged in precisely the same business and under the same circumstances. This case arose under the laws of South Dakota. By the statutes of that state it is provided that:

"Every railroad company shall permit connections to be made and maintained in a reasonable manner, with its side track, to and from any warehouse, elevator or mill, and adjacent to any station on its line, without reference to its size or capacity, where grain or flour is or may be stored: provided, however, that such railroad company shall not be required to pay the cost of making and maintaining such connection, or of the siding or switch track necessary to make the same: and provided, further, that a majority of the commissioners appointed under this act shall direct such railroad to make such connection and siding." Comp. Laws 1887, § 146.

But the commission dismissed the suit on the authority of *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489.

Both of these cases afford much light on the case at bar, and erect a barrier against the relief sought. It will be observed, too, that, in both the cases cited, action was had under state statutes authorizing the things done which were done, while in this state no legislation exists which authorizes the state board of railroad commissioners, or any board, to compel the defendant to permit plaintiff to load cars in its yards, or to furnish plaintiff a private switch on which to load. All that is said upon the subject will be found in article 17 of the constitution of Arkansas of 1874, and sections 10, 11, and 22 of the act of March 11, 1899 (Sess. Acts 1899, p. 82 et seq.), and they fall far short of the legislation referred to in the states of Nebraska and South Dakota. These decisions apply to both aspects of this case. The constant loading of cars by wagons in defendant's

yards, all day and every day, by plaintiff, against the defendant's will, to the detriment, delay, danger, and denial of its own business, when no one else along its entire line was allowed to do so, and when it was not a common carrier of coal by such methods as plaintiff desired to employ, and was not furnishing cars or carrying coal for others in that way, nor holding itself out to do so, was, pro tanto, as much an appropriation of private property to private use, and therefore a taking of private property without due process of law, as it would have been, in the above-cited cases, to have compelled the defendants to allow plaintiffs to construct elevators on the rights of way of said defendants, to be used by said plaintiffs for private, and not for public, purposes; for it must be remembered that the plaintiff in this case was not engaged in any public business, but was simply a private citizen, operating a coal mine on his own account.

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### MOREDOCK v. KIRBY.

(Circuit Court, W. D. Kentucky. October 28, 1902.)

#### 1. CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES OF CITIZENS—STATUTE AUTHORIZING PERSONAL JUDGMENT ON CONSTRUCTIVE SERVICE.

Service of a summons issued against a defendant who is a citizen and resident of another state, made on the agent in charge of his place of business in Kentucky, in accordance with Civ. Code Prac. Ky. § 51, subsec. 6, which provides that "in actions against an individual residing in another state \* \* \* engaged in business in this state the summons may be served on the manager or agent of or person in charge of such business in this state," does not confer jurisdiction to render a personal judgment against the defendant. Such statute, as applied to actions in personam, is invalid, as in violation of section 2, art. 4, Const. U. S., which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states; the right to be exempt from a personal judgment for a money demand without the service of process being one founded on principles of natural justice, and one of the fundamental "privileges and immunities" of every citizen, recognized as such by the laws of Kentucky with respect to its own citizens.

#### 2. SAME—DUE PROCESS OF LAW

Such statute is also invalid as in violation of those clauses of the fourteenth amendment which provide that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor deprive any person of property without due process of law.

#### 3. SAME—PROPERTY RIGHTS—WAIVER.

A citizen and resident of one state has the constitutional right to engage in business in another state, and he does not thereby waive the right to object to the constitutionality of a statute of the latter state subjecting nonresidents who engage in business therein to judgments without personal service of process.

On Motion to Quash Return of Service on Summons.

Matt O'Doherty and Forcht & Field, for plaintiff.

R. A. McDowell, for defendant.

EVANS, District Judge. Clara Moredock, a citizen of Kentucky, brought this action in the state court against F. M. Kirby, a citizen

of Pennsylvania, but who at the time was doing business in the city of Louisville under the name of F. M. Kirby & Co. It is an action at law wherein the plaintiff seeks to recover \$15,000 damages from the defendant—First, for speaking and publishing of and concerning her certain alleged slanderous and defamatory words; and, second, for an alleged false imprisonment of the plaintiff by the defendant. Upon filing the petition in the clerk's office of the state court, the plaintiff caused a summons to be issued thereon against the defendant, which was placed in the hands of the sheriff of Jefferson county for service. The sheriff made return thereon in the following language:

"Executed July 15, 1902, on F. M. Kirby, doing business under the firm name of F. M. Kirby and Co., by delivering a copy of the within summons to C. P. Dodge, the person in charge of the business of said F. M. Kirby, at No. 504 and 506 Fourth avenue, Louisville, Ky., the said F. M. Kirby being a nonresident of the state of Kentucky, but being engaged in business in the state of Kentucky at Nos. 504 and 506 Fourth avenue, Louisville, Kentucky.

"E. T. Schmitt, S. J. C.  
"By H. Woods, D. S."

In due season the defendant, specially entering his appearance for that purpose only, filed his petition for a removal of the action to this court, and upon execution of the proper bond an order of removal was entered accordingly. Upon filing the record in this court the defendant entered a motion to quash the sheriff's return on the summons. By an act of the general assembly of the commonwealth of Kentucky, passed in 1893, section 51 of the Civil Code of Practice was amended, and the amendment is what is now commonly known as subsection 6 of section 51 of the Code. It is in this language:

"In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of such business in this state in the county where the business is carried on, or in the county where the cause of action occurred."

The determination of the motion to quash the return must, therefore, depend upon the validity of a service made pursuant to this legislation of the state of Kentucky and its efficiency under the constitution of the United States to give the court jurisdiction over the person of a citizen of another state upon whom, confessedly, service was not had unless the service indicated by the return must be held constructively to have given the defendant the notice which he was entitled by law to have before a court acquired jurisdiction over his person. Subsection 1, § 2, art. 4, Const. U. S., is in this language:

"The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

The purpose of this most essential provision, and the vital principle upon which it is based, must be obvious. It was matter of the gravest moment, if the people of the United States were to have "a more perfect union," or if "domestic tranquillity" was to be "insured" to them, as suggested in the preamble, that such a provision should be inserted in the organic law; otherwise each state would take care mainly of its own citizens, and by a system of discriminations, which would naturally grow more strict and hostile as time progressed, we should only have



had disunion and contention instead of "union" and "tranquillity." Hence the profound necessity for the provision that the citizens of each state "shall be entitled" to all the "immunities" of the citizens of the several states. This clause was not meant to announce an abstract proposition, but the constitution, with all the force and vigor possible, declares that the citizen of Pennsylvania shall be "entitled" in Kentucky to all the immunities and privileges of the citizens of Kentucky. Moreover, this great provision is mandatory, and must not and cannot be ignored by the courts. It is not claimed that a state court, under the legislative act above copied, could, by the sort of service had in this case, acquire jurisdiction over the persons of citizens of Kentucky unless in the presumably rare instances of their residing elsewhere but continuing to engage in business in Kentucky. Manifestly, under the laws of Kentucky, as the court judicially knows, citizens of that state generally have entire immunity from being subjected to personal judgments for money upon such a service of process in actions at law,—that is to say, citizens of Kentucky generally are exempt from judgments on such service; and, if citizens of Kentucky have such immunity, or are exempt from such consequences, then, in the very language of the constitution of the United States, citizens of Pennsylvania are "entitled" to it also. This is the rule, and citizens of other states could not be deprived of the benefit of its operation, even if the principles of natural justice, to which we shall have occasion to allude, did not intervene. Nor can the rule be changed, and such a result be accomplished, constitutionally, under cover of the very rare exceptions just mentioned of citizens of Kentucky residing out of the state, but continuing to do business here. The constitutional provision deals with the rights of citizens generally, and its operation cannot be contracted by isolated instances.

The supreme court has persistently declined to limit itself to any express definition of the terms "privileges and immunities," as used in the constitution, but has repeatedly held that they were such as are fundamental, and belong to every citizen of all free governments. *Slaughterhouse Cases*, 16 Wall. 77, 21 L. Ed. 394. It is not doubted that one of them is the right to be exempt from a personal judgment for a money demand without the service of process,—an exemption which the supreme court has said was "founded on principles of natural justice." *Pennoyer v. Neff*, 95 U. S. 730, 24 L. Ed. 565; *Insurance Co. v. French*, 18 How. 406, 15 L. Ed. 451. That right is doubtless fundamental, and belongs to every citizen of every free country. Such an exemption is certainly an "immunity" or a "privilege" of the citizens of Kentucky under the laws and judicial proceedings of that state. If a citizen of Kentucky has the "immunity" of being exempt, under such circumstances, from a personal judgment, it constitutionally follows that the citizen of Pennsylvania is equally "entitled" to it. And it may be added that the right to be protected by the constitutional inhibition of any state legislation which shall subject any citizen to the liabilities of a personal judgment without due process of law is the common right of all. Can a citizen of Pennsylvania lose this right in Kentucky by reason of not residing here? We think not. On the contrary, we think it makes no difference where an individual resides or engages

in business. The authorities hold that no court of justice in this country can acquire jurisdiction over him, or a right to render a judgment in personam against him, without a service upon him in person of a summons in the action, unless he enters his voluntary appearance therein. Nothing else is "due process of law." 95 U. S. 714, 24 L. Ed. 565. Such a statute as the one in question cannot abrogate this fundamental rule as against a citizen of another state, though it cannot be doubted that as against the property of the nonresident so engaged in business there may be a judicial proceeding, which will be due process of law for its subjection to the liabilities of the owner. Of course, a state, as to property or a res within its borders, has ample power to provide a course of judicial procedure respecting it and judgments against it. Property not being in any sense a citizen, is not, per se, entitled to any privileges or immunities under the constitution. Hence all the states have attachment laws under which property may be seized and subjected to certain liabilities of the owner, whether he is actually served with process or not. Constructive service is sufficient in such cases.

If, therefore, we went no further, it must be plain upon the face of the Kentucky legislation, when it is tested by the supreme law of the land, that it violates the rights of the defendant as they are guaranteed to him by the national constitution by depriving him of an immunity or exemption allowed to citizens of Kentucky. In the case of *Carpenter v. Laswell* (Ky.) 63 S. W. 609, the court of appeals seems to have assumed that service of a summons upon a citizen of another state, made pursuant to the provisions of the act of 1893, was valid; but, if the question had been raised at the argument of that case, it does not so appear from the opinion of the court, wherein the question of the validity and potentiality of the legislation is neither considered nor decided. But, even if it had been passed upon, this court would not have been bound by the ruling. See the instance of conflict pointed out in *Goldey v. Morning News*, 156 U. S. 520, 15 Sup. Ct. 559, 39 L. Ed. 517. So far as we can find reported, the precise question involved in this case does not seem to have been decided by any court, though it is quite true that many questions very closely related to it have been adjudicated. A leading case is that of *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648. In that case the attempt was made in Louisiana to uphold a judgment in personam rendered in New York against an absent partner, where, under a New York statute, service had been made upon the partner found in that state, but not upon the absent partner in person. The court held that such a service could not confer jurisdiction over the person of the absent partner, and that the judgment was void, notwithstanding the provision of the constitution requiring that full faith and credit shall be given in each state to the judicial proceedings of every other state. The doctrine of this case was adhered to, and, indeed, emphasized, in *Hall v. Lanning*, 91 U. S. 161, 23 L. Ed. 271. *Grover v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670, was a case where Radcliffe, a citizen of Maryland, had executed a bond containing a warrant authorizing any attorney of any court of record in New York, or in any other state, to confess judgment for the penalty therein named, and, under a local statute per-

mitting such a procedure, judgment had been entered against him in Pennsylvania by a prothonotary, without service of summons or an appearance in person or by attorney. In a suit on the judgment in Maryland it was held that it was not valid because there had been no personal service on the defendant nor any appearance entered by him. In *Wilson v. Seligman*, 144 U. S. 45, 12 Sup. Ct. 541, 36 L. Ed. 338, it was held that a judgment rendered in one state upon a notice or summons served in another state was void, notwithstanding the law of the state where the judgment was rendered authorized such a proceeding. The law of one state having no extraterritorial force could not legalize a service made in another state. In the celebrated case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, there had been a sale of land under an execution issued on a judgment rendered on a service of summons by publication only, according to a statute of Oregon. It was held that the judgment was void, and that the purchaser acquired no title, because there was no personal service of summons on the defendant, and no appearance by him in the action in which the judgment was rendered. In *Freeman v. Alderson*, 119 U. S. 188, 7 Sup. Ct. 165, 30 L. Ed. 372, the same doctrine was affirmed, and a judgment in personam for the costs of a suit was held to be void where there had been no personal service of process, although there had been an attachment levied upon property. This ruling was held to be in accord also with that in the case of *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931. Another phase of the same general question is dealt with in *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896. In the case of *Brooks v. Dun* (C. C.) 51 Fed. 138, which arose under a statute of Tennessee quite similar to the Kentucky statute, Judge Hammond, in an elaborate and very instructive opinion, reached the conclusion that the service of the summons in that case was void. He reviewed the authorities with great care, and, while the precise question now involved did not there arise, the two cases are very nearly related.

It thus appears that the statutes of various states which have attempted to deny or abridge the right of the citizen to personal service of summons as a necessary condition precedent to jurisdiction over him in a judicial proceeding have been held to be wholly ineffectual for the purpose. But, though this is true, all the authorities hold that, where the purpose of the action is to seize and attach property merely, no personal judgment being sought, different principles apply. If property is within the "grasp of the court" by having been seized within its jurisdiction by attachment or other proper writ, it will become subject to whatever orders and judgments the court may make respecting it. So a court may obtain jurisdiction in certain cases to establish the status of a citizen of the state in which the court sits. But these matters stand apart, and in no way affect the general doctrine of the courts, and especially of the supreme court of the United States, that the principles of natural justice require that no one shall be subjected to a money judgment in personam unless he has been duly and personally served with notice of the pendency of the action, or unless he voluntarily appears therein. Even corporations, which must necessarily act through agents, and a summons upon which

must be served upon agents, have rights which are guarded by the same general principles. Examples of this are found in the cases of *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, and *Goldey v. Morning News*, 156 U. S. 519, 15 Sup. Ct. 559, 39 L. Ed. 517. The general rule of law applicable to all personal actions for the recovery of money is very accurately stated in 1 Black, Judgm. § 220, in this language:

"It is an unquestioned principle of natural justice that a man should have notice of any legal proceeding that may be taken against him, and a full and fair opportunity to make his defense. The law never acts by stealth; it condemns no one unheard. It is true that in proceedings in rem the notice may be constructive only, but here the action is directed against the thing itself, and there is no attempt to fasten a personal liability upon the parties concerned. It is true also that constructive service of process is authorized in some other cases, but not for the purpose of a personal judgment. A personal judgment rendered against a defendant without notice to him or an appearance by him is without jurisdiction, and is utterly and entirely void. We think it may be regarded as settled that a judgment of any court, in a suit requiring ordinary adversary proceedings, that appears upon its face or may be shown by evidence (in a case where it may be shown) to have been rendered without jurisdiction having been acquired, by notice, of the person of the defendant, or without jurisdiction of the subject-matter, is void, and may be treated as being so when it comes in question collaterally. Nor is this rule confined to judgments at law. A decree in chancery against a defendant who was never served with process and did not appear is void, and may be set aside, although not appealed from. And, if the court has not acquired jurisdiction of the person of the defendant, as in the case that no sufficient process has been served upon him, no judgment, even of abatement, can be rendered against the plaintiff, for the defendant must become a party before the court before he can have a judgment."

In *Goldey v. Morning News*, 156 U. S. 519, 15 Sup. Ct. 559, 39 L. Ed. 517, allusion is made by the court to the service of "mesne process" upon the "authorized agent" of a defendant, but mesne process and original process and final process are very different things. Bouvier, in his *Law Dictionary*, defines the former by saying that "process which is issued in a suit between the original and final process is called 'mesne process.'" The court, of course, used the word advisedly, and had nothing in view except an interlocutory notice, or something of a kindred nature. While constructive or substituted service—one form of which was attempted to be provided for in the amendment made to the Civil Code of Practice by the act of 1893—is adequate in actions in rem or quasi in rem as to the thing seized, it is not so as to any judgment in personam which may be sought. This is the rule clearly and certainly established by the authorities.

The general question involved in the pending motion may, therefore, be stated to be this: Does the character of service indicated by the sheriff's return on the summons confer on the court the lawful power to hear and determine the cause and render judgment against the defendant if he shall fail to defend it; in other words, does that service give the court jurisdiction over the person of the defendant? What has been said resolves the question in the negative, inasmuch as, in the court's opinion, such a service is a nullity.

2. This result may be reached upon other grounds, possibly different, though still closely connected. Not only would the provisions of the fourth article of the constitution be disregarded by holding other-

wise, and not only would the "principles of natural justice" be thereby violated, but the act of 1893 appears clearly to conflict with that clause of the fourteenth amendment to the constitution which says that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." That amendment also contains this most important clause, "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The supreme court has frequently defined the phrases "the equal protection of the law" and "due process of law" to mean "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance." *Pennoy v. Neff*, 95 U. S. 733, 24 L. Ed. 565, and later cases. Bearing that definition in mind, it may be said that, if the court could not, under the act of 1893, acquire jurisdiction over the person of the defendant by the mode of service attempted to be employed, then to subject him to a personal judgment whereby he would be deprived of his property would manifestly violate his rights under the fourteenth amendment. The state of Kentucky being forbidden by the constitution of the United States to pass any law which would deprive the defendant of his property without due process of law, it is not permissible for the state to enact a statute which enables its courts to render a judgment against him without a personal service of process upon him "within the state," and in this way deprive him of his property. So that, from whatever point of view we look at the question, whether from that of the fourth article of the constitution or from that of the fourteenth amendment, it seems to the court that the legislation referred to cannot be supported. If the legislation fails, all proceedings under it must necessarily fail also. And, as already indicated, this result is emphasized and vindicated to the moral as well as the legal sense by those principles of law which so equitably require that constructive or substituted service, such as here attempted, shall fail in such a case because the principles of natural justice demand personal service of process as an indispensable basis of jurisdiction over a defendant who does not voluntarily enter his appearance.

3. It is also contended that a citizen or resident of another state, who has engaged in business in Kentucky since the passage of the act of 1893, has done so with notice of its provisions, and should be held to have impliedly consented to be subject thereto. His constitutional right to acquire, hold, and enjoy property, or otherwise to engage in business in this state, on an equal footing with any citizen of Kentucky, is unquestionable. It cannot be presumed that such a right would be waived at all, and certainly not where there was no possible necessity nor consideration for doing so. Indeed, his rights in the premises might be regarded as inalienable; but, whether so or

not, anything short of the most express and unequivocal renunciation of them would necessarily be ineffectual. Nothing should be left to implication in such a case. Any implication here would be too shadowy to demand serious consideration.

It follows that the motion to quash the return of the summons must prevail, and an order to that effect will be entered.

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KEUFFEL & ESSER CO. v. H. S. CROCKER CO.

(Circuit Court, N. D. California. September 2, 1902.)

No. 13,072.

**1. UNFAIR COMPETITION—RULE GOVERNING.**

Where a complainant has been in business for many years, and has built up a high reputation and large sale for its goods, rendering its good will valuable, the law requires another, entering the market as a competitor, to use such method of wrapping, labeling, and cataloguing of his packages as not to lead an intending purchaser of ordinary intelligence, using ordinary care, into the mistaken belief that he is purchasing the goods of complainant.

**2. SAME—IMITATION OF GENERAL DRESS OF GOODS.**

Defendant, after having been agent for complainant for a number of years for the sale of drawing papers and materials, entered the market as a competitor, using for its drawing papers the same form of package, the same color of wrapper, with labels of the same general design and appearance, upon which was printed a name for each kind of paper which, while not identical with that used by complainant for the same kind, was similar in appearance in each case, the general effect of the package as a whole being so nearly like complainants as to require close scrutiny to distinguish between them. *Held*, that such imitation evidenced a fraudulent design, and constituted unfair competition, which entitled complainant to an injunction.

**3. SAME—FORM OF PACKAGE.**

The putting up of drawing paper in packages for sale in the form of rolls, that being the most convenient form for handling such goods and not peculiar or unusual, cannot be considered in itself an infringement upon the rights of an older dealer.

In Equity. Suit for unfair competition. On motion for a preliminary injunction.

Marcus Rosenthal, Walter S. Logan, and Fred C. Hanford, for complainant.

Lloyd & Wood, for defendant.

MORROW, Circuit Judge. The complainant, a corporation organized under the laws of the state of New Jersey, brings this suit against the defendant, a California corporation, to recover damages for the alleged infringement of the complainant's rights in and to certain trade names and marks, and for an injunction restraining the defendant from the further commission of such alleged infringing acts.

The complainant and its predecessor have been engaged in the business of manufacturing, importing, and selling, at wholesale and

¶1. Unfair competition, see notes to *Scheuer v. Miller*, 20 C. C. A. 165; *Lare v. Harper*, 30 C. C. A. 376.

retail, drawing or draughting materials, engineers' supplies, and surveying instruments for over 30 years. It is alleged that the complainant and its predecessor had adopted and used for many years certain arbitrary names by which to describe the drawing papers sold by them, as well as certain forms of packages and peculiarities in labels, and that such goods so named and marked had been catalogued by the complainant annually, extensively advertised throughout the United States, had achieved a high reputation, and the sales thereof had been a source of great profit to complainant. The defendant is charged with infringing the rights of complainant by the use of similar trade names and marks, similar form of packages, and by the issuance of a similar catalogue to the copyrighted one of the complainant, and by acts of unfair competition generally. The defendant has been for some years engaged in the general stationery business, and from May, 1892, to about October, 1898, was the sole agent for the Pacific Coast for the complainant's goods. The agency was withdrawn by the complainant at the time last mentioned, and the defendant thereupon entered into the business of selling goods similar to those of the complainant upon its own account, labeling and advertising them as its own production and importation. The defendant denies that the complainant has any exclusive rights in and to the trade-names adopted, to the form or wrapping of the packages, to the labels or catalogue, averring that similar ones are in general use by importers and dealers in such goods. The defendant admits that the labels first in use by it were similar to those used by the complainant, and states that upon its attention being called to such fact it discontinued the use of such labels, and has since used entirely different and distinctive labels, and so dressed its goods as to easily distinguish them from those of the complainant. It denies having acted with fraudulent intent in any of the transactions complained of, and denies that its acts have in any way damaged the complainant or been in fraud of its rights.

The following lists of names used by the respective parties to describe their drawing papers are set up by the complainant in support of its allegation of infringement:

**Names Used by the Complainant.**

Universal.  
Duplex.  
Normal.  
Paragon.  
Simplex.  
Economy.  
Cupola.  
Anvil.  
Corona.  
Alba.  
Abacus.  
Gothic.  
Doric.

**Names Used by Defendant.**

University.  
Deluxe.  
Normandy.  
Pebble.  
Simplicity.  
Economic.  
Composite.  
Anchor.  
Cornth.  
Antique.  
Arcade.  
Ionic.  
Delos.

It is to be observed that in each instance the word adopted by the defendants begins with the same letter as the word used by the complainant for the corresponding article, with one exception, and in that case the defendant's word is suggestive of the complainant's, each re-

lating to a style of architecture. While the words alone, if considered apart from the label as a whole, might not be deemed to present so close a resemblance as to constitute infringement, when connected with the associating lettering and general design, and forming a part of a label almost identical in size, shape, coloring, and lettering with that of the complainant applied to similar goods, it is very clear that the mind of the purchaser would readily be deceived by the similarity, and be quite as easily induced to purchase the goods of one as the other. In this way the defendant would be enabled to take advantage of the reputation of the complainant's goods, if such reputation were well established and of value in the commercial world. In the affidavit of William Keuffel, the president of the complainant corporation, it is stated upon oath that the good will of the complainant's business at the time of bringing the suit was of the value of more than \$500,000, by reason of the superior quality of the drawing papers sold and controlled by it, and its efforts in having the papers known by advertising, and the general acceptance of the papers by the public as meritorious and of high grade. The defendant has not controverted this showing, but admits having been the agent of the complainant for such goods for more than six years upon the Pacific Coast. Upon the evidence now before the court, therefore, the complainant must be presumed to have established the high reputation of its goods, in connection with which the trade-names used by it were of considerable value. The defendant, then, entering the field of competition when the complainant's goods were in this situation, appears to have acted with design in the adoption of labels of general design and appearance in imitation of those used by the complainant, including the selection of similar names for the description of like goods. The complainant's goods had become known to the eye by the form of package (consisting of a roll), the peculiar color of the outside wrapper inclosing this package, and the distinctive label describing the contents. These labels were alike for the different varieties of paper, differing only in the name describing the particular kind. It required a second glance to distinguish the particular name upon each package, while the general effect of the label as a whole was easily comprehended at the first glance. Every feature of this style of wrapping and marking was apparently copied by the defendant, with the result that close scrutiny was required to distinguish its packages from those of the complainant. Such use of names, labels, and wrappers was undoubtedly infringement, and the sale of such goods so wrapped, labeled, and marked was unfair competition.

With regard to the cut of a griffin used upon these labels, it is contended by the defendant that it has used this figure upon its stationery generally for many years past, and that for this reason, and because of its different position from that used by the complainant, it is not an infringement. I am of the opinion that the use of the griffin alone would not infringe, as the complainant is not shown to have any exclusive rights in and to the use of such a design; but associated with the general features of the infringing label, of similar color, and applied to the same class of goods, it forms a distinctive part of the



infringing device. Such use is unfair, and cannot be regarded with favor by a court of equity.

I do not think the contention of the complainant can be upheld with regard to infringement by reason of the form of package, namely, a roll. That is a convenient form for the handling of such goods, and should be permitted to any one dealing in them. If care is taken to so dress the goods as to present a different appearance otherwise, no deception is likely to be produced upon the purchasers because of the similarity in shape, especially when it is not of a peculiar or unusual form.

With regard to the catalogue of the defendant claimed by the complainant to be an infringement, so far as it contains cuts of labels that were infringements of those of the complainant, it may be said to have infringed, but not in the general appearance or design of the catalogue. The rights of the complainant under the copyright law in and to its copyrighted catalogues are not involved in this action, and cannot be determined upon any issues here presented.

The law applicable to this case may be stated in a few words. It requires the defendant, in offering his goods to the public, to use such method of wrapping, labeling, and cataloguing of his packages as not to lead an intending purchaser, of ordinary intelligence, using ordinary care, into the mistaken belief that he is purchasing goods placed upon the market by the complainant, when in fact he is purchasing the defendant's goods. The defendant does not appear to have observed this requirement, and the complainant is therefore entitled to the protection of a temporary injunction. It is immaterial that the defendant has changed the form of its label since this action was commenced. The complaint is directed against the acts of the defendant committed prior to the commencement of the action.

Let a temporary injunction issue in conformity with this opinion.

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### W. L. WELLS CO. v. AVON MILLS.

### SAME v. GASTONIA COTTON MFG. CO.

(Circuit Court, W. D. North Carolina. June Term, 1902.)

#### 1. CORPORATIONS—LEGALITY OF ORGANIZATION—ESTOPPEL TO DENY.

Certain persons obtained a charter from the state of Mississippi for a trading corporation, which was authorized to commence business when a stated amount of its capital stock had been paid in. They organized the corporation and commenced business in the corporate name, although the required amount of capital stock was not paid in until later. *Held*, that a customer to whom the corporation sold goods thereafter could not question the legal existence of the corporation for the purpose of defeating its right to maintain an action in a federal court, as a citizen of Mississippi, to recover the price of such goods.

#### 2. SAME—AUTHORITY OF OFFICERS AS AGENTS—SUBSCRIPTION TO STOCK IN OTHER COMPANIES.

The managing officer of a corporation organized for the purpose of trading in cotton has no power to bind it by a subscription to the stock

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¶ 1. See Corporations, vol. 12, Cent. Dig. § 84.

of another corporation, and a debtor of the trading company who pleads a payment made on such a subscription by authority of its president and manager as a payment on his debt has the burden of proof to show that the subscription was authorized by the company, or that the payment was known to and ratified by it.

The plaintiff in the two cases above brings suit as a corporation against the defendants to recover about the sum of \$70,000, principal and interest, claimed to be due for cotton sold and delivered to the defendants. The plaintiff's residence and place of business is in the city of Vicksburg, Miss., and the defendants are both corporations under the laws of North Carolina, and are engaged in the manufacture of cotton at Gastonia, in said state. The affairs of both defendants are under the same management, and John F. Love is secretary and treasurer of both companies. During the years 1899, 1900, and 1901 the plaintiff sold and delivered to the defendants cotton for use in defendants' mills, and these two suits were brought to recover the amount claimed by plaintiff as the purchase price thereof. The cases were tried at Charlotte, at May term, 1902, of the circuit court, and verdict and judgment rendered for plaintiff. Facts sufficient for an understanding of the legal points involved are stated in the opinion.

Jones & Tillett and Murray F. Smith, for plaintiff.

Burwell, Walker & Cansler and Chas. Price, for defendants.

BOYD, District Judge (after stating the facts as above). There are two cases pending for trial,—the one the W. L. Wells Company against the Avon Mills, and the other the same plaintiff against the Gastonia Cotton Manufacturing Company. The matters involved are substantially the same in both cases, and by consent of all parties the two cases are consolidated for trial. The fact is undisputed that the defendants dealt with the plaintiff as a corporation under its corporate name, and bought cotton, which was delivered to defendants by plaintiff at an agreed price, and that the amount claimed by plaintiff for the purchase of the cotton is correct. The defendants then set up two defenses against plaintiff's recovery,—the first as to the jurisdiction of the court, and the second an alleged payment of \$50,000 on plaintiff's debt. In the first place, the defendants deny that the plaintiff is a corporation under the laws of the state of Mississippi, and is therefore not a citizen of said state, and cannot maintain its action in this court. This defense is based upon the allegation that plaintiff was not duly organized under its charter, and was not in fact a corporation at the time of its dealings with defendants and at the bringing of the suits; and it is contended by defendants that, if this be true, the plaintiff did not have a legal existence as a corporation in the state of Mississippi, was not a citizen of said state, and consequently there was no diverse citizenship, and this court has no jurisdiction of the cause of action. The evidence upon this point is uncontradicted, and consists of a charter, duly issued under the laws of the state of Mississippi, creating a corporation to be called the W. L. Wells Company, in which W. L. Wells, John T. Wells, and George Butterworth are named as cor-

porators, authorizing the organization of said corporation with a capital stock of \$50,000; the purpose of the corporation being to deal in cotton; to begin business as such dealer when the sum of \$10,000 of the capital stock was paid in. Under the authority of this act of incorporation the corporators met, organized, and elected W. L. Wells president of the company, and one of the other corporators as secretary and treasurer. Thereupon a charter or certificate of incorporation was duly issued to the said company by the proper authorities of Mississippi, and the company commenced business. The \$10,000 of capital stock was not paid in at first, but the undisputed testimony is that the net profits of the company for the first year of its business were \$37,000, and from this amount the required \$10,000 of capital stock was paid in. The dealings of defendants with the plaintiff commenced soon after the corporation was organized, but the account between them for the first year has all been settled up, and the account upon which this controversy arises is based on transactions subsequent to the first year of plaintiff's existence as a corporation, and after the \$10,000 of capital stock had been paid in, so that plaintiffs had not only organized as a corporation under the provisions of law, but, according to the evidence, the \$10,000 of capital stock had been paid, anterior to the time the cause of action in this case arose. All of the transactions which the defendants had with the plaintiff were in its corporate capacity as the W. L. Wells Company. Every letter of plaintiff to defendants (and there are a great many of them) concerning the sale and delivery of the cotton for which plaintiff sues is upon paper headed, "The W. L. Wells Company, Incorporated," and the defendants, in answer to these letters, and in making orders for cotton to be shipped to the mills, in every instance addressed "The W. L. Wells Company." The bills of lading for cotton shipped defendants were made out in the name of the W. L. Wells Company, and the checks sent by defendants in making payments were all payable to the said company.

The first question (and that is the question which affects the jurisdiction) is this: Is the W. L. Wells Company a corporation of the state of Mississippi, and thus entitled to maintain its action against the defendants, who are citizens of North Carolina, in the circuit court of the United States? It is the opinion of the court that the evidence is conclusive upon this point. It is true that at the time the corporators perfected the organization of the corporation the \$10,000 of capital stock required to be paid before the corporation could engage in business was not paid, but, although this be true, when the company was organized and its officers elected under the provisions of the act of the legislature the company assumed a legal existence. The persons named in the charter had exercised the franchise of the corporators; that is, the right to organize and exist as a legal entity. There yet remained to the company the right to exercise the franchise of the corporation, which was the right to buy and sell cotton in pursuance of the purposes for which the corporation had been created. In this charter, as in many others, there are two separate and distinct franchises. The one is the franchise of the corporators named in the act, which is the power conferred upon them

to organize and become a body politic. The other is the franchise of the corporation; that is, the right of the corporation, when it has been organized, to proceed to business. The body becomes a corporation when the individual corporators have exercised the first right (that is, to organize under the provisions of the charter); and when this is done, in the opinion of the court, the corporation has a legal existence, such as to render it capable of suing and being sued. If, however, this doctrine is not sound, it is a fact that, before the transactions which are the ground of this claim were begun with the defendants in this case, the corporation known as the W. L. Wells Company had not only organized under the provisions of the law, but had actually paid in the \$10,000 of capital stock which authorized it to proceed to do business, for the testimony of John T. Wells is undisputed, either by facts or circumstances, that the \$10,000 of capital stock was paid in from the first year's profits. Further than this, even if the requirements of the charter have not been complied with to the extent necessary to constitute a corporation under the laws of Mississippi, yet it is an uncontroverted fact that W. L. Wells, John T. Wells, and George Butterworth are all citizens and residents of the state of Mississippi, were so at the time of the dealings with defendants and at the time of the bringing of this suit, and still are citizens of said state, and defendants are citizens of North Carolina. Can it be, therefore, that, upon a mere technical question of corporation or no corporation, these parties, who have bought and delivered cotton to the defendants, upon defendants' order, at prices which are not disputed by the defendants, are to have their suit dismissed from court, and be ousted of their remedy to recover from defendants a debt, part of which, at least, is admitted now to be due? The court cannot coincide with this view, but, on the other hand, is of the opinion that plaintiff is a corporation, and is entitled to maintain its action, and the jury is instructed to find the issue as to jurisdiction in favor of the plaintiff. On this point the court does not deem it necessary to discuss the question that plaintiff was exercising corporate franchises with the knowledge and consent of the state of Mississippi. *Irrigation Dist. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773.

The defendants next allege a payment of \$50,000 upon plaintiff's claim; the basis of payment being money paid by John F. Love, as secretary and treasurer of the two defendants, to a corporation known as the Loray Mills, for stock to that amount in the said corporation. The evidence to support this payment is, substantially, that W. L. Wells agreed to take \$50,000 of stock in the Loray Company, as shown by a letter written by him to John F. Love on October 4, 1900. In this letter Wells stated that he had arranged to take \$50,000 of the Loray stock, but asked to let it come in on the last payments. In the same letter Wells wrote Love, in substance, to keep the Loray subscription a secret from his (Wells') associates, and to mark letters to him concerning it "personal." This injunction was observed by Love, according to the testimony. W. L. Wells and Love had had some conversation about the former taking stock in this company before, but nothing definite had been said until this letter was written. Love at one time (so he testified) had taken \$10,-

000 of money due the W. L. Wells Company for cotton, and applied it as a payment upon the Loray stock, and at another time took \$40,000 of money due the W. L. Wells Company for cotton, and applied it in the same way; but there was no evidence whatever that these alleged applications of money were made by authority or consent of the W. L. Wells Company, or that the said company ever ratified said payments. Neither was there any evidence that W. L. Wells was authorized by the company to subscribe for stock in the Loray Company when he agreed to take the stock, or that the company at any time ratified any subscription for stock in the Loray Company made by said W. L. Wells. Love did not give notice to the company that he had taken any money due it and applied it for payment for stock in the Loray Mills, and it was not until the W. L. Wells Company had called upon the defendants for a settlement of the amount due for cotton, and for which this suit is brought, that Love, as agent for the defendants, or in any other manner, made known to the W. L. Wells Company that the alleged payment of \$50,000 was claimed.

In the last defense set up by the defendants (that is, the alleged payment of \$50,000 claimed as a credit upon plaintiff's debt), three principles of law are involved: First. That defendants, having dealt with plaintiffs as a corporation, are estopped to deny its corporate existence in order to prevent a recovery for the price of cotton sold and delivered. This principle is so well settled that no citation of authority in support seems to be necessary, but attention is called to *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523, and *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784. Second. W. L. Wells, being the agent of the plaintiff corporation for the purpose of carrying on its business as a dealer in cotton, was not authorized to subscribe for stock in an incorporated company for his principal, and the principal would not be bound by any contract the said agent would make in this behalf, unless express authority is shown, or there is evidence that such contract was afterwards ratified by the principal; nor was it within the scope of the agent's authority to direct the application of money due his principal in payment for stock in the Loray Company, and if defendants thus applied money due plaintiff, without the consent of the plaintiff, it was unauthorized, and such application cannot avail defendants against plaintiff's recovery in this action, unless the defendants introduce testimony which satisfies the jury that the plaintiff afterwards ratified the transaction. As before stated, the negotiations in regard to the subscription for stock in the Loray Company were had between W. L. Wells and Love. There is no evidence that these negotiations were ever brought to the knowledge of the plaintiff, or to John T. Wells and George Butterworth, the other incorporators; nor is it shown that the plaintiff in its corporate capacity, or that the associates of W. L. Wells, had any knowledge whatever of the application of money due for cotton in payment for stock in the Loray Company; nor is there any evidence that the plaintiff corporation or W. L. Wells' associates by any subsequent act ratified the subscription for stock or the application of funds in payment therefor. *Schutz v. Jordan*, 141 U. S. 213, 11 Sup. Ct. 906, 35 L. Ed. 705; *Owings v. Hull*, 9 Pet. 627, 9 L. Ed.

246; *Baldwin v. Burrows*, 47 N. Y. 211; *Starr & Co. v. Galgate Ship Co.*, 15 C. C. A. 366, 68 Fed. 243. From the evidence in this case the conclusion is irresistible that the defendants were put upon notice that the contract which they allege for the Loray stock was a contract for the benefit of W. L. Wells individually, and, being thus put upon notice of this fact, they were bound to inquire into the authority of W. L. Wells, no matter how general his powers might have been, as it is a rule of universal application that no agent, however general his authority, can apply his principal's property to the payment of his individual debts without the special authority of his principal; and it is a further rule of law that he who assumes to rely upon the authority of an agent to bind his principal to the discharge of his own obligations must prove actual authority if a contention arises. *Chrystie v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Park Hotel Co. v. Fourth Nat. Bank*, 30 C. C. A. 409, 86 Fed. 742. Third. The defendants having admitted the purchase of the cotton, and its delivery at an agreed price, the burden is then upon them to prove by a preponderance of testimony a payment which is alleged by them and denied by the plaintiff. Upon consideration of all of the testimony in this case, the court is of the opinion that there is no evidence reasonably sufficient to go to the jury to sustain defendants' alleged payment. Wells was not authorized to subscribe for stock for the plaintiff in the Loray Mills or any other corporation; nor was the money paid by Love for the stock applied with the knowledge or assent of the plaintiff, or such application afterward ratified by it. W. L. Wells had no power to bind his company upon any such contract, either as to the subscription for the stock, or as to the payment of the money from the amount due for cotton. At the time the money of the plaintiff was taken by Love, and applied, as he states, in payment for stock in the Loray corporation, the said corporation had not been organized, nor was it organized for months afterwards; and when the organization took place no representative of the plaintiff company was present, and there is no evidence that the plaintiff had notice of the meeting at which the organization was perfected. Indeed, the evidence shows that W. L. Wells himself had no notice of the meeting at which the organization was effected, and was not present either in person or by proxy. In the meantime the capital stock of the Loray Company, which was \$1,000,000, was changed, and instead of \$1,000,000 of stock, all of the same character, \$700,000 of preferred stock was issued to certain stockholders, and \$300,000 of common stock remained, and of this \$300,000 of common stock it was proposed to issue \$50,000 to the W. L. Wells Company as a payment on its debt for cotton. In other words, after \$700,000 of stock in the Loray Mills had been preferred and given priority in lien upon the property and for the dividends of the company, the proposition was to issue \$50,000 of the common stock, which, so far as the evidence shows, was without market value, as a credit upon a valid debt due to the W. L. Wells Company for cotton which had been sold and delivered to the defendants, and had been consumed by them in their operations.

The jury is therefore instructed to find the other issues submitted to them in favor of the plaintiff.

## In re TAYLOR.

(District Court, D. Massachusetts. October 22, 1902.)

No. 1,369.

## 1. HABEAS CORPUS—PRISONER HELD FOR EXTRADITION—SCOPE OF INQUIRY.

In habeas corpus proceedings for the discharge of a prisoner held for extradition to a foreign country, the court is not bound to accept the statement of the complaint that the place where the alleged offense was committed was at the time of its commission within the territorial jurisdiction of such foreign country, but should determine that question for itself, being governed by the action of the legislative or executive branch of the government with respect to the political status of the place or country where the offense is laid, if any such action has been taken, and, if not, acting upon such information as it deems most trustworthy, to obtain which it may consult the treaties, statutes, or decisions of foreign countries.

## 2. EXTRADITION—SCOPE OF TREATY WITH GREAT BRITAIN—OFFENSE COMMITTED IN SOUTH AFRICAN REPUBLIC.

The territory of the South African Republic was not a part of the dominions of Great Britain, in an ordinary or unqualified sense, prior to the proclamation of Lord Roberts of 1900, making it a British colony, nor in such sense as to bring it within the purview of the extradition treaty of 1889 between Great Britain and the United States; and under that treaty Great Britain cannot require from the United States the extradition of a person for an offense alleged in the complaint to have been committed at Johannesburg prior to the date of such proclamation.

## 3. SAME—CONSTRUCTION OF TREATY.

The treaty of 1889 between Great Britain and the United States, providing for the extradition of persons charged with offenses "committed within the jurisdiction of" either party, does not authorize the extradition of a person charged with the commission of an offense in a place or country which was not at the time within the jurisdiction of the country seeking the extradition, although it has since been brought within such jurisdiction.

## Petition for Writ of Habeas Corpus.

William H. Preble, for petitioner.

H. E. Bolles, for British consul.

LOWELL, District Judge. The petitioner for habeas corpus was arrested and held by the United States commissioner for extradition to Great Britain. The complaint on which he was arrested alleges that the offense was committed "between October 1, 1899, and February 1, 1900, at Johannesburg, within the jurisdiction of his Britannic majesty." At the time in question, Johannesburg was in the physical and political control of the South African Republic, and Lord Roberts' proclamation annexing the territories of that republic to Great Britain had not been issued. By order of the court, the United States district attorney was informed of the pendency of these proceedings, and it is understood that he has sought instructions from the department of justice. He has not addressed this court either in support of or in opposition to the issuance of the writ.

The counsel for the British government contends:

I. That this court cannot pass upon or consider the political status of Johannesburg, or any other place mentioned in extradition proceed-

ings, but is bound to accept the statement of the complaint,—at all events, if supported, like this complaint, by a certificate of the United States ambassador in London that the offense is “alleged to have been committed in his majesty’s colony of the Transvaal.” He contends that the political status of Johannesburg is to be determined solely by the secretary of state. That habeas corpus will issue to release a person held for extradition to Great Britain on account of a crime alleged to have been committed in Paris, for example, is too plain for argument, and the case would not be different if the complaint alleged that Paris was within the dominions of his Britannic majesty. If the legislative or executive department of the government of the United States has taken action regarding the diplomatic or international status of any place or country, this court is ordinarily bound by that action. But it is bound, also, to inquire what that action has been, and to govern itself accordingly. The court does not, as was suggested by the learned counsel for the British consul, refuse to take any action for fear that its decision may not be approved thereafter by the legislative or executive department. It investigates the question presented, follows the decisions made by the legislative and executive departments, where these decisions exist, and, in their absence, decides for itself upon such information as it deems most trustworthy. *Jones v. U. S.*, 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 691. Thus, in *Terlinden v. Ames*, 184 U. S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534, the court consulted not only the public acts of the United States, but those of foreign countries, such as their treaties, statutes, and the decisions of their courts bearing upon the question involved.

2. If this court can consider the political status of Johannesburg before Lord Roberts’ proclamation, counsel for the British consul contends that, at the time this offense is alleged to have been committed, Johannesburg was within the British dominions, so that the British government could then have demanded extradition for a crime committed there. The legislative and executive branches of our government have recognized officially that the South African Republic was not in an unqualified sense within the dominion of his Britannic majesty prior to the proclamation of Lord Roberts. Congress provided for a consul to Pretoria, which place is stated in the act to be within the South African Republic. 30 Stat. 269, 830. Following *Jones v. U. S.*, *ubi supra*, this court has inquired of the department of state, and has been informed that the commission of the consul at Pretoria contained no reference to the British government, and that his exequatur was granted by the government of the South African Republic. These facts do not show that that republic was completely independent of Great Britain, but they do show that its territory was not part of the British dominions in an ordinary or unqualified sense. Moreover, there is ample evidence that the British government itself did not before 1900 claim unqualified jurisdiction over Johannesburg. What may have been the meaning of the convention of 1881, it boots not to inquire, but by article 4 of the convention of 1884 the South African Republic was permitted to make treaties with foreign powers generally, and these treaties were to be deemed valid unless objected to within six months by the British government. 75 Hertslet, State



Papers, p. 10. Such treaties were made, in one case formally approved by the British government (76 Hertslet, State Papers, p. 264); in another case, not formally objected to (Id. p. 512); and these treaties made some provision for extradition. The international status of the South African Republic, as recognized by Great Britain and the other countries of the world, is illustrated by the universal postal convention. 30 Stat. 1629. There Great Britain and the British colonies are not treated as including the South African Republic. See, especially, pages 1658, 1659, 1692. That by virtue of the treaty of 1889 between Great Britain and the United States the latter would have sought before 1900 to obtain from Great Britain extradition to this country of a fugitive from American justice found in Johannesburg is not to be supposed. If this be true, as reciprocity is ordinarily an element in extradition, it follows that Great Britain would not before 1900 have deemed itself entitled to demand from this country the extradition of a person charged with a crime committed in Johannesburg. This court is informed by the department of state that no record is found in the department of any request for the extradition of a person alleged to have committed crime in the South African Republic and a fugitive in the United States, or of a person alleged to have committed crime in the United States and a fugitive in the South African Republic. For the purposes of this case, Johannesburg must be treated as without the purview of the treaty of 1889 at the time the offense in question is alleged to have been committed. In spite of the learned and ingenious argument of counsel for the British consul, I have not the slightest doubt that any British court would agree to this proposition.

3. Counsel for the British consul contends that the petitioner should be extradited even if at the time when the offense was committed the place of its commission was outside British territory. He contends that it is sufficient if the place where the offense was committed is within British territory at the time when extradition is sought. That the president and senate would have authority to make a treaty with this intent is not doubted, but the court has to consider, not what might have been done, but what is the meaning of the words used in the treaty, viz., "committed within the jurisdiction of" either party. That Great Britain has jurisdiction to punish the petitioner, if it can lay hands on him, is not doubted. Ordinarily an act is not said to be committed within the jurisdiction of A. unless the place where the act was committed was at the time of its commission within the jurisdiction of A. That this interpretation of the treaty of 1889 would lead in some instances to the escape of criminals cannot be denied. There was no treaty between the United States and the South African Republic when this offense was alleged to have been committed. Before annexation the petitioner could not have been extradited, and so the annexation, even if it has not assisted justice, has not hindered it. But counsel for the British consul asks if the United States could not in 1899 ask for the extradition from England of a person alleged to have committed a crime in Porto Rico before 1898. Before the annexation of Porto Rico, Spain could have obtained extradition in the case supposed; is the criminal to escape altogether because the place where the

offense was committed has changed its political status? This court is informed by the department of state that there appears to have been no case in which the United States, since the annexation of Porto Rico and the Philippines, has sought or obtained from any government the extradition of a person charged with having committed a crime in Porto Rico or the Philippines before the annexation of those islands. The absence of an attempt at extradition does not prove much, but in the absence of authority to the contrary, in the absence of legislative or executive interpretation, in the absence of intervention by the department of justice, as representing the executive, in this particular case, the words "committed within the jurisdiction" must receive their natural interpretation, and cannot be held to include acts committed in a place which has been annexed to Great Britain since the act was committed.

Writ to issue.

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UNITED STATES v. DASTERVIGNES et al.

(Circuit Court, N. D. California. August 18, 1902.)

No. 13,259.

1. FORESTS—REGULATION—RULES—DELEGATION OF LEGISLATIVE AUTHORITY.

The act of congress approved June 4, 1897 (30 Stat. 35), authorized the secretary of the interior, in his superintendence of all forest reservations, to "make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." *Held*, that the authority given the secretary is not unconstitutional as a delegation of legislative authority.

2. SAME—USE OF PUBLIC LANDS.

The pasturing of sheep on the Stanislaus forest reservation having been forbidden by rule of the secretary of the interior under authority of Act June 4, 1897 (30 Stat. 35), user cannot give a right of pasturage there.

3. SAME—USER.

Inasmuch as laches cannot be invoked against the government, user of government lands for pasturage gives no right so to do.

4. SAME—RESTRAINING USE—BILL—ALLEGATIONS.

A bill seeking to restrain defendants from pasturing sheep on a certain forest reservation alleged that defendants drove several bands of sheep upon the reservation. *Held*, that a demurrer on the ground that there was a misjoinder of defendants was of no merit, since, while it did not appear that the defendants committed several acts of trespass, it appeared there was a joint offense, and, even if the acts were several, they might all be included in one equitable action; the law and testimony applicable to each defendant being the same.

5. SAME—ALLEGATIONS—DAMAGES.

Where a bill to restrain the pasturage of sheep on a certain forest reservation alleged that the grasses, herbage, and undergrowth were injured by the tramping, traveling, and driving of the sheep, the allegations as to damage were sufficient to warrant continuance of a restraining order pendente lite.

Marshall B. Woodworth, U. S. Atty.  
Charles H. Fairall, for defendants.

BEATTY, District Judge. The government seeks to restrain the defendants from pasturing their sheep upon certain public lands, designated by the president as the "Stanislaus Forest Reservation." The act of congress approved June 4, 1897 (30 Stat. 35), authorized the secretary of the interior, in his superintendence of all forest reservations, to "make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." In pursuance of such authority the secretary prohibited the pasturing of sheep on this reservation, except through permission by him upon due application. The defendants made no application, and have no permit, but, denying the authority of the secretary to make such regulations, allege that the authority given by congress is in effect a delegation of legislative power, which is in violation of the constitution.

It is not doubted that a legislative body cannot delegate its authority to others to make laws; but that it may authorize the formulation of rules to enforce its laws, not simply according to their letter, but to the full extent of their spirit and object, has been too long held to be now doubted. To this should be added that such laws and the rules in pursuance thereof should not be strictly construed against the government, but liberally in its favor. The government is but the people en masse. Its laws are their laws, in which all are alike interested, and to the defense of which none are individually called. Strict construction might soon, with only such defense as the general public would give, result in such enervation as to render them valueless. Upon the same principle that laches is not imputed to the government, a liberal construction of the laws in its favor should follow.

In this case the authority is expressly stated to be for the purpose of securing the objects of such reservations, and then enumerates as one of such objects the regulation of their occupancy and use. The simple test to be applied to this case is the one before referred to: Is it authority to make a law or to enforce one already made? A brief examination of a few of the authorities will aid to a reply; and such examination is pertinent, because of the fact that two of the district courts have held, in criminal cases, these rules invalid. Before doing so, however, it is suggested that in many matters concerning which congress is called upon to legislate, and especially in those which are largely under the management of some chief department of the government, it is impossible that all the minutiae for the enforcement of such laws can be foreseen and provided for by special provisions. Necessarily much must be left to the executive officer. Congress indicates the objects it has in view. It embodies in general terms the matters to be accomplished and aims to be reached, and leaves the duty of enforcement to the proper executive officer. Hence the necessity, as has been the practice from the institution of the government, of authorizing such officers to make the proper rule for the enforcement of the law.

In *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, a

revenue act of congress provided for the free introduction into the United States of certain articles of commerce, and directed that, if the foreign countries so shipping those articles discriminated against the United States in certain matters, the president should have the power to suspend the act, as to those countries, for the introduction of their goods without duty. This gave the president the power to suspend an act of congress,—for the time to declare it void. But the court, after referring to the long-established practice of congress to so legislate, held this act constitutional. Pages 680, 692, 143 U. S., 12 Sup. Ct. 495, 36 L. Ed. 294.

In *Re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813, was involved an act of congress which provided that oleomargarine should be sold in packages to be "marked, stamped, and branded as the commissioner of internal revenue \* \* \* should prescribe." In a criminal action for the sale of such article without compliance with the rules, the defense was interposed that such authority by congress to the commissioner was a delegation of legislative power. The court, in sustaining the act, says:

"The regulation was in execution of or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense. We think the act was not open to the objection urged, and that it is disposed of by previous decisions. *U. S. v. Bailey*, 9 Pet. 238, 9 L. Ed. 113; *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; *Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415."

The court reviews cases in which was involved the validity of rules and regulations made by some department under the authority of congress, by which it appears that the law as held by that court is that all rules or regulations issued by any department in pursuance of authority given it by congress, and which are for the purpose of enforcing some provision or object which has been authorized or defined by the act itself, become a part of the law, and are not in contravention of the constitution, and are valid. But the court also points out that when such regulations require the performance of acts not provided for or fairly contemplated by the law, or that are not within its general objects, they are void.

In the case of *U. S. v. Eaton*, *supra*, the distinction was illustrated by an act defining butter, also imposing a tax upon and regulating the sale of oleomargarine. Authority was given the commissioner of internal revenue to make all needful rules for the enforcement of the act. He required, among other things, the keeping of a book in a certain form and monthly reports to be made. It was held that such requirement was not provided by the act, nor was it within its purview or general objects, and therefore was invalid.

While regretting that I am not of the same opinion reached in some other cases involving the same rules now under consideration, I must conclude, in view of the authorities and for the reasons before stated, that such rules are valid. This difference of view, it may be suggested, invites a review by the circuit court of appeals.

Defendants also claim that by long user they are entitled to pasturage upon these lands, and cite *Buford v. Houtz*, 133 U. S. 320, 10

Sup. Ct. 305, 33 L. Ed. 618, in support of such claim. That case only says, on page 326, 133 U. S., and page 307, 10 Sup. Ct., 33 L. Ed. 618, that uninclosed public lands of the government may be used for pasturage by the people when "no act of government forbids their use." In the present case the government has forbidden their use. Moreover, as laches cannot be invoked against the government, long use by defendants gave them no title. This defense is not tenable.

A demurrer to the bill charges a misjoinder of parties defendant, and that the allegations of fact to show irreparable injury are not sufficient to justify injunction. As to the first, the allegations of the complaint are that the defendants drove several bands of sheep upon the reservation. It does not appear that the several defendants committed several acts of trespass; but from the allegations it rather appears that it was a joint offense by all. Even if their acts were several, there is good authority that all may be included in one equitable action when the law and the testimony applicable to each individual is substantially the same. The complaint, I think, does not state as fully as it might the facts which constitute the irreparable injury. It does say, among other things, that the grasses, herbage, and undergrowth are injured by the tramping, traveling, and driving of the sheep. It is rather well known that sheep do tramp out and destroy all vegetation in the nature of grasses. I think a fuller statement of the facts showing the destruction they cause might be made. But, the whole bill considered, I think it sufficient to continue pendente lite the restraining order heretofore issued.

The demurrer is overruled, and the motion for restraining order pendente lite is granted.

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WYMAN et al. v. UNITED STATES.

(Circuit Court, E. D. Missouri, E. D. October 8, 1901.)

1. CUSTOMS DUTIES—CLASSIFICATION—SHEEP DIP.

Paragraph 657 of the tariff act of 1897, which places on the free list "sheep dip not including compounds that can be used for other purposes," permits the free entry of any preparation for sheep dipping, which is in a commercial sense adapted to, and usually and generally employed for, that purpose only; but not of a compound which may be used, and is in fact extensively used, for other purposes.

Appeal by the importers from a decision of the Board of United States General Appraisers, which affirmed a decision of the surveyor of customs at the port of St. Louis.

Rowell & Ferris, for appellants.

Edward A. Rozier, U. S. Dist. Atty.

ADAMS, District Judge. The surveyor of customs classified the importation as a "chemical compound" dutiable at 25 per cent. ad valorem, as provided by section 3 of the act of congress entitled "An act to provide revenue for the government and to encourage the industries of the United States," approved July 24, 1897; and the importers paid the duty under protest. The board of general ap-

praisers having affirmed the decision of the surveyor, the importers have taken the proper steps to bring the question involved before the court for review. It is claimed by them that sheep dip is entitled to admission free of duty under paragraph 657 of said act, which places on the free list "sheep dip, not including compounds that can be used for other purposes." The record and evidence clearly show that the sheep dip imported by the petitioners in this case is a chemical compound, of an oil distilled from coal tar, treated with caustic soda, and mixed with potash soap, and that the same is miscible with water, and can be used not only as a sheep dip, but can be and is extensively used for disinfecting, deodorizing, and antiseptic purposes; that it can be and is also used as a medical preparation for curing and healing wounds, sores, and diseases of the human and animal bodies. The petitioners do not seriously dispute the availability or utility of this compound for all these purposes,—in other words, they admit that this is a chemical compound, that it can be used and is used for purposes other than dipping sheep; but they contend that there is no showing that it can only be used for other purposes than those for which sheep dip can be used, and therefore that it is not within the exception that takes it off the free list. Counsel for the petitioners contend that paragraph 657 of the revenue act in question is ambiguous and uncertain, and that words must be supplied to give it any meaning. They say that the language, "sheep dip not including compounds or preparations that can be used for other purposes," does not and cannot grammatically refer to other purposes than sheep dipping, but must have added or supplied after the words "for the purpose" the following words, namely, "than such purposes as sheep dip can be used for." This seems to be a very subtle and strained interpretation. If the language of the act is ambiguous and uncertain, the language and meaning of the suggested clarifying words, in my opinion, render the act still more ambiguous and uncertain; for, if the exception relates to such compounds as can be used only for purposes other than sheep dip can be used for, it is quite interesting to note the profound import of the section when so amplified. It then would practically mean this, and nothing more: "Sheep dip not including anything that cannot be used as sheep dip;" in other words, sheep dip, and nothing else. This nullifies the whole exception, and I am unwilling to impute to congress any such senseless use of words as is necessarily imputable to it by the construction contended for. It is clear from the evidence in this case that the article imported and called "sheep dip" can be, and is very extensively, used for many other purposes than that for which it was intended by the act in question to be admitted free of duty. The act must receive a rational and reasonable interpretation, and I am disposed to approve of the interpretation placed upon the act by the general appraisers in the case of *In re Hulme*, G. A. 4124; T. D. 19,228. It is held in that case that the words "that can be used for other purposes" refer to a compound fit for other purposes than for dipping sheep in the commercial sense, or that people buy and actually do use for other purposes." This interpretation permits the admission of any preparation for sheep dipping free of duty when the preparation is, in the

commercial sense, adapted to and usually and generally employed for that purpose only. I take it that any preparation that is so adapted to that use and generally employed for that purpose should be admitted free of duty, even though it incidentally may be used for other purposes. If its main and very general purpose is for sheep dipping, it may be brought in free of duty; but if, as in the case at bar, the article is not only used as a sheep dip, but is a compound adapted to and is extensively used for other purposes, such as those just detailed, it is not an article admissible duty free.

I think the board of appraisers reached the correct conclusion in this case, and judgment will be entered accordingly.

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FARMERS' LOAN & TRUST CO. v. CHICAGO & N. P. R. CO. et al.

(Circuit Court, N. D. Illinois. August 28, 1902.)

1. RECEIVER OF FEDERAL COURT—ACTION AGAINST IN STATE COURT—INJUNCTION.

The receiver of a federal court in a railroad foreclosure suit cannot be sued without its leave in a state court on a claim against the mortgagor, which arose prior to the receivership; and where recourse against the mortgaged property has been cut off by the sale and proceedings in foreclosure, after giving all claimants an opportunity to be heard, and the receiver has disposed of the funds in his hands by order of the court, it will enjoin the prosecution of such an action.

In Equity. On petition by receiver for an injunction restraining the prosecution of an action against him in a state court.

Herbert S. Turner, for plaintiff.

H. S. Boutell, for defendant railroad company.

JENKINS, Circuit Judge. The receiver petitions the court to restrain the prosecution of an action brought against him in a state court, on November 21, 1898, without the permission of this court, by Ludwig Backhaus, administrator of the estate of Sophia Backhaus, for her death, occasioned by a train of cars striking her, which train was operated upon the tracks of the Chicago & Northern Pacific Railroad Company. The receivership of that road was by order in this cause of October 10, 1893, the road being at that time leased by the Chicago & Northern Pacific Railroad Company to the Wisconsin Central Railroad Company, and in the possession of and operated by the latter. The order appointing the receivers forbade them to take possession of any of the property so leased until the express order of the court. The receivers were not so ordered, and did not take possession, until July 1, 1895, which was subsequent to the time of the injury to the intestate of the plaintiff in the suit in the state court. It is thus clear upon the facts that the estate represented by the receiver should not be held liable for the death, unless the Chicago & Northern Pacific Railroad Company, as lessor,

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¶ 1. Actions by and against receivers, see note to *Plow Works v. Finks*, 26 C. C. A. 49.

is liable for the act of the Wisconsin Central Company, and that, therefore, they could pursue the estate of the former company in the hands of the receiver. In respect of such liability the circuit court of appeals of this circuit and the supreme court of the state of Illinois are at variance; the former holding that there is no such liability. On June 20, 1896, a decree was entered providing for the sale of the road, which was sold November 17, 1896 (and the sale confirmed on November 18, 1896), free and clear from all incumbrances and from all claims except such as should be adjudged by this court to be prior in lien or superior in equity to the mortgage foreclosed, and to the current liabilities of the receiver incurred, or obligations assumed or imposed upon him by order of the court. Provision was made for the presentation of all claims against the property, and limiting the time for their presentation, which had expired before the suit by Backhaus, his claim not being presented. The receiver had, before the commencement of the suit by Backhaus, under orders of the court, disposed of all moneys and property in hand. It will thus be seen that the claim of Backhaus—if it was a valid claim against the Chicago & Northern Pacific Railroad Company—is cut off by the decree of foreclosure and the sale thereunder, and is not one that may be imposed upon the purchased property under the decree; that it never was a claim against the receiver, and did not arise under the operation of the road by him. I am unable to distinguish the case from the decision in *Stewart v. Railway Co.* (filed March 27, 1902) 117 Fed. 782. The case of *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796, is only to the effect that a receiver may be sued in a state court for an act done by a prior receiver of the property in his possession. That does not conflict, for the receivership is but one thing, and the property is the object sought to be reached for the act of one receiver or another in its management. The claim here is not different from that of a like claim against a railway corporation whose road has been sold under mortgage, and recourse to the mortgaged estate cut off by the foreclosure. The receiver is not to be sued in a state court for claims against the corporation without leave of court. Under the statute he may be so sued for his acts in the management of the property, but one would think there must be a limit, practically, at least, to even such suits, for the claim must be charged upon the property sold, to be of any efficacy, and where the property is sold discharged of claims for which the receiver as such is not liable, the property cannot be charged therefor, and the receiver cannot be sued in respect thereof, without leave of the court. The suit sought to be enjoined was brought two years after the confirmation of the sale, for an injury caused by the lessee of the principal defendant here, for which, as held by the federal authority of this circuit, it is not liable. The road at the time of the accident was not operated by or in possession of the receiver. The suit against him is not by leave of this court, and is not of the class permitted by the statute.

The injunction must, therefore, be allowed.



## In re PILGER.

(District Court, E. D. Wisconsin. November 3, 1902.)

## 1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—JURISDICTION MUST AFFIRMATIVELY APPEAR.

To confer jurisdiction to adjudge a person an involuntary bankrupt, the proof must affirmatively show that such person is not within one of the classes excepted by the bankruptcy act from such proceedings.

## 2. SAME—WAGE-EARNERS.

A court of bankruptcy is without jurisdiction to adjudge a person an involuntary bankrupt who was both at the time of the filing of the petition and at the time of the alleged act of bankruptcy a wage-earner, working for a salary of less than \$1,500 per year.

In Bankruptcy. Issue upon creditors' petition for adjudication of involuntary bankruptcy.

Turner, Pease & Turner, for creditors.

Kanneberg, McGee & Cochem, for debtor.

SEAMAN, District Judge. The issues of insolvency and of commission of an act of bankruptcy having been determined upon the hearing before a jury, the questions of jurisdiction remain for consideration. Two objections are raised to adjudication of bankruptcy under the petition: (1) That the petition contains no averment that Pilger was not a wage-earner, and the testimony shows that he was such in fact; (2) that one of the three petitioners (R. H. Schwab & Sons Company) was not a creditor.

The testimony is undisputed that the alleged bankrupt was secretary and stockholder of a bankrupt corporation (Egan Engineering Company) up to the adjudication of bankruptcy against that corporation; that as secretary he was financial manager and "solicitor" for business, at a salary of \$100 per month, and that he had no other business; that the alleged act of bankruptcy occurred April 23, 1902; and that when the petition herein was thereafter filed he was earning \$65 to \$70 per month as a bookkeeper in the employ of other persons. Section 4b of the bankruptcy act authorizes involuntary proceedings against "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil"; and section 1 (27) defines a wage-earner as "an individual who works for wages, salary or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." No jurisdiction exists to adjudge involuntary bankruptcy against a person who is within either of these exceptions. In re Taylor, 42 C. C. A. 1, 102 Fed. 728. Whether a petition is defective which is made in the general form prescribed by the supreme court rules in that behalf, and does not negative these exceptions, has not been directly decided in any case called to my attention; nor is the question material to the present controversy, as the facts are undisputed, and an amendment of the petition would cover any such defect in the event of clear proof that the alleged bankrupt was not within either exception. When jurisdiction thus depends upon a specific fact or condition, the presumption is against jurisdiction, and, unless the

proof presents a case to which the exception is clearly inapplicable, the bankruptcy court cannot take cognizance. In *re Plotke*, 44 C. C. A. 282, 286, 104 Fed. 964. The general rule in respect of such conditions is that jurisdiction depends upon the state of things at the time the action is commenced. *Mollan v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154, 2 Rose's Notes U. S. Reports, 279. Under this provision of the bankruptcy act, it has been held (*In re Luckhardt* [D. C.] 101 Fed. 807) that the question whether the alleged bankrupt is within the exception dates from the commission of the alleged act of bankruptcy; and like view appears to have been adopted by Judge Ware, under the old act, in *Everett v. Derby*, 5 Law Rep. 225, Fed. Cas. No. 4,576. Tested by either of these rules, Pilger had no business or occupation other than that of bookkeeper and wage-earner at a salary less than \$1,500 per year, and was not subject to involuntary bankruptcy. Whether one or the other date is applicable to this case does not call for decision, as I am of opinion that the inquiry cannot, at the utmost, extend beyond the date of committing the act of bankruptcy. Moreover, if the prior status of Pilger were open to consideration on this question, the testimony shows that he was theretofore a wage-earner, within the above definition, and that he had no other occupation. While the fact appears that he was a stockholder in the insolvent corporation, it is not probable that such fact can be treated as a separate occupation or business, and I do not perceive that it would affect the exception. The second objection, therefore, requires no consideration.

The petition must be dismissed for want of jurisdiction.

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#### IN RE SEYDEL.

(District Court, N. D. Iowa, Cedar Rapids Division. November 6, 1902.)

1. **BANKRUPTCY—EXEMPT PROPERTY—DEBT NOT SUBJECT TO CLAIM OF EXEMPTION.**

The fact that the claim of a creditor against a bankrupt is for the purchase price of property which has been set apart to the bankrupt as exempt, against which the law of the state gives no right of exemption, does not bring such property within the jurisdiction of the bankruptcy court, nor entitle such creditor to an order requiring the trustee to take possession of and administer it for his benefit.

In Bankruptcy. On certificate of referee with respect to application of Thomas Metcalf, asking that the trustee be ordered to take possession of certain personal property.

Remley & Ney, for creditors.

SHIRAS, District Judge. From the certificate of facts sent up by the referee in this case, it appears that George F. Seydel was duly adjudged a bankrupt on September 18, 1902; that a trustee of his estate has been duly appointed; that certain carpets and other household furnishings have been set apart to the bankrupt as exempt property; that one Thomas Metcalf, a creditor, has proved up a claim against the estate in the sum of \$55, and has filed a petition or application ask-

ing that the referee enter an order requiring the trustee to take possession of the named property, in order to subject it to the payment of the petitioner's claim, who avers that the debt due him from the bankrupt is for the purchase price of the property, and therefore, under the exemption laws of the state of Iowa, is liable for such purchase-price indebtedness. The referee refused to grant the requested order, and the question thus presented has been certified to this court for consideration. This general question was before the court in *Re Hatch* (D. C.) 102 Fed. 280; it being therein held that where particular property has been set apart to the bankrupt as exempt, possession thereof being delivered to the bankrupt, so that the property is no longer in the possession of the court or of the trustee, and it being property in which the general creditors had no interest, a particular creditor who claimed a special lien on such property was not entitled to have an order directing the trustee to take possession thereof and sell the same for the benefit of one creditor. As property which is set apart and delivered to the bankrupt as exempt, or which, being exempt, is never taken possession of by the trustee, is not within the actual possession and control of the court, and as the title thereto does not vest in the trustee (section 70, Bankr. Act), it is difficult to see upon what ground it can be claimed that the trustee can assert any title in, or right to the possession of, the property in question. Furthermore, it is apparent that no possible benefit can inure to the general creditors from a sale of the property by the trustee; but, on the contrary, if the expense attending the taking possession and sale of the article should exceed the sum realized from the sale thereof, the excess of such expense might be chargeable upon the estate belonging to the general creditors, which certainly would not be a just result as between them and the creditor claiming a special lien or right therein, and it is a well-settled rule that the trustee is not obliged to take charge of property unless there is a reasonable prospect of realizing something therefrom for the benefit of the estate which he represents. A creditor who claims that he has a lien upon specific property, or a right to subject the same to the payment of his particular claim, from which liability it is not freed by the exemption laws of the state, cannot rightfully demand that the trustee should undertake to get possession of the property, and to sell it for the benefit of the one creditor only.

The ruling of the referee is therefore affirmed.

## KENNEY v. MEDDAUGH et al.

(Circuit Court of Appeals, Sixth Circuit. August 15, 1902.)

No. 1,022.

**1. LOCOMOTIVE FIREMAN—INJURY FROM MAIL CRANE—ASSUMPTION OF RISK.**

A locomotive fireman will be held to have assumed the risk from proximity to the track of a mail crane; he having been a fireman on the road for a year, during which there was no increase in the size of the engines, and having passed this place 83 times, and been over the other division 123 times, and the crane having been in position all that time, and at substantially the same distance from the track as the other cranes on both divisions; and this though it was dark, and blowing hard and snowing, these circumstances merely requiring extra caution on his part.

**2. SAME—PROVIDING SAFE PLACE TO WORK.**

A railroad company cannot be held to have failed to use due care to provide a locomotive fireman a reasonably safe place to work, by reason of a mail crane, when in position, being, at its nearest point, only 13½ inches from the side of the locomotive; this being the distance of the other cranes on this and other roads; the master car builder, who was familiar with the government regulations, and under whose supervision the catches on the mail cars were constructed, testifying that they could not be operated efficiently if placed at a greater distance; and there being no testimony of a competent witness to the contrary.

**3. SAME.**

A railroad company owes no duty to a locomotive fireman, familiar with the road, to place lights on mail cranes.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This is an action to recover damages for the alleged wrongful death of Cornelius J. O'Brien. The lower court at the close of all the evidence, upon motion of defendants, directed a verdict for them. The judgment rendered thereon is complained of herein. The accident which resulted in O'Brien's death happened after dark on the evening of February 1, 1900, at Climax, a station on the Western division of defendants' railroad, extending from Battle Creek, Mich., to Chicago, Ill. It is the second station west of Battle Creek, and a short distance therefrom. At that time, decedent was fireman on defendants' fast passenger train from Battle Creek to Chicago, due to leave the former place at 3:40 p. m., but which in fact left at 5:57 p. m., being 2 hours and 17 minutes late, and reached Climax at 6:15 p. m. The depot at that station is on the south side of the track, or left-hand side as you go west. On the same side, and about 475 feet east of the depot, a mail crane was stationed, to hold mail pouches to be taken aboard of fast passenger trains not stopping there, by means of mail catchers attached to the mail cars. As decedent's train passed this mail crane that evening, he was struck in the forehead by the upper arm thereof, and rendered unconscious, and shortly thereafter he died. No one saw the collision, and it is only a matter of inference from circumstances that his death was due to this cause. But there can be no doubt as to this, and defendants in error do not contend that it was not. In addition to its being dark, there was testimony to the effect that it was snowing, though not to any great extent, and blowing hard. In front of the depot building, and about 11 or 12 feet from the track, was a signal board which indicated to each train as it passed the number of the train just ahead of it, and the time it passed the station, and above it a signal light,—red if there was danger, and white if the way

¶ 1. Assumption of risk incident to employment, see note to Railroad Co. v. Hennessey, 38 C. C. A. 314.

was clear. East of the mail crane, about the same distance that it was east of the depot, there were signal lights at two switches, probably on the north side of the track, or right-hand side as you go west. There was a rule of the company, which required firemen on locomotives to be on the lookout for and to receive all the signals which might be given or located on the left side of the locomotive, and to transmit them promptly and correctly to the engineer. It was claimed by defendants that it was not necessary for a fireman to look out of the window on the side of the cab in order to comply with this rule; that he could see the entire width of the right of way, and beyond it, by looking out of the window in front; by plaintiff, that this could not be done when the vision through the window was obstructed by accumulated snow; by defendants, that in such event the fireman could open and clean the window, and thus remove the obstruction to his sight; and by plaintiff, that this could not be done when the snow was continuous. There was, however, no evidence that vision from the window in front was obstructed by snow at the time of the accident. It was purely a matter of speculation as to whether it was. But there was evidence that it was more or less customary for firemen on defendants' railroad to look out of the side window, in watching for signals. It was proven, though, that in order for him to do so it was not necessary that he should put his head out more than four to six inches.

Decedent had been in the employ of defendants as a fireman for not quite a year before the accident. In that time he had worked upon both divisions of defendants' road,—the most of the time, however, on the Eastern division, from Battle Creek to Port Huron. He had made, in all, 206 runs. Of these, 123 were on the Eastern division, and 83 on the Western. He had worked on both freight and passenger trains. He had made 9 runs on passenger trains on the Eastern division, and 6 on the Western. During that time there were in use on defendants' railroad 16 large Baldwin engines,—8 on freight trains and 8 on passenger,—and others of a smaller type. There was no difference between those used on freight trains and those on passenger, save in this: that the cabs of the latter were 6 inches higher than the former. Of the nine runs which decedent had made on passenger trains on the Eastern division, eight were on the larger engines, and one on the smaller. Of the six runs, which he had made on the Western division, four were on the larger engines, and two on the smaller. Of the runs on freight trains, about twice as many were made on the larger engines as the smaller, and in the six months preceding the accident they were almost entirely on the larger engines. The firemen, as well on passenger as on freight engines, had nothing to do in connection with the mail cranes along the road, and the opportunity of observing them and their proximity to the railroad track was as good on freight engines as on passenger. They were often up in position when freight trains passed or were on sidings waiting for passenger trains to pass. The distance between the outer end of the upper arm of the mail crane in question when in position and the outer edge of the nearest rail was 3 feet 6½ inches, according to the testimony of defendants' employé who had charge of its mail cranes, and who measured the distance about the time of the accident. According to the testimony of a carpenter who had no connection with the railroad, introduced as a witness by plaintiff, the distance, at some time within the year after the accident, not more definitely located, was 3 feet 5½ inches. There were a number of mail cranes along the line of defendants' railroad. On the Eastern division there were about 19; on the Western division, between Battle Creek and Elsdon, a distance of 168 miles, there were 7 or 8. According to the standard prescribed by defendants for the use of those who construct them, the distance of mail cranes, measuring as above, should be 3 feet 6 inches. As to the bulk of those on defendants' road, the distance was 3 feet 6 inches, and above. As to one, it was as high as 3 feet 7¾ inches. As to two of them, it was under 3 feet 6 inches; the lowest being 3 feet 5½ inches. The distances on the Michigan Central Railroad run from 3 feet 5½ inches to 3 feet 7 inches. The distance between the side of the cab on the engine in which the decedent was acting as fireman at the time of the accident, and the outer end of the upper arm when in position, was 1 foot 1½ inches, or 13½ inches, with the other distance at 3 feet 5½ inches. Said

arm in position came a little above the center of the side window in the cab. According to the testimony of defendants' master car builder, who was familiar with the government regulations, and under whose supervision mail catchers were attached to the mail cars, the mail cranes on defendants' road could not be placed further away from the track and be used with the catcher. No one testified that they could be, and there was no fact proven from which an inference could be drawn that they could be. The carpenter, before referred to, who had seen the mail crane at Climax work, and examined it, was asked by plaintiff's attorney whether the mail crane could be put further away from the track, and still do the work of taking the mail as the trains went by; but, upon objection of defendants, the court refused to permit him to answer the question. This is the case upon which the lower court sustained defendants' motion to instruct the jury to find for defendants.

George Weadock, for plaintiff in error.

Harrison Geer, for defendants in error.

Before SEVERENS, Circuit Judge, and WANTY and COCHRAN, District Judges.

COCHRAN, District Judge, after stating the facts as above, delivered the opinion of the court.

It is urged as ground of reversal of the judgment of the lower court that it erred in giving the peremptory instruction. The grounds upon which it was requested by defendants were three: That, as a matter of law, defendants had not been guilty of negligence; that, likewise, decedent had assumed the risk of the proximity of the mail crane to the track; and that, likewise, if defendants had been guilty of negligence, decedent had been guilty of contributory negligence. The lower court, in giving that instruction, gave no intimation, so far as the record shows, as to the ground of its action. There was room for it to have been based on the last ground urged by the defendants. The distance from the side of the cab to the outer end of the upper arm of the mail crane, when in position to deliver the mail, the distance out of the cab window which a fireman would have to project his head to see signals, and decedent's knowledge of the existence of the mail crane at that station, and its proximity to the track, when in such position, here assumed, hereafter shown, tend to establish negligence on decedent's part, even though it may have been proper for him to look out of the window for that purpose at all. But it is unnecessary to decide whether this position was well taken or not, for we are clear that the defendants were entitled to the peremptory instruction upon the other two grounds urged.

The negligence which it was claimed by plaintiff the defendants had been guilty of, and which had caused decedent's death, was a failure to use due care to provide him a reasonably safe place in which to work. He claimed that the place in which the decedent was set to work was not reasonably safe, because of the too close proximity of the mail crane, when in position, to the track, and that, if defendants had used due care, it would not have been so. Even if this were true, the plaintiff was not entitled to recover, because the decedent had assumed the risk of that lack of safety. He had assumed it because he knew of it, and he knew of it because it was

obvious and he had had ample opportunity to observe it. It is a general rule in the law of master and servant that the latter assumes all the risks he runs whilst in the former's service by reason of the condition as to safety of the place in which, or the appliances with which, he is set to work, of which he has knowledge. It makes no difference whether the place or appliances are as safe as can be, reasonably safe, or not reasonably safe, provided he knows the lack of safety, whatever it is, and the risks he runs on account of it. It is likewise a general rule thereof that a servant is presumed to know any lack of safety that exists in the place in which, or the appliances with which, he is set to work, and the risk therefrom, which is obvious to one of his intelligence and experience, and which he has had an opportunity to observe. These two general rules have been applied or recognized by the supreme court of the United States, by this court, and by the supreme court of Michigan, within whose jurisdiction the accident happened.

In four distinct cases the supreme court held that, as a matter of law, no recovery could be had for injuries to a servant occasioned by the lack of safety of the place in which he was set to work, because, presumptively, he knew thereof and the risk due thereto, and had assumed that risk. They are the cases of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Tuttle v. Railroad Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391.

In the *Randall* and *Tuttle* Cases the servant injured was a brakeman, in the *Kohn* Case he was a switchman, and in the *Seley* Case he was a conductor acting as a brakeman. In all of the cases save the *Kohn* Case the lack of safety was in the track, or some connection thereof. In the *Randall* Case a ground switch was located in a space between two tracks six feet wide, and the brakeman, whilst unlocking it to allow his train to pass on one track, stationed himself near the other track, and was struck by an engine thereon. Concerning his knowledge of the lack of safety and risk, Mr. Justice Gray said:

"Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks."

Concerning his assumption of the risk, he said:

"A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation in any work connected with the making up or moving of trains assumes the risk of that condition of things."

Though not pertinent here, it may not be out of place to quote, as bearing on decedent's conduct, Mr. Justice Gray's reference to the brakeman's choice of position in that case. He said:

"It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecessary in order to work it to stand, as plaintiff did, at the end of the handle next the adjacent track."

In the Tuttle Case the brakeman was caught and crushed between two cars, on a siding containing a very sharp curve, which he was attempting to couple from the inner side of the curve. The coming together of the cars was due to the fact that the curve in the track caused their drawheads to pass each other, and not to meet. The coupling could have been made safely from the outer side of the curve. Concerning the brakeman's knowledge of the lack of safety and risk, Mr. Justice Bradley said:

"Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the drawbars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only from the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it; for it is one of those things which happen in the course of his employment under such conditions as existed here."

Concerning his assumption of the risk, he said:

"Tuttle, the deceased, entered into the employment of the defendant, as a brakeman in the yard in question, with a full knowledge (actual or presumed) of all these things,—the form of the side tracks, the construction of the cars, and the hazards incident to the service. Of one of those hazards he was unfortunately the victim. The only conclusion to be reached from these undoubted facts is that he assumed the risks of the business, and his representative has no recourse for damages against the company."

In the Seley Case the conductor, whilst attempting to make a coupling, caught his foot in an unblocked frog, and was run over and killed. Concerning his knowledge of the lack of safety and risk, because of which it was held that he had assumed the risk, Mr. Justice Shiras said:

"The evidence showed that Seley had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his train; that he necessarily knew of the forms of frogs there in use; and it is not shown that he ever complained to his employers of the character of frogs used by them. He must therefore be assumed to have entered and continued in the employ of the defendant with the full knowledge of the dangers asserted to arise out of the use of unblocked frogs."

In the Kohn Case the lack of safety was in freight cars by which the switchman was injured whilst attempting to couple them. It consisted in their having double deadwoods, or bumpers of unusual length, to protect the drawbars. By far the larger number of cars which passed through that yard had none of these deadwoods or bumpers, but the switchman had in fact seen and coupled cars like those that caused the accident, and that more than once. Concerning his knowledge of the lack of safety and risk, and assumption of the risk, Mr. Justice Brewer said:

"But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervener was no boy placed by the employer in a position of undisclosed danger, but a mature man doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."



In each one of these four cases, though there was lack of safety in the particulars pointed out, the places in which the servants were at work when injured were reasonably safe, or there was evidence to that effect. In the Randall Case, Mr. Justice Gray said:

"The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been."

In the Tuttle Case, Mr. Justice Bradley said:

"Although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved,—much less, that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. \* \* \* The interest of railroad companies themselves is so strongly in favor of easy curves, as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with, in determining their obligations to their employés."

In the Kohn Case, Mr. Justice Brewer said:

"It is not pretended that these cars were out of repair or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods, or bumpers of unusual length, to protect the drawbars."

And in the Seley Case, Mr. Justice Shiras said:

"In this disputable state of the facts, the defendant asked the court to charge the jury as follows: 'The jury are instructed that if they find from the evidence that the railroad companies used both blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant.' This prayer should have been given by the court."

In three cases the supreme court refused to hold that, as a matter of law, the injured servant had assumed the risk due to lack of safety in the appliances with which or places in which he had been set to work, and held that it was for the jury to determine that question. They are the cases of *Hough v. Railroad Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Railroad Co. v. Archibald*, 170 U. S. 670, 18 Sup. Ct. 777, 42 L. Ed. 1188. In these cases the appliances or places in question were not reasonably safe. In the *Hough Case* the court so acted because there had been a promise to repair. In the *McDade* and *Archibald Cases* it did so because the knowledge by the servant of the lack of safety and the risks arising therefrom was a disputable fact in the case. In the *McDade Case* a blacksmith was injured whilst attempting to put a belt on a moving pulley. Mr. Justice Lamar said:

"Upon every question in the case—the safety and unsafety of the machinery, the ignorance on the part of the plaintiff of the danger of it, and the negligence of the plaintiff at the time of the accident—the evidence is controverted."

In the Archibald Case a switchman, in order to uncouple cars by removing the coupling pin which held them together, was compelled to go between them,—the lever by which it could have been removed without going between being out of order,—and, whilst so attempting to remove it, his feet were caught by a broken brake rod, with links of chain attached to it, and a hook at its end, which was hanging down under one of the cars, and, in the movement of them, was projected out into the space between; and, in attempting to escape being thrown down, his right arm was caught between the draw-head and crushed. In all three cases, however, the correctness of said two rules were presupposed or recognized. In the McDade Case, Mr. Justice Lamar said:

"If the employer fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was or ought to have been known to him, and was unknown to the employé or servant. But if the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must have been deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery."

In the Archibald Case, Mr. Justice White said:

"Where an employé receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used."

And again:

"Where an appliance is furnished an employé, in which there exists a defect known to him or plainly observable, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it."

This court has likewise applied and recognized these two rules in cases that have come before it. In one case only has it had occasion to decide, as a matter of law, that the servant knew of and had assumed the risk. This it did in the case of *Crude Oil Co. v. Grable*, 36 C. C. A. 94, 94 Fed. 73. There an engineer of a stationary engine had been injured by contact between projecting bolts on the rim of a revolving wheel and an adjacent water-pipe line. Judge Clark said:

"Notwithstanding the general rule requiring the master to furnish a safe working place and safe instrumentalities, the servant, in addition to the ordinary perils incident to the business, assumes the risks arising from obvious, patent defects in the things which he uses, and which are known or should be known to him."

And again, in referring to the case in hand, he said:

"The position of the water pipe and the revolving wheel being visible and patent, such danger as existed on account of this situation was just as obvious to and as easily comprehended by the servant as the master. The duties of the servant brought him in daily contact with the machinery, and furnished him constant opportunity to inspect the same. His means of knowledge were evidently superior to those of the master. Notwithstanding that the defect was open, patent, and constant, and the servant's knowledge not only equal, but superior, to that of the master, defendant in error is forced into the dilemma of maintaining that the danger of such a defect was one

which the master was bound to anticipate, while the servant was not. This contention is evidently unsound, as will be recognized by its simple statement, without more. The servant was a mature man and a skilled engineer, whose duty brought the patent conditions and dangers constantly under his notice and during a long service. Under such circumstances, if the servant is not bound to anticipate and appreciate the danger, no grounds can be suggested on which the master is required to do so. If the knowledge and means of knowledge of the servant in respect to a patent defect are equal or superior to those of the master, there can be no recovery,—certainly so in the ordinary case."

In the case of *Railroad Co. v. Hennessey*, 38 C. C. A. 307, 96 Fed. 713, this court held that a servant had, as a matter of law, assumed the risk arising from a lack of safety in that with which he had to do in the course of his employment, though he was ignorant of the particular lack of safety through which he was injured. This was because it was a part of his employment to handle that which was in an unsafe condition. In the case of *Narramore v. Railroad Co.*, 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68, it held that the servant had not and could not have assumed, as a matter of law, the risk through which he was injured, because the lack of safety out of which it arose, to wit, an unblocked guard rail, was in violation of statute. It was recognized, however, that if it had not been for the statute it would have to be held, as a matter of law, that the risk had been assumed, because of the servant's presumptive knowledge of the risk, and this notwithstanding the fact that he had testified that he had had no knowledge thereof. Judge Taft said:

"In the absence of the statute, and upon common-law principles, we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of the blocks in the guard rails and switches of the defendant. His denial of knowledge of the fact that the rails and switches of plaintiff generally were unblocked is entirely immaterial. Nor is his vague statement that he was so busy as not to notice whether the rails and switches of plaintiff generally were unblocked in a yard where there were hundreds of guard rails and switches, and in which he was constantly at work for seven months, of more significance or weight. His evidence upon this point is not creditable to him. He could only have been ignorant of the admitted policy of the defendant in respect to blocks through the grossest failure of duty on his part in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks."

In a number of cases this court has refused to hold, as a matter of law, that the servant had assumed the risk through which he was injured. This it did in these cases: *Norman v. Railroad Co.*, 10 C. C. A. 617, 62 Fed. 727; *Railroad Co. v. Thompson*, 27 C. C. A. 333, 82 Fed. 720; *Railway Co. v. Keegan*, 31 C. C. A. 255, 87 Fed. 849; *Clow & Sons v. Boltz*, 34 C. C. A. 550, 92 Fed. 572; *Railroad Co. v. Yockey*, 43 C. C. A. 228, 103 Fed. 265; *Railroad Co. v. Miller*, 43 C. C. A. 436, 104 Fed. 124; *Felton v. Girardy*, 43 C. C. A. 439, 104 Fed. 127; *Railroad Co. v. McDade*, 50 C. C. A. 591, 112 Fed. 888.

In the *Norman*, *Keegan*, and *Boltz* Cases, it refused to so hold because knowledge of the risk was a disputable fact, its obviousness and the opportunity of observing it not being such that it was to be presumed; in the *Thompson* Case, because, whether the injury was

due to the risk assumed was disputable; in the Yockey Case, because the question as to whether the servant had had a reasonable opportunity to quit after becoming aware of the risk was disputable; and in the Miller and Girardy Cases, because knowledge of the risk, on account of the lack of experience of the servants who were injured through it, was a disputable fact. Of all the cases in which this court refused to so hold, probably the McDade Case needs most to be distinguished from the one in hand. This is because the railway servant in that case had been injured by a structure alongside the track. He was a brakeman, and whilst on the top of a car, signaling to the engineer with his lantern over the side thereof, he was struck by a waterspout projecting unnecessarily close to passing cars. Though an experienced brakeman, he had been on the road in question but a short time. He had been over the division where the waterspout was located not more than eight or ten times, equally divided between day and night trips. This was the only waterspout which it was shown projected so close to passing cars, and the car upon which the brakeman was located when struck was a furniture car, which was higher and wider than the average freight car. Judge Lurton said:

"McDade was entitled to rely upon the company's having properly constructed this spout, and the danger from the proximity of this particular spout was by no means so obvious, especially in view of McDade's short experience on this part of the road, as to charge him with having assumed the risk."

These cases all recognize, however, that, as a general rule, a servant assumes the risks of which he has knowledge, and that he is presumed to know the risks that are obvious and that he has had an opportunity to observe.

These principles have been recognized and applied by the supreme court of Michigan, within whose jurisdiction the accident in question happened, in these cases: *Illick v. Railroad Co.*, 67 Mich. 632, 35 N. W. 708; *Pennington v. Railway Co.*, 90 Mich. 505, 51 N. W. 634; *Ragon v. Railway Co.*, 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336; *Manning v. Railway Co.*, 105 Mich. 260, 63 N. W. 312; *Phelps v. Railway Co.*, 122 Mich. 171, 81 N. W. 101, 84 N. W. 66; *Potter v. Railway Co.*, 122 Mich. 179, 81 N. W. 80, 82 N. W. 245; *Pahlan v. Railway Co.*, 122 Mich. 232, 81 N. W. 103.

The exemption of a master from liability for injuries to a servant occasioned by the lack of safety in his working place or appliances, on the ground that the servant has assumed the risk thereof, does not come within the principle of those cases which hold certain contracts void, as against public policy, which provide for exemption from liability for injuries due to negligence. *Railroad Co. v. Voight*, 176 U. S. 505, 20 Sup. Ct. 385, 44 L. Ed. 560.

Such, then, being the settled law in regard to the assumption by a servant of the risks of his employment of which he knows, and as to his presumptive knowledge thereof, it follows that if the proximity to the track of the mail crane in question, when in position, and the risk of coming in contact with it and being injured, were obvious to one of decedent's intelligence and experience, and he had

had an opportunity to become aware of them, it should be presumed that he did know of them, and should be held that he had assumed the risk.

The decedent was 32 years of age. The evidence is not definite as to the extent of his railroad experience. He had been a fireman on defendants' road for not quite a year. According to the testimony of his widow, he had acted as a fireman in the yard at Durand, doing some extra running, for seven or eight months, which was probably immediately preceding his going upon the road. There is no evidence of his having had any previous railroading experience. During all the time he was on the road, the mail crane in question had been located at Climax, the same distance from the track. He had passed there 83 times, in all, on both freight and passenger trains,—mostly on freight; but the opportunity of observation as to the proximity of the mail crane was practically as good on freight as on passenger trains, some, if not many, of which trips, no doubt, were in the nighttime. The mail crane in question was one of a number of other mail cranes on the same division, and on the other division over which he had made 123 like runs, and they all were substantially of the same proximity to the track as this one. In that time there had been no increase in the size of the engines. There can therefore be no doubt that the proximity of the mail crane in question to the track, and the risk of coming in contact therewith and suffering harm therefrom, were perfectly obvious to decedent, and that he had had ample opportunity to observe them. It must be held, therefore, that he knew of that risk and assumed it. It is probable that he did not know the exact distance between the side of the cab and the outer end of the upper arm of the mail crane when in position, but he knew that it was sufficiently close to be dangerous if he put his head out too far. It is true, also, that it was dark and blowing hard, and, to some extent, snowing. Had he never been over the road before, or but a few times, these circumstances might have been pertinent, as bearing upon the question as to whether he knew of the proximity of the mail crane to the track, and the risk thereof; but where, as here, previous knowledge thereof is clearly shown, the sole effect of these circumstances was to render it incumbent on decedent to use extra precaution to prevent injury therefrom. He knew that he was on a fast passenger train, and that the mail cranes along the road would be up in position to deliver their mail to it, and, with this knowledge, he should not have placed his head so as to come in contact with them. No fact or circumstance was proven in the case that rendered it necessary that he should have put his head out so far as to be struck by it.

But the defendants were entitled to the peremptory instruction not only on the ground of assumed risk, but also on the ground that the defendants had not been guilty of negligence toward him. This follows from the fact that decedent had assumed the risk of the proximity of the mail crane to the track. The master owes no duty to a servant to remove a risk that he has assumed, and hence is not negligent towards him in failing to remove it. Saying that a servant has assumed a risk is but another way of putting it that the

master has not been negligent in not removing the risk. Valentine, J., in the case of *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582, said:

"Culpable negligence on the part of one person as towards another always involves a breach of duty on the part of the former as towards the latter. Where there is no breach of duty, there can be no culpable negligence, and it is only for negligence of a culpable character that any person can be held responsible in law. Where an employé is hired and paid for assuming a known danger, and the thing itself is not contrary to law, it cannot be properly said that the hirer has been guilty of any breach of duty as towards the person hired, and therefore it cannot be said that the hirer has been guilty of any culpable negligence as towards the person hired."

In the *Narramore Case*, *supra*, Judge Taft said:

"Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers, the risk of which he agreed, expressly or impliedly, to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk."

And in the *Kohn Case*, *supra*, Mr. Justice Brewer said:

"Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

There was, however, no failure on the part of the defendants to use due care to provide the decedent a reasonably safe place to work, in this particular. Notwithstanding the proximity of the mail crane to the track, and the liability of a negligent fireman coming in contact with it when in position, it was reasonably safe. According to the testimony of defendants' master car builder, who was familiar with the government regulations in such matters, and under whose supervision the catchers were constructed upon the mail cars, and who was therefore an expert in such matters, the mail cranes could not be placed at a greater distance and operated efficiently. The place in which decedent was set to work was, then, according to this opinion, as safe as it could be made, consistently with provision being made for fast passenger trains taking up the mail at small stations without having to stop to do so. In addition to this, all other mail cranes on defendants' road and those upon the Michigan Central and Pere Marquette Railroads were located at substantially the same distance from the track as the one in question. There was no testimony to the contrary of this. The carpenter at Climax, who had seen the mail crane in question work, and examined it, was asked by plaintiff, in substance, whether it could have been placed farther away from the track, and still do the work of delivering the mails to the trains as they passed by. But upon objection by defendants, the court refused to permit the question to be answered. This ruling was excepted to, and has been assigned as error. It does not appear from the record what answer the witness would have made to the question if he had been permitted to answer. And even if it did ap-

pear that he would have answered it in the affirmative, we think the court's ruling was correct. It was not shown that he had sufficient knowledge in regard to the matter to be entitled to give an opinion as to it. Such knowledge as he had was confined to the mail crane. It was not shown that he had any knowledge in regard to the mail catcher and its workings, except, perhaps, to see it catch the mail as the train passed by. Besides, if admitted, it would have been entitled to no weight whatever as against the action of the defendants and the Michigan Central and Pere Marquette Railroad Companies as to all the mail cranes located on their roads. In the Randall Case, supra, plaintiff and another brakeman had testified that the switch which the plaintiff was attempting to unlock when injured was not properly constructed and arranged, and that it should have been an upright switch, instead of a ground one. Concerning this testimony, Mr. Justice Gray said:

"There was no sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and his witness was too slight."

In the Tuttle Case, Mr. Justice Bradley said:

"The interest of railroad companies themselves is so strongly in favor of easy curves, as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with, in determining their obligations to their employés."

And in the McDade Case, in this court, Judge Lurton said:

"If it had appeared that there was a uniform custom on well-managed railroads to construct such swinging waterspouts in such proximity to passing cars as to endanger employés standing or sitting on the roofs of such cars while in the discharge of their duty, no legal imputation of negligence would, perhaps, arise from such a construction, however unnecessary such dangerous proximity might be."

Still further, as we have shown and the above quotation indicates, it was an immaterial question in the case whether the mail crane could have been placed farther back from the track, and the mail delivered efficiently. The decedent knew its actual proximity to the track, and assumed the risk thereof. In view of all these considerations, it must be held that the ruling of the court was correct. At any rate, it cannot be said that it was clearly erroneous. In the case of *Manufacturing Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035, Mr. Justice Gray said:

"Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial, and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law."

It must be held, therefore, that there was no failure on defendants' part to use due care to place the mail crane in question at a reasonably safe distance from the track.

It was proven that the mail crane was not lighted, and the point is made that defendants were negligent in not causing it to be lighted.

We have heretofore directed attention to the sole significance of the fact that the night was dark, and it was perhaps snowing to some extent. As to the claim that the mail crane should have been lighted, the defendants had a right to act upon the idea that decedent, being aware of the proximity of the mail crane to the track, would conduct himself in such a way as not to come in contact with it. In the case of *Brown v. Railroad Co.*, 69 Iowa, 161, 28 N. W. 487, a fireman had been killed by coming in contact with a snow bank close to the railroad, and one of the particulars in which it was claimed that the defendant company had been negligent was in failing to place danger signals upon the snow bank. Rothrock, J., said:

"He knew of the existence of the banks of snow in close proximity to the track, and with this knowledge, as we held on the former appeal, he assumed the risk of the danger attendant upon the condition of the road in this condition. He must be held to have the same knowledge of this danger as he had of the close proximity of cattle chutes, coal sheds, platforms, bridges, water pipes, or other structures and appliances necessarily located in close proximity to the track, which may be passed in perfect safety so long as employes keep themselves within line of the cars in the train, but which are dangerous when an employé exposes himself to contact with them by swinging outside of the line of the train. And there is no rule of diligence which requires railroad companies to place signals at snow banks by flags in daylight and lanterns at night, to protect trainmen from injury, that would not also require them to do so at other objects near the track."

Our conclusion, therefore, is that there was no failure on the part of the defendants to use due care to provide the decedent a reasonably safe working place, and that on this ground, as well as upon the ground that decedent had assumed the risk of such lack of safety as there was in that place, the defendants had been guilty of no negligence towards the decedent, and because of this were entitled to the peremptory instruction given.

Three cases have been cited to us, involving injuries to railroad employes by mail cranes located alongside the railroad tracks. They are the cases of *Railroad Co. v. Gregory*, 58 Ill. 272; *Sisco v. Railway Co.*, 145 N. Y. 296, 39 N. E. 958; *Railroad Co. v. Milliken's Adm'x* (Ky.) 51 S. W. 796. The question of assumption of risk does not seem to have figured in either one of them. The sole question in each one seems to have been as to the railway company's negligence. The *Sisco* Case is in accord with the position we have taken on that question, and the *Gregory* and *Milliken* Cases are not contra.

In the *Sisco* Case a brakeman, whilst climbing up the side of a car, was struck by the upper arm of a mail crane which was stationary, and the distance from the outer end of which and the side of the car was 12 inches. The defendants' evidence showed that cranes of similar construction were in use on many other railroads. There was no evidence that the crane, if placed further from the track, would have performed its work. The mail crane had been erected only a short time before the injury. It was held that the plaintiff was not entitled to recover, because there was no evidence of failure to use due care on defendants' part. Andrews, C. J., said:

"The employer does not undertake with the employé that he will use the very best appliances; nor is he called upon to discard machinery adopted by him in his business, reasonably suited therefor, although there may be other



machinery that may be safer. It is bound to the exercise of reasonable care in providing machinery and appliances, in view of all the circumstances. Still less is the master to be cast in damages for error of judgment in selecting one method of prosecuting his business, or one kind of machinery or appliance, on proof that another method or appliance is better or safer, when both methods or both kinds of appliances are in common use. *Frace v. Railroad Co.*, 143 N. Y. 182, 38 N. E. 102; *Flinn v. Railroad Co.*, 142 N. Y. 11, 36 N. E. 1046. It was not found, nor was there any evidence upon which a jury could infer, that the crane in question could be placed any further from the track than it was, and perform the function for which it was designed. Plaintiff was bound to show a state of facts indicating negligent construction or location, to raise a question for the jury upon this point. It was not sufficient for him to show an injury, or that operating the device involved danger to the brakeman. He took the risk of all constructions necessary and reasonably adapted to the business of the railroad. The burden was upon him to show that the appliance, concededly useful in the business of the defendant, was improperly constructed or located, and this he wholly failed to do. Proof that it was dangerous was not enough. He was bound to go further, and show that the defendant might, by the use of reasonable care, have accomplished its purpose, and at the same time protected its employés from the danger."

In the Gregory and Milliken Cases it was held that the questions of negligence and contributory negligence were for the jury. Judge Scott, in the former case, thus summarized the facts thereof:

"It most satisfactorily appears that in general those inventions for the delivery of the mails are not dangerous to the operations of the road. They have been and can be placed at a distance from the track that would be entirely safe, and still perform their proper functions. If such was not the case, it would be the duty of the company to abandon their use. There is evidence tending to show that the one at Clifton station was dangerous; that it had produced one or more injuries; and there is also evidence tending to show that the company had knowledge of that fact in ample time to have removed it to a safe distance, so as to have prevented the death of Burnett. The significant fact appears, and no reasoning, however ingenious, can destroy its force, that after its removal for only a distance of a few inches it was and has been perfectly safe, and no accident has since occurred from its use."

The employé injured in that case was a fireman, and the distance between the end of the arm and the side of the coaches was 7 to 10 inches, varying according to the construction of the different coaches. In making this quotation, we would not be understood as approving the statement therein that, if such useful instrumentalities as mail cranes could not be placed at a distance that was entirely or perfectly safe, they should be abandoned.

In the Milliken Case a brakeman who was sitting on the top of a freight car, with his feet hanging over the side, was knocked off and killed. This extract from the opinion by Judge Hobson is sufficient to differentiate that case from this, to wit:

"There was evidence that the crane was not upright, but leaned towards the road about four inches. The swing of the arms and the hanging of the bag, always on the side next to the road, would have a tendency to pull the upright post over. This would throw the bag nearer the car, the greater the inclination became. It was in proof that this crane was set some four and one-half inches nearer the track than the other cranes from which the mail was taken. If this proof was true, this mail bag hung something like eight inches nearer the track than required by the government; and if it had hung eight inches further off, from the photographs exhibited, it would seem that the intestate would not have been knocked off. We cannot say that the de-

pendant might, by the use of reasonable care, have accomplished its purpose, and at the same time protected its employes from the injury."

The Sisco Case was cited, approved, and distinguished.  
The judgment of the court must be affirmed.

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ERIE R. CO. V. KANE.

(Circuit Court of Appeals, Sixth Circuit. August 15, 1902.)

No. 944

1. MASTER AND SERVANT—FELLOW SERVANTS—RAILROAD EMPLOYEES UNDER OHIO STATUTE.

Under the second clause of section 3 of Act Ohio April 2, 1890 (87 Ohio Laws, p. 150), which provides that every person in the employ of a railroad company "having charge or control of employes in any separate branch or department shall be held to be the superior and not fellow-servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed," as such provision has been construed by the supreme court of the state, an engineer, although having control of but a single employe, may be the constructive superior of a fireman in a different branch of the service.

2. SAME—SEPARATE BRANCHES OF SERVICE.

Within the meaning of such provision as construed by the supreme court of Ohio, two switch crews handling different trains in the same yard are engaged in separate branches or departments of the service.

3. SAME—CONTRIBUTORY NEGLIGENCE OF SERVANT—VIOLATION OF RULES.

If the violation by a railroad employe of a reasonable rule made by the company for the government of employes in the discharge of their duties, and of which he has knowledge, causes or contributes to his injury, he is guilty of contributory negligence, as matter of law, which defeats the right to hold the master liable for such injury.

4. SAME—RAILROAD FIREMEN.

The petition in an action against a railroad company to recover for the death of a fireman on a switch engine who was killed in a collision with another switch engine alleged that at the time of collision the deceased was standing on the front of his engine, engaged in cleaning the number, which was below the headlight; and the evidence tended to support such allegation. A rule of the company provided that firemen must "attend to the fires of the locomotives when on the road, and to taking water and oiling the machinery; assist the engineman in watching for signals and obstructions; clean and polish their locomotives at the end of each trip; and assist in making repairs when necessary." The engine was engaged in switching, having cars coupled in front of it, and was moving backward slowly, when it met another switching train backing in the opposite direction. *Held*, that the court erred in refusing to instruct the jury that there could be no recovery if the deceased voluntarily violated the rule requiring him to assist the engineer in watching for signals and obstructions, and but for such violation he would not have been injured, and in leaving it to the jury to determine whether the violation of the rule, if proved, constituted negligence.

5. SAME—RIDING IN DANGEROUS PLACE.

The deceased was also guilty of contributory negligence, under the evidence and allegations of the petition, which defeated the right of re-

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¶ 1. Who are fellow servants, see notes to Railroad Co. v. Smith, 8 C. C. A. 668; Railway Co. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

¶ 3. See Master and Servant, vol. 34, Cent. Dig. §§ 759, 760.

covery, irrespective of the rule, in that he left his proper place in the cab, without necessity, and placed himself in a position of obvious danger, while the engine was in motion; it further appearing that he would not have been injured if he had remained in the cab.

6. CONTRIBUTORY NEGLIGENCE.

One may be guilty of contributory negligence in failing to anticipate and act upon the contingency of another's negligence.

7. EVIDENCE—PRESUMPTION FROM FAILURE TO CALL WITNESS.

It was error to instruct that an inference unfavorable to a party to a civil suit might be drawn from his failure to place on the stand a witness who was present in court in obedience to a subpoena issued by the other party, and equally accessible to both.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is an action by the defendant in error against the plaintiff in error to recover damages for the wrongful death of her intestate, in which she obtained judgment for the sum of \$4,000. The accident by which the decedent lost his life happened on the morning of December 17, 1897, after daylight. It was a collision between two trains which were being switched in the yard of the plaintiff in error at Niles, Ohio, by two switching crews. In that yard there are two main tracks, extending through it east and west. The north track is used by through trains going west, and the south one by such trains going east. The depot is located north of both of them. The collision occurred on the north or west-bound track, a short distance west of the depot. The easterly one of the two trains was composed of a yard engine, at its western end, headed eastward, and without a pilot or cowcatcher, and 10 or 11 freight cars; that next to the engine being an empty gondola. It was proceeding west slowly, and had about come to a stop. It had come in upon that track from a side track to the north of it, and had not yet cleared the switch; and the purpose was for it, as soon as it had done so, to proceed eastwardly. The westerly train was composed of a yard engine and 8 freight cars. The engine was at its western end, headed eastward. The car next to the engine and that on the end were box cars; and those between, gondolas,—all loaded with coal. It was proceeding eastwardly at a much higher rate of speed than the other. It had come in upon that track from the south or east-bound track by means of a cross-over between the two, the western end of which connected with the former just west of where the westerly train was about to come to a stop, and upon the south or east-bound track from the New Lisbon branch of the plaintiff in error, east of the depot. As it passed the depot it also passed the other train, going in the same direction at a slower rate of speed; and its conductor left it, to enter the depot. The decedent was the fireman on the engine in the easterly train, and at the time of the collision was at the front end thereof, upon the pilot, or bunting beam, or head bar, as it is variously termed, in front of the boiler, engaged in cleaning the number of the engine, located just below the headlight. The effect of the collision between the two trains was to cause a collision between decedent's engine and the empty gondola next to it, and, by reason thereof, to force the body of the latter up against the head of the former, catching decedent between them, and, as it seems, killing him instantaneously. The ground upon which it was claimed that the plaintiff in error was liable in damages for the death of decedent, thus caused, was that the collision between the two trains was due to the negligence of the engineer of the westerly train, named Bowker, in proceeding eastwardly on the north or west-bound track, with knowledge that decedent's train was thereon and had the right of way, at a high rate of speed, without orders so to do, without keeping a proper lookout, and without giving warning of the approach of his train by bell or whistle. It was not seriously contended that Bowker had not been negligent, and there can be no doubt but that he was. The plaintiff in error sought to defeat the recovery upon two grounds: One was that Bowker was the fellow servant of the decedent; and the other, that decedent was

guilty of contributory negligence. In support of the latter contention, it proved that amongst the rules of the plaintiff in error, which decedent knew and had agreed to be governed by, was one in these words: "They [firemen] must report for duty at the appointed time; attend to the fires of the locomotives when on the road, and to taking water and oiling the machinery; assist the engineman in watching for signals and obstructions; clean and polish their locomotives at the end of each trip; and assist in making repairs when necessary."

John H. Clarke, for plaintiff in error.

T. McNamara and George F. Arrel, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

1. The plaintiff in error requested the lower court to give to the jury two instructions, in these words:

"No. 1. The court says to you, as a matter of law, that, upon the evidence introduced upon this trial, the plaintiff's decedent, Thomas Kane, a fireman upon one engine and with one train crew, was, at the time of the accident complained of in this case, a fellow servant with Bowker, the engineer of another engine, with another train crew, whose negligence, it is claimed in this case, was the proximate cause of the accident resulting in Kane's death, and that therefore the plaintiff cannot recover in this case, and you should return a verdict in favor of the defendant railroad company."

"No. 10. The court instructs you that the plaintiff cannot be entitled to recover in this case unless you shall find from the evidence introduced in this trial that the engineer, Bowker, had charge or control of other employes of the company; and, if you conclude that the plaintiff has failed to show that fact by a preponderance of the evidence, she cannot recover in this case, and you should return a verdict in favor of the defendant railroad."

It refused to give either one of these instructions, and, on the contrary, instructed the jury that Bowker was not the fellow servant of the decedent. The refusal to give these instructions was duly excepted to, and has been assigned as error. The lower court so acted because it was of the opinion that the second clause of the third section of an act of the legislature of Ohio passed April 2, 1890 (87 Ohio Laws, p. 150), as construed by the supreme court of Ohio in the case of Railroad Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11, applied to this case. That section is in these words:

"That in all actions against the railroad company for personal injury to or death resulting from personal injury of any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employes, it shall be held, in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employe of such company, is not the fellow-servant, but superior of such other employe; also, that every person in the employ of such company having charge or control of employes in any separate branch or department shall be held to be the superior and not fellow-servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

The syllabus of the Margrat Case, which was prepared by the court, and expresses the law thereof, is in these words:

"(1) An engineer in charge of a locomotive on one train of cars of a railroad company is in a branch or department of its service separate from that of a brakeman on another train of the same company, within the meaning of the terms 'separate branch or department,' as those terms are employed in section 8 of the act of April 2, 1890 (87 Ohio Laws, p. 150).

"(2) An engineer in charge of a locomotive, who has authority to direct or control a fireman serving on the same locomotive, is a superior within the meaning of the above-named section.

"(3) Whether an engineer or other employé of a railroad company has authority to direct or control other employés of the same company is a question of fact to be determined in each case. This may be done, however, either by proof of express authority, or by showing the exercise of such authority to be customary, or according to the usual course of conducting the business of the particular company interested, or of railroads generally."

In the opinion, Judge Bradbury presents the reasoning upon which these conclusions were founded, in these words:

"The relation of superior and subordinate, however, did not actually exist between Margrat and the engineer by whose negligence he was injured; for, as we have seen, the latter had no authority to command or direct the former in discharging his duties. But the statute, we think, declares that relation to exist, as matter of law, for the purpose of charging the company, if the engineer was the superior of—that is, was authorized to command or direct—any co-employé whatever, and Margrat was without such authority. They must have been in 'separate' branches or departments of the company's service, for the section so declares. The section, however, makes no attempt to define the terms 'departments' and 'branches,' but these terms should not be limited so as to embrace merely those large divisions created for convenience in administering the affairs of the company. On the contrary, it is more reasonable to suppose that they relate to those minute ones which concern the daily duties of the employés. Those terms are general and comprehensive, but, as the legislature discloses no purpose, in this connection, to regulate the internal affairs of a railway company, it should not be presumed to refer to divisions of its business made for its own ends; and, if not to such divisions, what divisions could it mean, but those which divide up the employés while in actual service? The section expressly declares a purpose to enlarge the remedy of the employés for accidents occurring in the course of their employment. This declaration emphasizes the presumption that the terms under consideration should be construed as referring to conditions affecting them, rather than to those which are established by the company for its own purposes. Without pursuing the matter further, we hold that, under the section of the statute under consideration, an engineer on one train is in a separate branch of the company's service from that of a brakeman of another train belonging to the same company."

The facts of the case were these: The train to which the plaintiff brakeman belonged was being coupled to two cars in the yard of the railroad company at Deshler, Ohio. Whilst he was proceeding along a parallel track to reach the place of coupling, he was negligently run into by a locomotive manned by an engineer and fireman. Whether the plaintiff's train had come in off the road, and it was the intention for it, after the coupling was made, to proceed on its journey, or it was a train in charge of a switching crew, and being switched in the yard, does not clearly appear. It is stated, however, that it was part of plaintiff's duties to help switch cars in defendant's yard at Deshler. Nor does it clearly appear that the locomotive which

ran plaintiff down belonged to the yard, or had connection with any other cars.

Counsel for plaintiff in error contend that the second clause of said statutory provision does not apply to this case, for two reasons: One is that the employé who is thereby made the constructive superior, and hence not fellow servant, of certain other employés, is one who is the actual superior of more than a single employé, and in this case Bowker was the actual superior of but a single employé, to wit, his fireman. The ground upon which they base this construction of the clause is in the use therein of the plural word "employés." And it was in view thereof that instruction No. 10 was asked. This construction is undoubtedly too narrow, but, whether so or not, there can be no question but that the Margrat Case has settled that the clause may apply to an actual superior of a single employé. For in that case the engineer who was adjudged not to be the fellow servant of the injured brakeman was the actual superior of a single employé, to wit, his fireman. Hence that instruction was properly refused.

The other reason assigned for the nonapplicability of said clause to this case is that Bowker and decedent were not in separate branches or departments, within the meaning thereof, but in the same branch or department, to wit, the yard. And it was in view of this construction that instruction No. 1 was asked. The Margrat Case is against this construction, also. Counsel for plaintiff in error suggest that it is not, because it had relation to two trains out on the road, and not to two trains in a yard being handled by two switching crews, as here. The position is that in such a case the consociation between the two crews is so much greater than in the case of two road trains that they should be held to be not in separate branches or departments, but in the same branch or department. But it appears from the facts of the case that the accident involved therein happened in the yard of the railroad company at Deshler, Ohio, and the probability is that the two trains were being handled by two yard crews, or at least two crews whose duty it was to do yard service. This, though, is not entirely clear. The matter, however, is put beyond question by the decision of the supreme court of Ohio in the case of *Railway Co. v. Munger*, 61 N. E. 1147, rendered May 21, 1901, without opinion, the record in which has been furnished us by counsel for defendant in error. There two trains were being handled by two switching crews in the yard of the railroad company at Ashtabula, Ohio, and the brakeman on one was injured through the negligence of the conductor in charge of the other. The plaintiff recovered in the lower court, and that judgment was affirmed by the supreme court. The trial court was requested by the defendant to instruct the jury that "the two crews and all the members thereof were engaged and consociated in the same department and branch of duty, work, and line of employment, and that each member of the one crew was the fellow servant of each member of the other crew." It refused to so instruct the jury, and charged them that the two trains "were separate branches of the executive force" of the railway company.

There is, however, another possible view of the clause in question, which has not been suggested, but which, if a true one, may render it inapplicable to this case. It is that the actual superior to whom it applies, and whom it makes the constructive superior, and hence not fellow servant, of certain employés of whom he is not the actual superior, is one who is the actual superior of all the employés other than himself in the branch or department to which he belongs, and hence the head of that branch or department. Reasons for such a view may be found in the contrast between the language used in the two clauses of the statute in describing the actual superior to which they respectively apply, that in the first applying to an actual superior of one or more employés, without reference to the question as to whether they are all the employés, other than himself, in the branch or department to which he belongs; in the description of the employés covered by the actual superiority of the actual superior to whom the second clause applies, as having relation to a separate branch or department; in the effect of the insertion of the definite article, "the," before the word "employés," in said clause; in the omission to make the constructive superiority cover employés in the same branch or department, not covered by the actual superiority; and in the probability that the origin of the statute was to change the law as adjudged in the case of *Railroad Co. v. Devinney*, 17 Ohio St. 198, where it was held that the conductor of one train was the fellow servant of a brakeman on another train. According to such a view of the statute, it may apply to an actual superior of a single employé, provided such single employé is the only employé other than himself in the branch or department to which the actual superior belongs. In such a case the plural word, "employés," would apply to him, for, though but one, he represents the whole. And it may be claimed that this view of the statute is not foreclosed by the decisions in the *Margrat* and *Munger* Cases. Certainly not by the latter, because there the actual superior, who was held not to be the fellow servant, of the injured brakeman, was the conductor of the other train, who had charge of all the employés on it, and hence was the head of that branch or department. In the *Margrat* Case the effect of the decision was that the engineer of an engine running light is an actual superior, within the clause in question. This is hardly a decision that the engineer on an engine in a train in charge of a conductor is such an actual superior, either because said clause is not limited to an actual superior who is the head of the branch or department to which he belongs, or because an engine in such a condition is a separate branch or department by itself. There is, though, language used in the syllabus and opinion that may be construed to mean that an engineer, even in such a case, is within the clause. But to this it may be said, as was said by Judge Taft in *Narramore v. Railway Co.*, 37 C. C. A. 505, 96 Fed. 298, 305, 48 L. R. A. 68, "The syllabus and opinion are, of course, to be restrained to the facts."

But we will not determine in this case whether this view of the clause in question is the correct one, or the effect upon it of the decision in the *Margrat* Case. It appears from the facts herein that

the conductor was not on Bowker's train at the time of the collision, having left it as it went east on the south track past the depot, and entered the depot. Owing to this fact, it is possible that, according to the usages or rules of the railroad company, Bowker, as engineer, acquired charge of the train and all employes on it, *pro tempore*, just as in the case of *Railway Co. v. Howe*, 3 C. C. A. 121, 52 Fed. 362, upon the breaking of a freight train in two, according to the rules of the railroad company, the engineer became conductor, *pro tempore*, of the forward part of the train, and hence was an actual superior, within the meaning of said clause, even according to said view. The evidence, however, did not disclose whether there was any such usage or rule. Besides, as hereinafter set forth, the decedent, Kane, was guilty of such contributory negligence as to preclude any right of recovery for his death. In view of these considerations, we do not deem it necessary to dispose of those questions herein, or to pass upon the further question, dependent upon them, as to whether instruction No. 1 should have been given. We have, however, felt it incumbent upon us to direct attention to this alleged error, and the questions upon which it depends, so as to avoid any misconstruction as to the bearing of this case upon the applicability of said clause to an engineer on an engine in a train of which he is not in charge.

2. The plaintiff in error requested the lower court to give to the jury the following instruction, to wit:

"No. 6. The court charges you that if plaintiff's decedent, Kane, for the purpose of cleaning his engine at the time when he was not required by the company to clean it, voluntarily violated the rule of the defendant company requiring him to assist the engineer in watching for signals and obstructions, and if you also find that, but for such violation of the rule of the company, he would not have been injured, the plaintiff cannot recover in this case, and you should return a verdict in favor of the defendant railroad company."

This it refused to do. Its ruling was duly excepted to, and is assigned as error.

This court, in the case of *Railway Co. v. Craig*, 19 C. C. A. 631, 73 Fed. 642,—*Id.*, 25 C. C. A. 585, 80 Fed. 488,—which was twice before it on writ of error, had occasion to consider and determine the effect, on the right of a servant to recover for an injury sustained by him whilst engaged in the master's business, of the fact that at the time of his injury he was violating a rule prescribed by the master for the transaction of his business. The particular rule which it was claimed had been violated in that case was one prohibiting employes from entering between cars, whilst in motion, to uncouple them. On the first hearing the question involved was as to whether the alleged violation could be said to have caused or contributed to the injury. On the second, two questions were involved: One was whether the rule had been abrogated by an habitual disregard thereof to the knowledge of the master's superintendent; the other, whether the violation of the rule, in and of itself, if it caused or contributed to the injury, was sufficient to defeat the servant's right to recover. The lower court, on the second trial, had instructed the jury as to this latter question in these words:



"He might violate the rule itself, strictly construed, and not be negligent; that is, the rule providing that no one should pass in between cars while in motion. He might violate that rule by stepping in between cars when going at the rate of two miles an hour, under such circumstances that it would be a violation of the rule, and yet not be negligence."

And had refused to give this charge:

"That if Craig violated the rules, and their observance would have prevented the injury, or if he had observed the rules the injury would not have occurred, then he is not entitled to recover."

These rulings this court held to be erroneous. In delivering the opinion of the court on this point, Judge Clark said:

"It may be well, in considering the separate parts of the entire paragraph, to refer to certain rules now well settled, and no longer the subject of question. It is, for example, recognized that a duty rests upon a railroad company, in the operation of a complex and dangerous business, to make rules and regulations for the government of its servants and employes. *Railroad Co. v. Camp*, 31 U. S. App. 213, 13 C. C. A. 233, 65 Fed. 952; *Railway Co. v. Dye*, 16 C. C. A. 604, 70 Fed. 24; *Wood, Mast. & S.* 403; 3 *Wood, R. R.* 382; *Reagan v. Railway Co.*, 93 Mo. 348, 6 S. W. 371, 3 Am. St. Rep. 542. And a company being under a duty to make reasonable rules, it needs hardly to be said that there no longer exists any question of its right and power to do so, and that a servant accepting employment with knowledge of such rules, and especially when his attention is directed thereto, is under obligation to fully conform to such rules when and so long as they are really maintained in force, and that a servant or employe failing or refusing to observe such rules takes upon himself the risk of the consequences of such disobedience, and is, as matter of law, guilty of negligence which defeats his right to hold the master liable for an injury of which such negligence is the proximate cause. *Russell v. Railroad Co.* (C. C.) 47 Fed. 204; *Brooks v. Railroad Co.* (C. C.) 47 Fed. 687; *Railroad Co. v. Reesman*, 19 U. S. App. 596, 9 C. C. A. 20, 60 Fed. 370; *Railway Co. v. Dye*, 16 C. C. A. 604, 70 Fed. 24; *Railroad Co. v. Finley*, 25 U. S. App. 16, 12 C. C. A. 595, 63 Fed. 228; *Gleason v. Railway Co.*, 19 C. C. A. 636, 73 Fed. 647, 43 U. S. App. 101; *Railway Co. v. Wilson*, 88 Tenn. 316, 12 S. W. 720; *Railroad v. Reagan*, 96 Tenn. 128, 33 S. W. 1050. If negligence of the servant in violating a reasonable rule is either the sole proximate cause of an injury, or if, without being the sole proximate cause, the servant's negligence concur with that of the master in producing the injury, the master is exonerated from liability, and the servant is without remedy. *Railway Co. v. Hoedling's Adm'r*, 10 U. S. App. 422, 3 C. C. A. 429, 53 Fed. 61; *Railroad Co. v. Howe*, 6 U. S. App. 172, 3 C. C. A. 121, 52 Fed. 362."

And again:

"In the ordinary case of this character the questions of negligence and contributory negligence, as known to the common law, are questions of fact for the jury. In such a case, whether the servant's mode of performing his duties is negligent, as well as whether such negligence is the proximate cause of the injury, are both questions of fact to be submitted to the jury under all the circumstances of the particular case; whereas, in a case like this, with a rule in force, the violation of the rule by the servant is, as a matter of law, negligence, as has often been declared, and the only question left open and to be submitted to the jury, as one of fact, is whether or not such negligence was the proximate cause of the injury, or concurred with the negligence of the master in producing the injury."

Such being the law as to the effect of the violation of a rule, if its violation causes or contributes to the injury complained of, it follows necessarily that if decedent, Kane, at the time of his injury, was violating that portion of the rule of plaintiff in error referred to

in the statement preceding this opinion, which requires a fireman to assist his engineer in watching for signals and obstructions, and such violation caused or contributed to his injury, his personal representative was not entitled to recover herein. That decedent at the time of his injury was acting in violation of such portion of said rule is clear. It is certain that he was then engaged in cleaning the number of the engine on the front end of the boiler, below the headlight, with his back to the east and his front to the west. It was alleged in the petition that he had gone out on the "front of his engine for the purpose of cleaning the number of said engine, which number is just below the headlight," and whilst "at work cleaning the number of said engine" the collision took place, catching "plaintiff's decedent between said car and engine, crushing and mangling him to death," and there was nothing in the evidence to impugn the truth of these statements. On the contrary, it all went to confirm them. The engineer on decedent's train testified that the last he saw of him was out on the running board, opposite the bell, with a piece of waste in his hand. A bystander testified that he did not know whether the gondola "hit him or the jerk knocked him, but he fell in between, and it ketched him," and that he "thought he was wiping something"; he "couldn't exactly say." And trainmen and bystanders testified that he was found on top of the draft timbers of the gondola, under the body, with his head towards the engine and feet from it, and crushed through the back.

The court, in its charge to the jury, submitted to it the question whether decedent's action was a violation of that portion of said rule which requires firemen to "clean and polish their locomotives at the end of each trip," intimating to them that, in its opinion, it was not; and counsel for defendant in error earnestly contend the same thing. The point made by the court in support of this position was that this portion of the rule has no application to firemen working upon yard engines, because it presupposes that the locomotives to which it does apply take trips, and an engine at work in a yard does not do this. Possibly this point is well taken, and possibly, also, it is not. Each day's work of such an engine may be regarded as a trip; when it goes out to work being the beginning of the trip; and when it comes in, the end thereof. But though, in this view of the matter, it may be properly said that this portion of the rule has application, it would seem that the object of it is to secure the cleaning and polishing of each locomotive at frequent and regular intervals,—the time fixed upon being the end of each trip it makes,—and not to prohibit such cleaning and polishing at other times. As, for instance, it is hardly to be said that doing this at the beginning of each trip, or at intermediate stations, or on side tracks, when the locomotive is not in motion, is prohibited. And if not at other times when not in motion, so not at other times when in motion. We are therefore inclined to the view taken by the lower court, that decedent's action was not a violation of this portion of the rule, though not for the same reason, and we do not understand counsel for plaintiff in error to be contending that it was. But it does not follow from this that his action was not a violation of that portion of the rule which required him

to assist in watching for signals and obstructions. It must be regarded, in view of the absence of permission to clean and polish at other times than at the end of each trip, that it is a violation thereof to be so doing when on the road,—certainly when the engine is in motion. A fireman is required by said rule to do several things when his locomotive is on the road. Primarily, he is required to do that which will enable the engine to run, to wit, fire, water, and oil; secondarily, that which will enable it to run efficiently and without accident,—to watch for signals and obstructions. When not occupied with the former, it is his duty to be doing the latter, and doing anything that interferes with its performance is a violation of that portion of said rule. Nowhere is there greater necessity for the efficient performance of this duty than in a yard, where there is much more shifting and making of couplings and uncouplings, and more likelihood of running into something—other engines or cars or individuals—or being run into. There can, therefore, be no question but that decedent was violating this portion of said rule at the time of his injury. It would seem to be certain, further, that, even if to any extent, whilst engaged in cleaning the number of the engine, he was watching for signals and obstructions,—a matter, however, of very great improbability, if not impossibility, and, at best, of pure speculation, without anything in the facts proven to justify an inference that he was,—he was not in his proper place. That place was in the cab, on the left-hand side, where he could more readily catch signals and observe obstructions, and more promptly and correctly communicate information received to the engineer. That such was his proper place when not engaged in the performance of a primary duty was proven by decedent's engineer, and is a matter of common knowledge. The requirement that he should be there when not so employed, as well as that he should promptly and correctly communicate the information received to the engineer, may be said to be implied elements in that portion of the rule providing that he should assist the engineer in watching for signals and obstructions. But whether so or not, it was his duty to perform the duty so required from that vantage point. This he was not doing at the time of the collision. And, in addition to this, irrespective of the question as to whether his being out on the front of the engine was a breach of such a duty, and as to whether he was violating the requirement to assist the engineer in watching for signals and obstructions, it would seem that it was negligence for the decedent to be where he was, because of the great danger of that position, and the absence of reasonable occasion for his being there. In the cases of *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, and *Kresanowski v. Railroad Co.* (C. C.) 18 Fed. 229, 5 McCrary, 528, laborers had been injured whilst riding upon the front of engines. In the first case a box car had been provided for plaintiff and other laborers to ride in, and he chose to ride on the engine. He was injured by a collision between his train and cars upon the track. Mr. Justice Swayne, in alluding to the place where plaintiff was riding, said that it was "obviously a place of peril, especially in case of collision." In the other case there was no room for the plaintiff to ride, save on that

part of the engine, where he was injured by a collision between the engine he was riding on and another one. Concerning the place where plaintiff was riding, Judge Shiras said:

"I think it is apparent to every one—it cannot be questioned—that a person placing himself upon the pilot of an engine certainly puts himself in a very dangerous position. There can be no more dangerous one to be thought of, upon a train or upon a locomotive. It is apparent to every one that it is a place that is exposed to the very greatest danger. In case of any accident, there is scarcely any protection at all to prevent the party from being thrown off from the locomotive. It is not a place gotten up or intended to be used for the purpose of persons riding upon, and in case of collision, where the collision comes from the front part of the engine, it is the place, of all others, that is exposed to the greatest danger."

In the case of *Railroad Co. v. Egeland*, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82, Mr. Justice Peckham, in referring to these two cases, said:

"The persons injured in those cases were seated, in the first case, on the pilot of the engine, and, in the other, on the front beam of the engine, with his feet over the pilot. The positions were most dangerous, and the danger was plain and obvious at the first sight. No other place on either train was as dangerous, and yet each of the plaintiffs substantially selected his position as a fit and proper place to ride in. The great and obvious danger of the positions in which the plaintiffs voluntarily placed themselves is the material and controlling fact upon which the cases were decided."

And again:

"Both these cases \* \* \* stand on the same ground, which is the exceedingly dangerous position taken by the plaintiffs upon the engines, the danger of which was open and obvious to every one."

There is this difference between this case and those two. Here the decedent was at work. There one plaintiff was riding from, and the other to, work. Besides, it may be said that riding on the front end of an engine, with nothing in front of it, is more dangerous than so riding with cars in front of it, as here. But as we have seen, the work was not required or even authorized, and his being there was therefore entirely without reasonable occasion for it. And though riding in such a place may be more dangerous when there are no cars in front of the engine than when there are cars there, in the latter instance it is so dangerous that it must be regarded that it is negligence for one to be there under such circumstances. In the event of a collision, there is no place so dangerous for one to be as between cars, or between a car and an engine, as here, except it be on the front of an engine, with no cars in front of it. Counsel for defendant in error contends that, because decedent's standing on the beam in front of the engine did not place him entirely between the engine and gondola, and the distance from where he was standing to the gondola was as much as 4½ feet, he was not in a dangerous place. But we do not see that these two facts render the place where he was standing so much less dangerous than it would have been had he been entirely between the two, and they were closer together, as to make his standing there not negligence. It is so uncertain what will happen in the event of a collision that the question as to negligence in voluntarily and without reasonable occasion being be-

tween cars, or between an engine and car, should not be affected by the mere distance between the two, or the extent that the party injured is between them. Again, counsel for defendant in error urge that it was not negligence for decedent to be there, because he was not bound to anticipate Bowker's negligence, through which the collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where, as a matter of law, it is negligence not to anticipate negligence in others. As, for instance, it is well settled in the federal courts that it is negligence for a highway traveler not to anticipate failure on part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals. Mr. Justice Field, in the case of *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, said:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precaution for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of danger."

And it is hard to understand how it was held in the foregoing cases that it was negligence for an employé to ride on the front of an engine, except upon the idea that he was bound to anticipate a collision from negligence or mishap. Mr. Beach, in his work on *Contributory Negligence* (2d Ed., §§ 38, 39), treats of this matter, and his conclusion is announced in these words:

"The rule that a plaintiff must exercise ordinary care under the circumstances in order to escape the imputation of contributory negligence will more often require him to act upon a presumption of the probable or possible negligence or wrongdoing of others than it will justify him in acting upon the contrary presumption. This, in the author's judgment, is a view that commends itself to the common experience and common sense of the average mankind, though it has found little sanction at the hands of the judges."

It seems to be equally clear that decedent's being out on the front of the engine, instead of in the cab, if not his violation of said portion of the rule requiring him to assist in watching for signals and obstructions, concurred with Bowker's negligence in bringing about, and therefore contributed to, his injury. There was room in the evidence for the inference that if decedent had been in the cab, watching for signals and obstructions, the approach of Bowker's train might have been observed, and he warned through the whistle on decedent's train, or the course of the latter might have been reversed, and in either or both of these ways the collision might have been prevented. The engineer was engaged at the time in looking east for a signal that his train had cleared the switch, and, had decedent been on the lookout from the cab whilst this signal was being looked for, one or the other of them could have been looking west. It is certain, however, that if decedent had been in the cab, and not on the front of the engine, he would not have been hurt, as the cab and the engineer in it sustained no injury. In the *Jones Case*, supra, Mr. Justice Swayne said:

"All those in the box car, where he should have been, were uninjured. He would have escaped, also, if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."

And in the Egeland Case, *supra*, Mr. Justice Peckham, in referring to the effect of the dangerous position occupied by the parties injured in the Jones and Kresanowski Cases, said:

"It was therefore held that the necessary inference or legal conclusions to be drawn from these uncontradicted facts was that the plaintiffs, in their choice of positions on the engines, were guilty of negligence directly contributing to the injury."

The facts of this case, therefore, were such that the defendant might properly have asked a peremptory instruction on the ground of decedent's breach of duty in being out on the front of the engine, instead of in the cab, if not for his negligence in being there without reasonable occasion for it, irrespective of the question as to whether it was his duty to be in the cab. It was certainly entitled to have the question submitted to the jury as to whether said portion of the rule had been violated by decedent, and the violation thereof had contributed to his injury. Of course, if the evidence had showed that said portion of the rule had been abrogated to the extent of permitting the cleaning of engines under the circumstances of this case, then plaintiff in error would not have been entitled to have it submitted to the jury whether decedent's action was a violation of said portion of the rule, and contributed to his injury. An attempt was made to show that it had been, to that extent, abrogated. The attempt, however, fell short of coming up to the requirement as to what is necessary to show an abrogation. The conductor of Bowker's train and the engineer of decedent's train both testified that firemen cleaned their engines in the yard at Niles when in motion, as well as when standing. But knowledge thereof was not brought home to any employé with whose knowledge plaintiff in error was chargeable, nor was the habit or custom of so doing proven to such an extent as that it might be inferred that such employé had such knowledge. On the contrary, the superintendent of the division of plaintiff in error's railroad, in which the Niles yard was located, introduced as a witness by plaintiff in error, testified positively that he never knew or heard, before the trial of this case, that any fireman on his division of the road had engaged in cleaning his engine whilst in motion. This case, therefore, does not come within the case of *Railway Co. v. Craig*, 25 C. C. A. 585, 80 Fed. 488, where this court held that habitual disregard of a rule by employés, to the knowledge of the superintendent, amounts to an abrogation of the rule. It comes within the cases of *Russell v. Railroad Co.* (C. C.) 47 Fed. 204, and *Railroad Co. v. Reesman*, 9 C. C. A. 20, 60 Fed. 370, 23 L. R. A. 768, where it was held that prior disregard of a rule more or less habitual, even though to the knowledge of a conductor, did not amount to its abrogation. There was therefore nothing in this consideration to deprive plaintiff in error of the right to have said instruction given to the jury. And it was error to refuse to give it, unless it was substantially embodied in the charge that was given.

The lower court instructed the jury at three separate times. The first was the usual charge at the close of the evidence. The other two were upon recall of the jury from their room after the submission of the cause to them. On the last occasion they were simply instructed as to the burden of proof on the question of contributory negligence, and no further reference need to be made to it. Possibly the true effect of what the court said in its original charge, and on the first recall, upon the subject of decedent's contributory negligence, cannot be had without quoting it in full. But we believe we can do justice to it without so quoting it, and its length is such that to quote it in full would extend the opinion too greatly. As before stated, the court submitted the question as to whether decedent's action in cleaning the number on his engine was in violation of that portion of the rule which required firemen to clean and polish their locomotives at the end of each trip; intimating, however, that, in its opinion, for the reason heretofore stated, it was not. It not only intimated this, but also that there was some doubt as to whether decedent was out on the front of the engine, cleaning its number, at the time of the collision. After doing so, however, it added:

"I am willing to say to you that, both parties having assumed that that was his business there, you may try this case upon the theory that that was the purpose for which he was out on the front of the engine at the time this death occurred."

Indeed, in the course of the charge expressions were used indicating that, in the view of the court at that time, decedent might not have been on the front of the engine at all, but may have been on the running board. Such intimations, as we have seen, were contrary to the distinct allegations of the petition and all legitimate inferences to be drawn from the testimony in the case. But though the question as to the violation of this portion of the rule was submitted to the jury, they were not told, at least in the original charge, that if they believed from all the evidence that it had been violated, and the violation thereof contributed to the injury, plaintiff could not recover. On the contrary, they were there told that, though they might so believe, yet if they further believed that, under "all the" or "the particular facts and circumstances of the case," decedent's action was that of a prudent and careful man, plaintiff was entitled to recover. This was emphasized by being repeated a number of times. One quotation from the original charge is sufficient to present the court's instruction to the jury therein on this point.

"If you find from all the circumstances in the case, and from this proof that has been given to you by the superintendent and everybody else about the management of these trains, and how these operatives were controlled, and also that he was under an obligation and rule not to clean his engine until he had got back to the engine house, or until the engine had gone off duty, so to speak, and that he was on the running board and polishing the engine under circumstances where he was not justified by the rule, and when he was not justified by the particular facts and circumstances in this case, then he cannot recover, under the rule I have given you in reference to contributory negligence. But if you find from all the facts and circumstances that this rule does not apply to that situation, and that, whether it did apply or not, there were certain facts and particular facts and circumstances that then and there existed which justified a prudent man, in the

discharge of his duties, acting under the rule of ordinary care, that he was doing that which was prudent and careful, he would still be entitled to recover, and it is a question for you, gentlemen of the jury, to determine, as it was in the other case, whether he was guilty of any such negligence, under the rules and under the management and control of this train, as an ordinarily prudent fireman would not do."

The court also submitted to the jury the question as to whether decedent's action was a violation of that portion of the rule which requires firemen to assist the enginemen in watching for signals and obstructions. It did so in the original charge in these words:

"There is another branch of this rule to which some of these instructions and much of the argument has been directed, and that is that he shall assist the engineman in watching for signals and obstructions. It is conceded by his learned counsel, who have argued this case for him, or for the plaintiff, rather, that he was bound by that rule; that that was his duty,—to look out; help the engineman to look out; but they say it was just as necessary for him to look in the easterly direction as in the other direction, and he might have been engaged in that duty while he was cleaning the engine and polishing it,—might have been looking out in that direction. We have no proof to show that he was directed to go there for that purpose, or that there were any circumstances that made it necessary for him to go for that purpose; and yet, it might have been, for a watchful, prudent man, as his counsel say,—it might have been that he felt he could discharge that duty of keeping a lookout for obstructions as well there as elsewhere. And then, again, he might have felt that the situation there was such that there was no reason for him to be looking out for any train running back against him under the particular circumstances of that case. Was the situation such that he might expect that a train would be coming back against him, when he saw that Bowker's train had gone across, and was to stop at the crossing up there until he should receive a signal to come back? The same rule in determining his prudence and carefulness in respect to that obligation of the rule applies as in respect to the other. He was bound to do that which a prudent and careful man would do, charged with that duty and that obligation. And it is a question for you to determine, on all the facts and circumstances in this case, as it appears in that particular situation, and say whether or not he was doing that which an ordinarily prudent and careful fireman, charged with the duties of a fireman, under those particular circumstances, would do. If he was, he is entitled to recover. If he was acting imprudently and without due and ordinary care, under those circumstances, he is not. And that is a question for you to decide upon this proof, as you have had it before you from the witnesses."

The intimation in said portion of said charge that it might be prudent for a fireman, under the circumstances of this case, to watch for signals and obstructions, standing on the front of his engine, and that the jury might infer that decedent was in fact so doing whilst engaged in cleaning the engine, cannot be approved. Certainly, in so far as it and that part of the charge which related to the other portion of the rule left it to the jury to determine whether decedent's action was prudent and careful, even though it may have been in violation of the rule, it was erroneous. They contained the vice of the instruction disapproved by this court in the case of *Railway Co. v. Craig*, supra, on the last hearing herein. They left it to the jury to determine whether the violation of said portions of the rule was negligence, when the jury should have been told that such action was negligence, as a matter of law, and that, therefore, if said portions of said rule had been violated, and the violation thereof contributed to the injury, they should find for the defendant. The first



recall was for the purpose, as the jury were told, to "correct some wrong impressions" that had been made by the original charge. Possibly it was the intention of the court upon the recall to withdraw the position embodied in the original charge,—that plaintiff was entitled to recover, notwithstanding decedent's action was in violation of either portion of said rule, if they believed that it was that of an ordinarily prudent and careful man,—and to tell them, if it was such a violation, it was negligence, as a matter of law, and no recovery could be had. If such was the purpose of the recall, the further instructions given did not correct those originally given in the above particular. At least, they were so ambiguous that it is not reasonable to believe that they succeeded in removing the wrong impressions made by those given at the first. One quotation from the additional charge will make this good. It is in these words:

"You are to look to all the duties that he had to perform, and if you find he was not there for the purpose of looking out for signals and looking out for obstructions, and you find he was there for the purpose of cleaning or polishing up his engine, then it is a question for you to determine, as it was before, whether or not, under this rule, he was properly and prudently there, or whether he was there in violation of this rule. And if you find he was there in violation of this rule about cleaning the engine, then he cannot recover. If you find he was there properly and prudently under the rule, and that he might do it under the rule, or, rather, that the rule did not apply, and he might do that, and it was according to the ordinary custom and habit of the fireman on this road to clean the engine under those circumstances, it is for you to say whether he was prudently there. If he was following the rule, or ordinary custom and habit of firemen to do that, where the rule did not apply, then he would not be guilty of contributory negligence."

It is evident, therefore, that the idea contained in instruction No. 6 asked for by defendant was not embodied in the charges to the jury. That being so, it was error for the court to refuse to give it.

3. The defendant excepted to certain portions of the charge to the jury originally and upon the first recall, and these portions thereof are assigned as error. Some of them are contained in the portions of said charges already quoted. So far as not there contained, they express similar ideas, or ideas which we have already commented on and criticised. In making these quotations, and commenting upon them and said ideas, we have had in view that the words conveying them were assigned as error, as well as their bearing upon the question as to whether there was error in refusing instruction No. 6. A consideration of them in connection with what we have already said is all that is sufficient to show to what extent and why they are erroneous.

4. Bowker was summoned as a witness at the trial by both parties, and attended in pursuance to the summons. He was not put upon the stand by either party, and did not testify in the case. The court instructed the jury upon this matter in these words:

"Much comment has been made by the plaintiff's counsel upon the fact that Bowker hasn't been here to testify about that circumstance; that he hasn't been put upon the stand by the defendant company to explain how it was that he came to move that train under the circumstances that he did. On the other hand, the defendant says that Bowker was under the subpoena of the plaintiff, and that the plaintiffs might have put him on the stand

themselves, as they had him subpoenaed here, to have shown how it was, if they desired to do so. The rule of law upon that subject is this: Where it appears that there is in the possession and under the control of one of the parties evidence which would explain or which would in any way mitigate the proof that has been offered by the other side, and that testimony is not introduced, and no sufficient and satisfactory reason is given for not introducing it,—no good ground is shown for not introducing the witness,—the law presumes that the testimony of that witness, if produced, would operate against the party whose duty it would be to offer it."

And again it charged:

"On the other hand, where a party, the other side, has control of the testimony, or has the power to introduce the testimony, and does not do so, the presumption is to be taken most strongly against them,—that, if that testimony was offered on the witness stand, it would be against them, or it would be seen to tend to prove the issue against them."

Other language in the same line was used, but the above alone was excepted to, and has been assigned as error. We think it clear that the court erred in so charging the jury. *Scovill v. Baldwin*, 27 Conn. 316; *Bleeker v. Johnson*, 69 N. Y. 309; *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095; *Crawford v. State*, 112 Ala. 1, 21 South. 214; 1 Greenl. Ev. (16th Ed.) § 1956; *Whart. Ev.* § 1207. Counsel for defendant in error do not contend otherwise. Their position is that the error was not prejudicial, because plaintiff was entitled to a peremptory instruction to the jury to find that Bowker had been guilty of negligence. Counsel for plaintiff in error do not dispute that plaintiff was entitled to such an instruction, but contend that the instruction complained of was prejudicial, because it placed defendant in the attitude before the jury of suppressing the truth. Inasmuch as this case has to be reversed upon the other grounds stated, it is not necessary to determine this question.

For the reasons stated, the judgment of the lower court is reversed, and the cause remanded for proceedings consistent with this opinion

## OAKLAND SUGAR MILL CO. v. FRED W. WOLF CO.

### DETROIT SUGAR CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. October 7, 1902.)

Nos. 1,060, 1,061.

#### 1. FOREIGN CORPORATIONS—MICHIGAN FRANCHISE ACT—VALIDITY OF CONTRACTS.

The Michigan franchise tax act of 1891 (Comp. Laws Mich. 1897, § 8574) requires, *inter alia*, every foreign corporation "which shall hereafter be permitted to transact business in this state" to pay a franchise fee, and provides that all contracts made in the state "by any corporation which has not first complied with the provision of this act shall be wholly void." As construed by the supreme court of the state, such statute has no application to a foreign corporation whose business relates entirely to interstate commerce, but imposes a tax upon the franchise or privilege of carrying on business within the state. *Held*, that as so construed the statute is within the power of the state and enforceable as applied to a foreign private business corporation which commences

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¶1. Taxation of foreign corporations, see note to *McCanna & Fraser Co. v. Citizens' Trust & Surety Co.*, 24 C. C. A. 13.

business in the state with the purpose of transacting or carrying it on, and if it does so without first paying the required tax the act renders all contracts made in the state in the conduct of such business void, but that it is not intended to apply to a single contract made by a foreign corporation which is not of a character to indicate a purpose to engage in business in the state.

2. SAME—DOING BUSINESS IN STATE.

The question whether a foreign corporation is engaged in "transacting" or "carrying on" business in Michigan, so as to be subject to the penalty imposed by the state statute for failure to pay a franchise tax, is one of fact, to be determined by the jury, unless the evidence is undisputed, and but one inference can be drawn from it.

3. ACTION FOR PRICE OF MACHINERY—DEFENSE OF BREACH OF WARRANTY—ESTOPPEL.

Plaintiff furnished and installed for defendant the machinery for a large sugar mill under a contract which warranted the capacity of the plant, and that the machinery and appliances should be first class and of the most approved designs. A portion of the purchase money was to be withheld for 60 days after the mill went into operation, during which time defendant was to have full opportunity for inspection. In fact, no demand for payment was made until it had been operated during a full season under plaintiff's superintendence, and its capacity shown to meet the warranty. Defendant then presented a written list of alleged defects, which it afterward twice added to. Plaintiff remedied the most of the defects claimed, but a few it disputed, and on defendant's refusal to pay the remainder of the contract price until they were remedied brought suit for the same. *Held*, that defendant was not entitled to prove as breaches of the contract other defects not complained of before suit, upon a claim that they were not known until afterward, there being no offer to show that they were latent, and could not have been discovered by reasonable diligence.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This is an action of assumpsit brought by the Fred W. Wolf Company, an Illinois corporation, against the Oakland Sugar Mill Company, a Michigan corporation. The cause of action arose upon a written contract dated January 27, 1899. The contract is of great length. In substance its provisions were as follows:

(1) The contractor, the Wolf Company, undertook, at its own expense, to furnish all the engines, boilers, machinery, tools, implements, appliances, and appurtenances, and the materials therefor, and perform all the work necessary to fully equip a beet sugar factory upon lands of the owner, of a sufficient power and capacity to manufacture sugar from 500 tons of beets each 24 hours, and to set up and install the same and put the same in operation. The plans and specifications are to be furnished by the contractor, and shall be subject to acceptance and approval of owner. "The owner shall have the right to employ competent men to inspect said material, machinery, etc., and to inspect the installation and operation thereof during the progress of the work, and all reasonable facilities for such inspection shall be furnished by the contractor to the owner."

(2) The contractor to furnish the owner with four sets of blue prints, complete building plans, and specifications for the buildings required for said factory.

(3) The contractor guarantees that the cost of the granulated sugar produced by the factory for a period during the campaign of 1899, or about 100 days, shall not exceed an average of 3¼ cents per pound. During this campaign the contractor for the purpose of testing the operativeness of the mill, and to carry out this guaranty as to cost and quality of sugar produced,

¶ 2. Foreign corporations "doing business" in state, see note to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585.

contracted to take entire and absolute control of the mill and all its operations, and make selection of all skilled operatives, the owner to furnish all other help and materials. The test to continue through the season for delivery of beets, and to be at expense of the sugar company. Certain conditions in respect to cost of beets and coal and other materials were also specified.

(4) "All materials, and all workmanship used and furnished by the contractor in the construction of said machinery and appliances and equipments, shall be first class in every respect, and said machinery, appliances, and equipment shall be of the latest and best approved designs and patterns."

(5) The work is to be completed on or before the 1st day of October, 1899.

(6) The owner is to provide the land and buildings required for the factory, to perform the masonry, iron, and carpenter work pertaining to such work, on or before the 1st day of June, 1899. The owner is to perform all masonry and carpenter work in and about the machinery, and is to furnish a railroad switch and the water supply.

(7) The owner shall pay the contractor for machinery, materials, and work the sum of \$293,000. The terms of payment are prescribed.

(8) All the property rights in the machinery, etc., are to remain in the contractor until payment is made.

(9) The plant is to be accepted at the close of the campaign of 1899, if it complies with the contract.

(10) The contractor is to protect the owner against liens.

(11) The owner is to maintain insurance against fire.

(12) The contractor is to protect the owner against claims under patents.

(13) The contractor is to furnish a bond, guarantying performance.

(14) Provides that modifications of the contract shall be in writing.

(15) The right of the owner to become purchaser of the machinery, etc., attaches to each article as it is procured.

The plaintiff's declaration avers performance, and charges that defendants did not perform. The bill of particulars credits the defendant with payment of \$265,000, but claims a balance due of \$28,000, with interest. The defendant pleaded the general issue with notice of special defenses. This notice avers performance by the defendant, and denies performance by plaintiff. It denies that the work done on the machinery and appliances furnished were first class or the mechanism of the latest and best pattern. A large number of defects in the articles and appliances furnished are specifically pointed out. Damages were claimed in a large sum owing to such alleged defective construction. The contract of the Oakland Sugar Company was guarantied by the Detroit Sugar Company. The plaintiff contemporaneously brought suit against the Detroit Sugar Company upon this guaranty. The two suits were tried together, the defenses to the latter being identical with those to the former. There was a jury, and verdict for the plaintiff for \$29,627.19, and judgment accordingly in both cases.

H. H. Hatch, for plaintiffs in error.

George W. Moore and Frank H. Scott, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The principal question arising upon this writ of error concerns the validity of the contract under the Michigan act of 1891, entitled "An act to provide for the payment of a franchise fee by corporations." Pub. Acts 1891, No. 182. The contract in question was made January 27, 1899. The act of 1891, with the amendments then in force, is found as section 8574, Comp. Laws Mich. 1897, and is in these words:

"An act to provide for the payment of a franchise fee by corporations.

"(8574). Sec. 1. The people of the state of Michigan enact, that every corporation or association hereafter incorporated or formed by consolidation or

otherwise, by or under any general or special law of this state, which is required by law to file articles of association with the secretary of state, and every foreign corporation or association which shall hereafter be permitted to transact business in this state, which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this state and been thereby authorized to do business therein, shall pay to the secretary of state a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore organized or doing business in this state which shall hereafter increase the amount of its authorized capital stock shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof; provided, that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this state, or foreign corporation authorized to do business in this state, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this state shall pay a franchise fee of five dollars. All contracts made in this state after the first day of January, eighteen hundred ninety-four, by any corporation which has not first complied with the provisions of this act, shall be wholly void."

The Fred W. Wolf Company is confessedly a foreign corporation, which had not complied with this law, and the contract was confessedly made in the state of Michigan. The act, already set out, declares that "all contracts made in this state after January 1, 1894, by any corporation which has not first complied with the provisions of this act, shall be wholly void." To determine the corporations to which this damnable clause applies, we must look to the whole act, and construe all of its parts together. The words "any corporation," used in the clause, manifestly mean any of the corporations required to pay the franchise tax by the preceding parts of the act.

When we look to see what classes of corporations are required to pay this franchise tax, we find that they consist of two kinds: (a) Domestic corporations thereafter organized or created by consolidation, or who should thereafter increase their capital stock. (b) Foreign corporations thereafter "permitted to transact business in this state," or which should thereafter increase their capital stock.

What foreign corporations are meant by those thus described? If we turn back to the earlier legislation in respect to foreign corporations, and plainly referred to by the act here involved, under which foreign manufacturing and mercantile corporations were authorized to file and record their charters, we find that, by an amendment to the general act authorizing the incorporation of domestic manufacturing and mercantile corporations, corporations of any state or foreign country created for any of the purposes contemplated by the Michigan act might file and record their charters and appoint an agent for service of process, and thereafter "carry on business" in the state, and "enjoy all the rights and privileges, and be subject to all the restrictions and liabilities, of corporations existing under this act." 3 How. Ann. St. § 4161d6, and section 7072, 2 Comp. Laws Mich. 1897. This provision has been construed as simply defining the terms upon which such foreign corporations might, if they should so desire, become entitled to the benefits conferred by the act upon domestic corporations

organized under that act, but as in no wise prohibiting such companies from "doing business" in the state or making their contracts void for noncompliance. *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736.

There would seem to be some ground for construing this franchise tax act as requiring the payment of such tax only by such foreign corporations as should voluntarily choose to file and record their charters, and that it had no effect upon the contracts of corporations which had not availed themselves of the privileges of filing and recording their charters. But the act is in this respect not now subject to our interpretation inasmuch as the supreme court of Michigan has construed it, and held it applicable not only to such foreign corporations as should actually file and record their charters, but to all foreign corporations carrying on or transacting business in the state, whether they choose to avail themselves of the right of registration or not. *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147; *Secretary of State v. National Salt Co. (Mich.)* 86 N. W. 124. In *Rough v. Breitung*, a contract made in Michigan by a foreign corporation "doing business" in the state was held unenforceable, because it had not paid the franchise tax imposed by this act. In *Secretary of State v. National Salt Co.*, the Michigan supreme court refused to issue a writ of mandamus requiring the salt company to file and record its charter as a foreign corporation doing business in the state, the court saying:

"If it chooses to do business without compliance with the law, it does it at its risk, and is subject to a suit by quo warranto, or to pay the penalty provided by the law, as was done in *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147."

Although the act declares that "all contracts made in this state by any corporation \* \* \* which has not complied with this law shall be wholly void," yet these words, "all contracts," are not to be construed literally; for this would include contracts in respect of purely interstate commerce, and make the act repugnant to the interstate commerce clause of the federal constitution. In *Coit v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819, the act was construed by the Michigan supreme court as having no application to foreign corporations whose business within the state consists in the sale and delivery of goods or commodities made in other states, whether the contract for such sale be made in or out of the state. This construction of the act excludes purely interstate transactions, and confines its operation to business done or carried on within the state of Michigan. This construction, being that of the highest court of the state as to the scope of the act, is conclusive upon the courts of the United States in a case like this. *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 565, 7 Sup. Ct. 4, 30 L. Ed. 244.

It is plain that this statute is intended to put foreign corporations doing business in Michigan upon a like footing with domestic companies in respect to the payment of a franchise tax as a condition to the lawful transacting or carrying on of business in the state. Neither kind of company is permitted to file and record its articles of association without paying this tax. The organization of the domestic company could not be completed without filing and recording its articles,

and there could be no filing without the prepayment of this tax. If the foreign company desired to be put upon a plane of equality with domestic companies, it, too, must file and record its charter, and this it could not do without prepayment of the same franchise tax. But, as we have already seen, a foreign company could not be compelled to file its charter or prepay this franchise tax, although doing business in the state. It may, as said by the supreme court of Michigan, do business at its risk, being unable to enforce its contracts as a penalty for nonpayment of this franchise tax. *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147. But liability to this penalty is dependent upon the condition that the foreign company whose contract is in question was engaged in "doing," "transacting," or "carrying on business" in the state. Nor, as we have seen, can the tax be exacted of a foreign corporation whose business in the state is limited to taking orders to be executed by the sending of goods into the state from another; for that would be a regulation of interstate commerce, and such regulation is not within the power of any state, and is wholly beyond the scope of this law as construed by the highest court of Michigan. *Coit v. Sutton*, already cited.

In prescribing the terms and conditions upon which foreign corporations might "carry on" their business in the state, the state did not exceed its reserved powers; for it is well settled that it is entirely competent for a state to prescribe the terms upon which a foreign corporation may enter and transact business in the state. 2 Tuck. Const. U. S. 628; *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; *New York v. Roberts*, 171 U. S. 658, 664, 19 Sup. Ct. 70, 43 L. Ed. 323.

There is a distinction between the effect and scope of such laws when applicable to corporations organized to carry on interstate business, such as railway and telegraph companies, and laws applying only to corporations organized to conduct a strictly private business, and this distinction is noticed in *New York v. Roberts*, cited above. The Michigan franchise tax law is intended to apply to strictly business corporations, such as the *Fred W. Wolf Company*. No tax is sought to be laid, directly or indirectly, upon goods or machinery, imported or domestic, nor on the sale of such goods. It is a tax, said the Michigan supreme court, laid upon "the privilege of doing business in Michigan"; "a tax upon the occupation of the corporation." *Coit v. Sutton*, 102 Mich. 327, 60 N. W. 690, 25 L. R. A. 819. In *New York v. Roberts*, 171 U. S. 658, 664, 19 Sup. Ct. 70, 43 L. Ed. 323, a law imposing an annual tax upon the business of foreign corporations carried on in New York was sought to be enforced against a corporation of another state whose stock of merchandise consisted mainly, if not wholly, of articles which were the product of another state or imported from foreign countries. It was objected that, so far as the business consisted in the importation and sale in original packages, no tax could be imposed under the doctrine of *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678. But the court said:

"But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the

business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture, and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested. *Society v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025."

If the defendant in error was engaged in "carrying on" business in Michigan, it is immaterial whether a part of the materials, machinery, and appliances furnished in discharge of their contracts for the construction of manufacturing plants were brought or are to be brought from other states. The tax is upon "the business carried on in the state," and the origin of the materials and machinery used in carrying on such business cuts no figure; for the tax is not upon articles imported, but on the "business" done in the state.

But the plain purpose of the law is not to compel the payment of a franchise tax against a foreign company which is not "carrying on" or "transacting business" in the state. Such statutes are quite usual, and have almost uniformly been construed as not applicable to the contracts of foreign companies which are not of a character to indicate a purpose to engage in business in the state. Statutes requiring foreign corporations to file their charters, or take out a license, or pay a franchise tax, have with much uniformity been construed as not rendering void contracts which constituted a solitary act of business not indicating a purpose to "carry on business" in the state. *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Manufacturing Co. v. Gorten*, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135; *Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667; *Tabor v. Manufacturing Co.*, 11 Colo. 419, 18 Pac. 537; *Dry Goods Co. v. Lester*, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. Rep. 162; *Bank v. Sherman*, 28 Or. 573, 43 Pac. 658, 52 Am. St. Rep. 811.

The proper construction of the Michigan statute is that no foreign corporation shall begin any business in the state with the purpose of transacting or carrying it on until it shall have paid the franchise tax required by this law, and that, if it does so without complying with the law, all contracts made in the state in the conduct of that business shall be void. It is obvious, if this be a proper interpretation of the Michigan law, that the question as to whether the plaintiff corporation was a foreign corporation engaged in carrying on its business in Michigan without complying with the law was a question of fact to be determined by the jury under proper directions from the court, unless the facts bearing upon the question were undisputed, and the inference from them so obvious as to leave no issue for submission to the jury.

It was conceded that the plaintiff company was a corporation of Illinois, and that its shops for the making of certain lines of machinery were wholly in that state. It was also in evidence that it had no shops or place of business or office in the state of Michigan, and that business was solicited in that state through traveling agents or by correspond-



ence. But there was also evidence tending to show that the Wolf Company was engaged in the business of constructing and equipping manufacturing plants within the state of Michigan, which involved in some instances not only the equipment of such factories with machinery, but the actual planning and constructing of the factory buildings also.

The contract in question does not limit the contractors to machinery of any particular make or indicate its expected origin further than might be presumed from the domicile of the Wolf Company. As a matter of fact, very much of the machinery and equipment was bought from others, and a considerable part of such purchases were made in Michigan from Michigan manufacturers or dealers, though the larger proportion of the machinery installed was, in fact, made by the Wolf Company at their Chicago shops, and shipped in parts to the site and there set up. There was evidence that in the execution of their contract there were employed for several months from 25 to 100 men, who were employed and paid at Rochester, Mich., out of funds deposited in a bank at Rochester for this special purpose. If the business carried on in Michigan consisted wholly in the sale and delivery of goods to be brought into the state upon orders taken either in or out of the state, the Michigan act has no application, according to the construction put on the act by the supreme court of the state. *Coit v. Sutton*, heretofore cited. If, on the other hand, the business carried on in the state included something more than such interstate commerce, the act would apply, and it would be entirely competent for the state of Michigan to prescribe the payment of a franchise tax as a condition upon which such intrastate business might be carried on by a foreign corporation. *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; *New York v. Roberts*, 171 U. S. 664, 19 Sup. Ct. 58, 43 L. Ed. 323.

In the light of all the evidence as to the character of the business involved in the contract here in question, as well as in other contracts made in Michigan before and immediately after the matter at issue, it will be the duty of the jury to say whether the Wolf Company was engaged in carrying on in Michigan any business which was intrastate in character. If they so find, then the Michigan act was applicable and the contract void, unless they find the required franchise tax had been paid prior to beginning such business. The inference to be drawn from the evidence is not, as a matter of law, so obvious as to justify the taking of the question from the jury.

2. Many errors have been assigned to the rulings of the court excluding evidence of alleged defects in the machinery and appliances furnished by the defendant in error, which defects were not discovered, and therefore not claimed, until after suit was brought. The court admitted evidence of defects not claimed before suit brought, when such defects were shown to have been latent, but excluded evidence of defects not then claimed when not accompanied by an offer to show that they were latent, although the plaintiff in error offered to show that such defects were not in fact discovered before suit.

After the factory had been completed and operated a whole season, and after its capacity to extract the sugar from 500 tons of beets per

day at a cost not exceeding  $3\frac{1}{4}$  cents per pound for granulated sugar had been demonstrated and the warranty in that particular satisfied, the plaintiff in error, with great deliberation and in the most specific manner, pointed out in writing a large number of alleged minor defects or alleged departures from the highest standard of workmanship and machinery in the mechanism and appliances furnished, and declined to pay the balance of \$28,000 then due, until these defects were remedied. Twice thereafter, and while the defendant in error was engaged in remedying certain of the matters complained of, this list of defects was amended and enlarged.

The claim that in one of the earlier communications specifying certain defects there was a general statement that there were others not mentioned, by reason of which an estoppel is obviated, has been considered. If that had been the last notice or negotiation, the contention would be of weight. But it was not. It was followed by a later communication, which amended the former list by the addition of nine other claims, making, with the former list, forty-five in all. These were all taken up and remedied until only four, or possibly five, remained unadjusted, and because the contractors would not remedy these remaining claims this suit became necessary. The defendant denied the averment that the contract had been performed, and gave notice that it would claim damages not only in respect of the four disputed items of which it had complained, but that it would claim many other defects not theretofore claimed, and upon the trial it offered to prove various other defects not claimed before suit, averring that these defects were unknown to the defendant until after suit brought.

This offer of evidence was unaccompanied by any offer to prove that these new claims were latent in character and undiscoverable by such inspection as the owner could give before suit. The contract provided that 15 per cent. of the total price might be withheld until 60 days after the starting of the factory. The demand for this balance was not made until after the factory had been operated through a whole season under the direction of the contractor and with its own skilled labor. From the beginning of the work and through the test operations the contractor was under obligation to give to the owner every reasonable opportunity for inspection, and no complaint is made that any obstacle to a full and complete inspection was interposed by the contractor. Neither is it contended that the purchaser would have waived the right to sue for a breach of the warranty by acceptance of the factory, or the right to set off the balance of purchase money when sued for same by the damages resulting from any breach of a warranty as to quality of machinery and workmanship. The objection made to the presentation of claims for defects which had not been presented before suit is predicated upon the fact that, when the balance due under the contract was demanded, the owner based the refusal to pay upon specified grounds, which did not include the objections now urged. The claim was that the contractor agreed that all materials, tools, appliances, machinery, and workmanship should be first class; and that all machinery and appliances should be of the latest and best pattern and design. This warranty it was claimed had been breached in the particulars pointed out, and the purchaser refused to

pay the balance of the purchase price until these specified defects were remedied. The question is whether, under such circumstances, the purchasers are not precluded from advancing new claims of defects without offering to show that these new claims were for latent defects not discoverable by any reasonable inspection at the time the original or amended lists of defects were presented. Under the circumstances, we have stated, we are of opinion that the learned trial judge did not err in excluding the evidence offered of defects not claimed when the purchaser particularized the matters in which it regarded the contract as not performed.

True, the plaintiff in error offered to show that these new claims for defects were in respect of defects not known to it before suit brought. But it did not offer to show that the defects were latent, and that there had been no negligence in failing to discover them when undertaking to point out the changes and alterations necessary to comply with the contract. The contention that it was for the contractor to show that these new claims were not founded upon latent defects is based upon an entire misapprehension of the ground upon which the ruling was rested. The purchaser undertook to point out specifically just what changes and alterations were necessary to satisfy the warranty as to the quality of workmanship, machinery, and appliances, and refused to make further payment until these things were done. The contractor, in effect, said: "Very well. There are four items in your list which I dispute. The remainder I concede. I will go forward and make the changes you demand except as to the items I dispute. These we will submit to the arbitrament of the courts. If I am right, you will pay me the entire balance I claim. If you are right, the sum awarded me will be diminished by the damages incident to the defects which you claim and I deny." The contractor did accordingly make all the changes and alterations demanded except in respect to four disputed items, and has submitted to the court the question as to whether he was bound to do the disputed things. Upon the items thus disputed the jury has found for the contractor.

To permit the purchaser under such circumstances to change the issues and propound new defenses, presumably waived, without offering to show that it had been misled by the conduct of the contractors or that the defects since discovered were latent, would be contrary to well-settled principles of estoppel. *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810; *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; *Carleton v. Jenks*, 26 C. C. A. 265, 80 Fed. 937; *Davis v. Wakelee*, 156 U. S. 680-690, 15 Sup. Ct. 555, 39 L. Ed. 578; *Gingrass v. Iron Cliffs Co.*, 48 Mich. 413, 12 N. W. 633; *Gould v. Banks*, 8 Wend. 562, 24 Am. Dec. 90; *Manufacturing Co. v. Allen*, 53 N. Y. 515, 519.

In *Railway Co. v. McCarthy*, cited above, Mr. Justice Swayne, speaking for the court, thus stated the principle upon which the ruling of the court below was predicated:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Gould v. Banks, 8 Wend. 562, 24 Am. Dec. 90; Holbrook v. Wight, 24 Wend. 169, 35 Am. Dec. 607; Everett v. Saltus, 15 Wend. 474; Wright v. Reed, 3 Term R. 554; Duffy v. O'Donovan, 46 N. Y. 223; Winter v. Coit, 7 N. Y. 288, 57 Am. Dec. 522.

In Carleton v. Jenks it was sought to hold a contractor liable for the damages sustained by a lake steamer by the moving of her boilers, alleged to be due to insecure fastenings. After the boilers had been put in place it was shown that the contractor had called upon the officers of the steamer to examine and inspect the work. This they did, and no fault was found, and the boiler was accepted.

Speaking for this court, Judge Severens said:

"After this inspection, made for the purpose of determining the question of their acceptance, and the taking the machinery away without any further requirements, we think the appellants were properly held to have been concluded from afterwards raising the question of the nonperformance of the contract. *Beverly v. Coke Co.*, 6 Adol. & E. 829; *Parker v. Palmer*, 4 Barn. & Aid. 387; *Bianchi v. Nash*, 1 Mees. & W. 545; *Norton v. Dreyfuss*, 106 N. Y. 90, 12 N. E. 428; *Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; *Hirshhorn v. Stewart*, 49 Iowa, 418. The two cases in 115 N. Y. and 22 N. E. contain very full and elaborate discussions of the law on the subject. A suggestion is made in behalf of the appellants that the appellees were skilled in their work, and that for that reason they (the appellants) were entitled to rely upon representations made by the manufacturers, that the fastening was sufficient, and that, their acceptance being founded upon a representation which turned out to be untrue, the appellants are not bound by such acceptance. We are unable, however, to find much force in this suggestion. It might have significance if the question related to the construction of the boiler itself and applied to inherent defects, or those which were not as readily observable to the other party as to the manufacturers; but the matter of the fastenings to the boat was open, and as much exposed to the inspection and judgment of the appellants as to the manufacturers, and the requirements would seem to be as much within the knowledge of the manager, the captain of the boat, and more especially the chief engineer, who had immediate charge of the machinery, as to any one. In these circumstances the doctrine which the appellants invoke would not have application. *Dounce v. Dow*, 57 N. Y. 16; *Gurney v. Railway Co.*, 58 N. Y. 359; *Dounce v. Dow*, 64 N. Y. 411; *Benj. Sales*, p. 701."

In *Littlejohn v. Shaw*, cited above, the action was upon a contract of sale of gambier. The defendant had rejected the article delivered upon two specific grounds. The contention was that it was a condition precedent to recovery that the plaintiff should affirmatively prove that all the terms of the contract had been fulfilled on his part, and that a failure in any point was fatal to the action. After observing that the general rule was that it devolved upon a plaintiff to show performance of all essential stipulations of a contract sued upon, the New York court of appeals said:

"But in this case the defendants placed their rejection of the gambier upon two specific grounds, viz., that it was not of good merchantable quality, and that it was not in good merchantable condition. By thus formally stating their objections, they must be held to have waived all other objections. The principle is plain, and needs no argument in support of it, that if a particular objection is taken to the performance, and the party is silent as to all others, they are deemed to be waived. This waiver of all other objections is not only justly inferable generally, but is especially so when as under the circumstances present in this case the deliberateness with which the objec-

tions are stated leaves it to be implied that there has been a consideration of the matter of acceptance of the goods and a result reached upon particular grounds. The defendants, therefore, were not in a position to insist upon any other proof of the plaintiffs, to enable them to recover upon their cause of action, than that the gambler was of good merchantable quality and in good merchantable condition."

The errors assigned upon the exclusion of evidence of defects not claimed before suit, and not accompanied by an offer to show that the defects were latent, and all exceptions to the charge as delivered and to the refusal of the court to deliver special charges bearing on this matter, are overruled.

There are a number of exceptions to the competency of evidence, for the most part not of material character, which we do not pass upon, as they are not likely to arise upon another trial, in view of the matter already decided.

The judgment, for the reasons already stated, will be remanded, with directions to award a new trial.

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**SCHMERTZ v. UNITED STATES LIFE INS. CO. IN CITY OF NEW YORK.**

(Circuit Court of Appeals, Third Circuit. September 24, 1902.)

No. 36.

**1. INSURANCE—POLICY—NONCONTESTABLE CLAUSE—CONSTRUCTION.**

A policy provided that it should take effect on payment of the first premium, and that failure to make payment of any subsequent premiums, which were payable annually, when due, should render the contract null and void, and that, if the policy should become void, all payments made thereunder should be forfeited. *Held*, that in view of such provision, declaring the forfeiture for nonpayment of "any subsequent" premium, a provision that after two years from the date of the policy, if the premiums are duly paid as stipulated, the liability of the company should not be disputed, could not be construed to preclude the company from disputing liability or from forfeiting the policy for nonpayment of the third annual premium.

**2. SAME—PREMIUMS—TIME OF PAYMENT—EXTENSION—FORFEITURE—ACTIONS—EVIDENCE—INSTRUCTIONS.**

Where in an action on a policy there was no evidence that the company extended the time for payment of premiums in a certain year beyond the day on which they were payable, according to the terms of the policy, including the 30 days' grace allowed, an instruction that any agreement, declaration, or course of action on the part of the company leading insured to believe that by conforming thereto a forfeiture of his policy would not be incurred would estop the company from insisting on a forfeiture of the policy, etc., was properly refused.

**3. SAME.**

The fact that an insurance company in a certain year or years granted to the insured an indulgence in the payment of his premiums, and accepted payment after the time within which they could be paid had expired, did not bind the company to grant such an indulgence in a subsequent year, or estop it from enforcing a forfeiture for nonpayment of premiums on the date required according to its notices.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

¶ 3. See Insurance, vol. 28, Cent. Dig. § 1057.

D. T. Watson, for plaintiff in error.

Willis F. McCook, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This case is before us on a writ of error to the circuit court of the United States for the western district of Pennsylvania. Amelia E. Schmertz, the plaintiff in error, brought an action of assumpsit in the court of common pleas No. 1 of Allegheny County, Pennsylvania, to recover against The United States Life Insurance Company in the City of New York, a corporation of New York, the defendant in error, on two policies of life insurance, each for the sum of \$10,000, issued to her husband Edmund C. Schmertz in the fall of 1896. After the filing of the statement and affidavit of claim, and before further pleadings were had, the action was, on the application of the defendant, removed to the circuit court for the western district of Pennsylvania, and, thereafter coming to trial, judgment was by direction of the court entered for the defendant November 16, 1901. To reverse this judgment the present writ was taken. Each of the policies is in the same words, letters and figures as the other, save that one of them is numbered 87,280 and the other 87,281, and, aside from the application therefor, is in the following form:

'No. 87,280

Amount, \$10,000.

The  
United States  
Life Insurance Company,  
In the City of New York.

Copy of the application for this policy attached hereto.

Age 41.

Premium, \$183.50.

In Consideration of the statements and agreements in the Application for this Policy on the life of Edmund C. Schmertz (hereinafter called the Insured) which are made part of this contract; and in

Further Consideration of the payment of the annual premium of One hundred and eighty-three Dollars and fifty cents on or before the seventeenth day of September in every year during the continuance of this contract:

Does Hereby Promise to Pay, at its office in New York City, to Amelia E. Schmertz (hereinafter called the Assured) if living; if not living then to the Executors, Administrators or Assigns of the Insured, the sum of Ten Thousand Dollars (less the balance of the year's premium, if any, and any other indebtedness to the Company), within 60 days after receipt at its said office of satisfactory proofs, upon the Company's blanks, of the death of the Insured, within the period of Ten years ending on the 17th day of September, nineteen hundred and six at noon; upon the conditions and agreements on the back hereof, which are made part of this contract.

In Witness Whereof, The said company has, by its president and secretary, signed this policy at its office in New York City, the seventeenth day of September, eighteen hundred and ninety-six.

A. Wheelwright,

Geo. H. Burford,

Assistant Secretary.

President.

(Wife's Continuable Term.)

Edition 294—A.

Checked by

Examined by

H.

E. N. H.

Conditions and Agreements Referred to in the Within Policy.

I. All premiums are payable in New York City at the company's office. This policy shall take effect only upon actual payment of the first premium hereon, and delivery of this policy to the assured (during the lifetime and sound health of the insured), in exchange for the company's receipt for said payment signed by the president, secretary, assistant secretary or actuary. Failure to make payment of any subsequent premium either to the company or to a duly authorized agent in exchange for receipt signed as above, or nonpayment of principal or interest on any note given in connection with this policy, when due, will render this contract null and void. Whenever this policy shall become null and void from any cause, all payments made hereunder shall become forfeited to the company, except that:

II. After being in force three full years, an extended insurance shall be allowed, in accordance with the requirements of Chapter 690 of the Laws of 1892, of New York.

III. In case of understatement of age, the amount payable shall be the insurance that the actual premium paid would have purchased at the true age of the insured. Any other breach of warranty or untrue or incomplete statement made in the application for this policy will render this contract null and void, provided that discovery of the same must be made and communicated to the insured or assured within two years from the date hereof.

IV. Within two years from the date hereof, death by suicide; impairment of health by narcotics or stimulants; travel or residence within the Torrid Zone; engagements in blasting, mining or sub-marine labor; manufacturing, handling or transporting inflammable or explosive substances; service upon any vessel or boat; or engagement in military or naval service in time of war; shall render this contract null and void.

V. This company shall not take notice of any assignment of this policy, until a duplicate original of such assignment be delivered to it at its office in New York City.

VI. Options for renewal, or change of policy, without medical examination.

(a) Upon written application and surrender of this policy, by the legal holder hereof, to the company, at its office in New York City, before the expiration of the term, this policy being in full force and effect, this insurance may be renewed upon the same plan, or upon any other plan then issued by the company, upon payment of the premium therefor corresponding to the then age of the insured.

(b) At any time while this policy is in force, the legal holder hereof may change it to a policy of the same amount, upon any plan then issued by the company, by the payment of the premium rate called for thereby at the then age of the insured; or

(c) To a policy of the same amount and date, and at the premium rate required therefor at the original age hereunder, by payment of a sum equal to the difference in premiums, with interest at the rate of 4 per cent per annum compounded.

VII. The said company agrees, in case the life insured survive to the end of the specified period, if this policy be then in full force, to pay to the said Edmund C. Schmertz the dividend apportioned to this policy from its profits by said company. If desired, said dividend may be used in reduction of future premiums under a renewal of this policy.

VIII. After two years from the date hereof, if the premiums on this policy are duly paid as herein stipulated, the liability of the company under this policy shall not be disputed.

C. P. Fraleigh,  
Secretary.

George H. Burford,  
President."

Policy No. 87,280 was delivered to Edmund C. Schmertz, the insured, October 22, 1896, and policy No. 87,281 was delivered to him November 30, 1896. Schmertz paid the annual premium on each policy for two years, and, while the payments were not, in point of time, made in those years as required by the express provisions of the policy, it is nevertheless conceded that the delay on his part in making

them did not under the circumstances disclosed in the case render void or in any manner affect the validity of the policies or either of them. Schmertz died October 20, 1898; neither he nor any one for him having paid the third annual premium on either of the policies. Nor was such third annual premium paid by anyone after the death of Schmertz.

The first question raised by the assignments of error, and that on which much stress was laid by counsel on both sides, is whether, the annual premiums for the first two years having been paid to and accepted by the insurance company, the omission to pay the annual premium on the policies for the third year avoided them. Under each policy Schmertz was insured "upon the conditions and agreements on the back hereof, which are made part of this contract." One of those conditions is as follows:

"VIII. After two years from the date hereof, if the premiums on this policy are duly paid as herein stipulated, the liability of the company under this policy shall not be disputed."

It is claimed on the part of the plaintiff in error that the words "if the premiums on this policy are duly paid as herein stipulated" have reference solely to the period of two years next following the date of the policy, and that the effect of the condition is that, if annual premiums were duly paid by him for that period, the policy could not be avoided by his failure to pay the third or any subsequent annual premium as stipulated in the policy. The policy on its face shows that a vital consideration for the contract of insurance was "the payment of the annual premium of One Hundred and eighty-three Dollars and fifty cents on or before the seventeenth day of September in every year during the continuance of this contract." The consideration of the contract was not in whole or in part any promise or undertaking on the part of the insured to pay such premium every year, but his actual payment thereof every year until his death or the termination of the period of ten years, whichever event should first occur. The first condition in the policy is of controlling importance. It and the second condition are as follows:

"I. All premiums are payable in New York City at the Company's office. This policy shall take effect only upon actual payment of the first premium hereon, and delivery of this policy to the assured (during the lifetime and sound health of the insured), in exchange for the company's receipt for said payment signed by the president, secretary, assistant secretary or actuary. Failure to make payment of any subsequent premium either to the company or to a duly authorized agent in exchange for receipt signed as above, or non-payment of principal or interest on any note given in connection with this policy, when due, will render this contract null and void. Whenever this policy shall become null and void from any cause, all payments made hereunder shall become forfeited to the company, except that:

II. After being in force three full years, an extended insurance shall be allowed, in accordance with the requirements of Chapter 690 of the Laws of 1892 of New York."

The exception contained in the second condition has no applicability to this case, which, aside from any question of waiver, falls strictly within the express provisions of the first condition. That condition is in itself plain and unambiguous. There is no room on its face for more than one construction as to its effect. It renders the contract



"null and void" for "failure to make payment of any subsequent premium" as therein required. The eighth condition, if construed as contended for on the part of the plaintiff in error, would be inconsistent with and repugnant to the first condition. It would virtually strike out of that condition the words "any subsequent premium" and substitute therefor "the second premium"; it being provided that the "policy shall take effect only upon actual payment of the first premium," &c. The eighth condition, read by itself, is capable of more than one construction. Standing alone, it might mean that, if the premiums are duly paid for a period of two years next following the date of the policy, liability thereunder of the insurance company shall not thereafter be disputed on account of the non-payment of a subsequent annual premium as stipulated or on any other ground; or, on the other hand, that, if the premiums are duly paid for such period of two years, liability of the insurance company under the policy shall not thereafter be disputed, save for nonpayment of a subsequent annual premium, as stipulated, or, in other words, the liability of the company under the policy shall not after the expiration of such period of two years be disputed so long as the annual premiums continue to be paid as stipulated. Where a particular provision in a contract, when taken alone, is susceptible of two or more meanings, it should be examined in the light of the remaining provisions in order that its real significance and effect may be determined. The ambiguous provision should, if possible and reasonable, be so construed as not only to give it effect, but also to avoid repugnancy to, and harmonize it with, the other provisions, to the end that the contract may be operative in all its parts. The application for each policy contains, among other things, the following:

"It is hereby declared and agreed: 1st. That all the statements and answers in this application are hereby warranted to be true, full and complete, and that this application and declaration shall, with the policy herein applied for, alone constitute the contract between me and The United States Life Insurance Company in the City of New York," &c.

The third condition of the policy is as follows:

"III. In case of understatement of age, the amount payable shall be the insurance that the actual premium paid would have purchased at the true age of the insured. Any other breach of warranty or untrue or incomplete statement made in the application for this policy will render this contract null and void, provided that discovery of the same must be made and communicated to the insured or assured within two years from the date hereof."

The fourth condition renders the policy null and void in case of death by suicide within two years from the date thereof, &c. Reading the eighth condition in connection with the portion of the application above quoted, and the first, third and fourth conditions, it clearly was not the purpose of the eighth condition to preclude the insurance company from disputing its liability on the ground of the non-payment of premiums as stipulated either after or before the expiration of two years from the date of the policy, but merely that the insurance company, if premiums were duly paid as stipulated, should not be permitted, after the expiration of the above mentioned period of two years, to dispute its liability, except as otherwise provided, on the ground of "breach of warranty or untrue or incomplete statement" in

the application, or breach of the fourth condition, or both. This conclusion accords with and is required by the express provisions of the policy as a whole and by the nature of such a contract. The prompt payment of premiums is of its essence, and failure to make such payment, if not expressly or impliedly waived by the insurer, is a breach of a condition subsequent, resulting, unless otherwise provided, in the forfeiture of premiums paid and in the termination of the contract. *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789; *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765. We are not unmindful of the rule requiring policies of insurance to be liberally construed in favor of the assured and the adoption of that one of two admissible constructions which is less favorable to the insurer. But here there is no room we think for the construction of the eighth condition urged on the part of the plaintiff in error, and the first assignment, therefore, cannot be sustained.

The second assignment alleges error on the part of the court below in refusing to charge the jury as follows:

"That forfeitures are not favored in the law, and that any agreement, declaration or course of action on the part of an insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy or policies would not be incurred, followed by due conformity on his part, will operate to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract; the company is, under such circumstances, estopped from enforcing the forfeiture. And if the jury find from the evidence in this case of the whole course of business between the defendant company and the insured from the commencement to the close, that the insured, as a prudent man, had reasonable ground to believe, and did believe, that the defendant company would not require him to pay the premiums maturing on October 17, 1898, promptly on or before that day, but that it would be willing to take his money or notes in payment of said premiums within a reasonable time after said day, without regard to the condition of his health, then the failure of the insured to pay said premiums prior to his death October 20, 1898, was not a valid ground of forfeiture of said policies, and the plaintiff is entitled to recover."

If there was no evidence in the case tending to support such an instruction, there was no error in refusing to give it to the jury. Was there any such evidence? It appears, without contradiction, that the insurance company, through its manager, early in September, 1898, mailed to the insured notice in printed form informing him of the day, September 17, 1898, on which the third annual premium on each of the two policies would fall due, and its amount. Each notice contained, among other things, the following:

"Payment may be made to the undersigned on that day, or within the one month's grace allowed, (provided the policy be then in force), in exchange for the company's official receipt, which is held at this office.

Respectfully,

W. M. Wood,  
Manager."

Afterwards the insurance company, through its manager, sent, October 6, 1898, the following written communication to the insured:

"Pittsburg, Pa., October 6th, '98.

Mr. E. C. Schmertz, City:

Dear Sir:—The premium on your two policies, amounting to \$367, due September 17th, has not yet been paid. In order to save this from lapse the

money should be in our office on or before October 17th. As this policy has only been paid two years, if this premium is not paid you will forfeit all rights under it. One more payment would make it nonforfeitable. Please give the matter attention.

Yours very truly,

W. M. Wood, Manager."

The record shows that the above letter was received by the insured, and there is no evidence that it was not received in due course of mail. In the absence of such evidence it may be presumed that it was so received not later than the day next following its date. It also appears from the uncontradicted evidence that Joseph S. French, an agent of the insurance company, under Wood, saw the insured in Pittsburg October 8, 1898, and told him that his premium was due, that he "was on grace at the time" and that he had better attend to the matter at once. French subsequently and prior to October 17, 1898, the limit of the extension of time for the payment of the third annual premium on the policies, urged the insured promptly to make payment thereof. The insured, however, failed to do so and died October 20, 1898, as before stated. There is absolutely no evidence that the insurance company extended the time for the payment of the premiums in 1898 beyond October 17. The company, on the contrary, fully notified the insured and insisted that the premiums must be paid by that time to avoid a forfeiture.

It is well settled that forfeiture under a clause in a policy of life insurance, providing for it in case of non-payment of premiums at maturity and declaring want of authority in agents of the insurer to receive payment thereafter or to waive forfeitures, may be waived by the insurer either expressly or by implication; and is impliedly waived where the conduct of the insurer in dealing with the insured and others similarly situated has been such as reasonably to induce a belief on the part of the insured that, if the premium be not paid by the stipulated date, a forfeiture will not be enforced, if payment be made within a reasonable period thereafter. *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65. But it is equally true that the mere granting of indulgence to the assured beyond the time stipulated in the policy for payment of the premium in one year does not bind the insurer to grant a similar indulgence in a subsequent year. In *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765, Mr. Justice Bradley, in delivering the opinion of the court, spoke of granting indulgence or days of grace for payment of premiums as follows:

"This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of 'leniency.' It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular

lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and injurious to the public. \* \* \* It is always open for the insured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the assured has a right to rely."

In the case before us the granting by the insurance company prior to 1898 of indulgence or days of grace for payment of the premiums on the policies in suit, as shown by the evidence, could not possibly, as against the notice and insistence of the company that the third annual premium must be paid by October 17, 1898, have given the insured, assured, or any other person "just and reasonable ground to infer that a forfeiture would not be exacted" in case of non-payment by the day last named. There was no evidence to go to the jury to establish a waiver beyond that day. In view of the conclusions reached it is unnecessary to consider the other assignments of error.

The judgment of the court below is affirmed, with costs to the defendant in error.

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SAMUEL BROS. & CO. v. HOSTETTER CO.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

1. UNFAIR COMPETITION—EVIDENCE TO ESTABLISH.

The testimony of two witnesses employed by complainant that they went to the wholesale liquor store of defendant, where they were sold by a clerk, in bulk, what he represented to be complainant's bitters, but which was in fact a spurious article made to imitate that of complainant in appearance, taste, and smell, and that they were also furnished by the clerk with empty bottles having thereon complainant's label and trade-mark, to be used in retailing the bitters to customers, is sufficient to support a finding that defendant was engaged in unfair competition, although there was no proof that any customer had actually been deceived.

2. DEPOSITIONS—MODE OF TAKING.

The fact that a witness on his second examination reads over a copy of his testimony given on a previous examination, and subscribes the same as his deposition, does not render such deposition inadmissible.

3. SAME—OBJECTIONS.

An objection to the admissibility of depositions on the ground of irregularity in taking should be taken by motion to suppress made before the hearing, and where not so taken, although the depositions had been open and on file for a month, an objection to their being read on the hearing was properly overruled.

4. EVIDENCE—PROOF OF INCORPORATION—SUFFICIENCY.

A certified copy of a complainant's charter, supplemented by parol testimony, is sufficient to establish the fact of its being a corporation, as against a denial on information and belief.

5. UNFAIR COMPETITION—DEFENSES—GROUNDS FOR RELIEF.

The preparation known as "Hostetter's Bitters," having been made, sold, and known to the public for many years, has acquired a commercial value which entitles the proprietors to the protection of the courts in its sale, and they will not enter upon the question of its merits, as

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¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper*, 30 C. C. A. 376.

¶ 3. See Depositions, vol. 16, Cent. Dig. § 315.

a remedy for the ailments for which it is recommended, at the instance of a defendant who has been engaged in selling a spurious article for the genuine.

Appeal from the Circuit Court of the United States for the Northern District of California.

The appellee, claiming to be the owner of the medicinal preparation known as Hostetter's Bitters, brought a suit against the appellant, charging it with selling as and for the appellee's preparation an article of bitters resembling that of the appellee. The answer put in issue these facts, and, as to the allegation of the corporate existence of the appellee, it averred that the appellant could not "admit or deny the allegations of said bill relative thereto," and it denied, on information and belief, the averment of the bill that the appellee acquired, by purchase from the administrator of David Hostetter or otherwise, the exclusive right to make and sell the preparation described in the bill. The evidence upon which the circuit court sustained the charge of unfair dealing against the appellant was the testimony of two witnesses, Morrison and McEvers, who were in the employment of the appellee. Their testimony was, in substance, that on March 30, 1899, they entered the liquor store of the appellant, where they met Paul Samuel, a salesman, whom they asked if he had Hostetter's Bitters. He answered that he had, and that the price was \$8.50 per case. That thereupon McEvers remarked that the price was high, and that there was not much in it to the retailer; whereupon Samuel went into the office, and shortly returned and said: "You fellows ought to buy Hostetter's Bitters in bulk. That is the cheapest way." On being asked if the bitters in bulk were the same as those in cases, Samuel replied: "They are just the same. There is no difference in the bitters at all." That he further said that he sold bitters in bulk at \$2.25 a gallon, and that a gallon would make about eight bottles. He then informed them, as they were "new in the business," that he would not handle the Hostetter's Bitters unless he could sell them in bulk, and added that the Hostetter Company sells only to importers in bulk. That Morrison then said: "I will take a half gallon of Hostetter's Bitters." That Samuel then advised Morrison that he could get a Hostetter's Bitters bottle, and then fill it up whenever it got empty. That Morrison then asked if he could get a Hostetter's Bottle at the drug store, and Samuel answered: "You cannot get an empty Hostetter's bottle at the drug store; the junk shop is the place to get that;" and added, "Wait a moment;" and that then he sent for and obtained and delivered to Morrison an empty Hostetter bottle, with the labels and trade-marks of the appellee thereon. The witnesses testified further that on a second visit to the appellant's store, on April 6, 1899, they were met by the same salesman, and that Morrison said, "I want to get some more tokay wine, and \$1.25 worth of Hostetter's Bitters, and a half gallon of sherry wine;" and that Samuel said to a man in the store, "Get the wines, and a half gallon of Hostetter's Bitters out of the barrel marked 'H Bitters,'" and that the bitters were placed in the bottle, and tagged "H Bitters;" and that on that occasion Samuel furnished the witnesses an empty Hostetter's Bitters bottle, as before.

R. H. Countryman, for appellant.

Albert H. Clarke and E. Edgar Galbreth, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

In view of all the evidence, we cannot say that the circuit court erred in finding that the transaction between the appellant and the witnesses who were sent by the appellee to procure the bitters at its store occurred substantially as detailed in the testimony of those witnesses. It is true that the witnesses were employed by the appellee to obtain

testimony of the unfair dealing of which the appellee suspected the appellant, and for that reason their testimony must be carefully scrutinized. But they made notes of the transactions at the time thereof, and their memory, thus refreshed, may properly have been considered more trustworthy than that of the salesman, Samuel, who testified from his memory of the circumstances a year after their occurrence. Samuel, it is to be noted, did not deny that the appellant had for sale bitters in barrels which it marked "H Bitters," and which were made to resemble, in taste, color, and smell, Hostetter's Bitters. He did not deny that the witnesses asked for Hostetter's Bitters, and that he sold them bitters marked "H Bitters," and that on such occasion he furnished them an empty Hostetter bottle containing the labels and trade-marks of the appellee. These are significant circumstances that may well have influenced the circuit court to give credence to the version which the witnesses Morrison and McEvers gave of the transaction, rather than to that of the appellant's salesman.

But it is urged that, in any view of the facts, there was no evidence that the appellant has defrauded any one, or that any consumer has been deceived into purchasing its bitters believing them to be the preparation of the appellee. It is true that the witnesses who bought the bitters from the appellant were not in the liquor business, and did not intend to sell the bitters in bottles to others, but we think that all the circumstances, taken together, indicate that the appellant was, to some extent at least, in the business of furnishing to retail dealers bitters in bulk, made to simulate Hostetter's Bitters, with the understanding that they were to be placed in the appellee's bottles bearing their label and trade-mark, and to be disposed of to consumers as Hostetter's Bitters. According to the evidence of the two witnesses who bought the goods, Samuel declared that such was the appellant's course of dealing. We think the circuit court may properly have inferred that the transaction with those witnesses was a sample of the appellant's method of vending spurious bitters to retail dealers. *Hostetter Co. v. Brueggeman-Reinert Distilling Co.* (C. C.) 46 Fed. 188.

It is contended that the court erred in admitting in evidence certain depositions taken by the appellee to prove its incorporation and its title to the preparation which it made and sold as Hostetter's Bitters. The appellee gave notice to take the depositions of certain witnesses on October 13, 1899, at Pittsburg, Pa. By mistake the depositions were not taken on the date named, but were taken on October 9th, the appellant making no appearance. The appellee, finding it necessary to give a second notice to take the depositions, served notice that it would take them at Pittsburg on December 2, 1899. Under the latter notice, the depositions were taken, the appellant making no appearance. It was objected on the trial of the cause in the circuit court that these depositions so taken in December were simply carbon copies of the typewritten depositions taken in October; and that that fact was apparent upon inspection thereof. All this may be true, and yet furnish no ground for suppressing the depositions. No reason is perceived why, upon a second examination of a witness, he may not be permitted to read over a copy of his

prior deposition and subscribe his name thereto as and for his deposition. But if, indeed, the depositions were open to the objection which is urged, the objection came too late when it was made for the first time upon the trial of the cause, more than a month after the depositions had been returned and opened. The motion to suppress should have been made before the hearing in order that the appellee might have had the opportunity, if necessary, to again take the depositions. *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, and cases there cited.

We think the evidence sufficiently shows that the appellee is the owner of the right and property of compounding and selling the preparation known under the name of Hostetter's Bitters. This is shown by a copy of the assignment and by other evidence. In view of the nature of the denial of the incorporation of the appellee, we deem the evidence in the record sufficient to establish the fact of a corporate existence. It is shown by parol evidence and by a certified copy of its charter. *Dutilh v. Coursault*, 5 Cranch, C. C. 349, Fed. Cas. No. 4,206; *Pierce v. Brown*, 7 Wall. 205, 19 L. Ed. 134.

Much of the evidence in the case taken on behalf of the appellant was for the purpose of showing that the appellee's preparation is a quack medicine and an alcoholic stimulant, and therefore not entitled to the protection of a court of equity. Upon the evidence in the case this contention cannot be sustained. The proprietor of such a preparation has the right to keep its formula secret. It appears that for more than 50 years the preparation has been made and compounded in a uniform manner by the appellee and its predecessors in interest, and that it has uniformly received the protection of courts of equity. The record contains the testimony of many physicians who have prescribed the preparation in their practice for the ailments mentioned on the label. It is argued that no one preparation can possibly be a remedy for the numerous and divers ills for which the label declares this preparation to be adapted, and that the evidence for the appellant shows that a preparation containing so large a percentage of alcohol is contraindicated for many of those ailments. The court will not attempt a minute investigation of this field of inquiry. It is one upon which the experts differ. It is enough to advert to the fact that the preparation purports to be a general tonic, and as such efficacious in restoring strength to those weakened by various ailments, and that it has become widely known and largely manufactured and used, and that it has a commercial value. See *Hostetter Co. v. Conron* (C. C.) 111 Fed. 737, and cases there cited. The argument that it is a quack medicine, and that it is injurious to the human system, and is contraindicated for some of the ailments which it purports to cure, comes with ill grace from those who imitate it as closely as they may without possessing a complete knowledge of its formula, and by unfair trade sell the simulated article as and for the genuine.

We find no ground for disturbing the conclusion of the circuit court. The decree will be affirmed.

## MIDDLEBY v. EFFLER.

(Circuit Court of Appeals, First Circuit. October 16, 1902.)

No. 422.

## 1. SLANDER—CHARGING CRIMINAL OFFENSE—SUFFICIENCY OF DECLARATION.

A case which shows only that defendant spoke and published words charging that plaintiff had "written anonymous letters" which were scurrilous, and that it was "a state prison offense," without colloquium or innuendo, is insufficient to warrant an instruction that, if the words were spoken substantially as alleged, they amounted to a charge that plaintiff had committed a crime against the laws of the United States.

## 2. SAME—GROUNDS OF ACTION—WORDS USED IN ANSWER TO QUESTION.

Words used by a husband in answer to a question addressed to his wife, if they do not go beyond the question or the occasion, will not, unless under exceptional circumstances, afford ground for an action for slander by the person who put the question.

## 3. PLEADING—OVERRULING OF DEMURRER—WAIVER OF ERROR.

Under the Massachusetts practice acts, a defendant, by going to trial on an issue of fact after the overruling of a demurrer to the declaration, based on a defect in matter of substance not cured by the verdict, does not waive the right to assign as error the overruling of the demurrer.

## 4. SLANDER—SUFFICIENCY OF DECLARATION—MASSACHUSETTS PRACTICE ACT.

Under the provisions of the Massachusetts practice acts, giving directions and suggesting a form for a declaration in a suit for slander based on an alleged charge of the commission of a crime, the declaration should, at least, contain an allegation naming the specific offense charged or a statement of the words spoken, sufficient to cover the substantial elements of a criminal offense; and, if it fails in this respect, it is insufficient on demurrer.

In Error to the Circuit Court of the United States for the District of Massachusetts.

John K. Berry (Eugene C. Upton, on the brief), for plaintiff in error.

Harvey N. Shepard (Curtis G. Metzler, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges.

PUTNAM, Circuit Judge. This is a writ of error on which the defendant below seeks to reverse a judgment and set aside a verdict in favor of the plaintiff below. It is convenient to call the defendant below the "defendant," and the plaintiff below the "plaintiff." The action was for slander. The declaration contains several counts, but the sixth, inserted by amendment, gives the substance of everything in the others, and also the substance of all which the plaintiff claims to have been proved in her behalf. This count is as follows:

"For that the defendant, on or about the 3d day of September, A. D. 1900, at Winthrop, in the county of Suffolk and commonwealth of Massachusetts, falsely and maliciously spoke and published of the plaintiff words imputing to the plaintiff the commission of a crime, in words substantially as follows, to wit: 'You have written anonymous letters. They are scurrilous. You are criminally liable. It is a state's prison offense. You will be arrested,'—

¶ 2. See Libel and Slander, vol. 32, Cent. Dig. § 132.



whereby the plaintiff was seriously injured and damaged in her reputation and in her position in society, and brought into public scandal, and has suffered great distress both in body and mind, all to the damage of the plaintiff, as she says, the sum of twenty thousand dollars."

It will be noticed that the count contains no colloquium nor innuendo, and nothing to explain the alleged spoken words, or to show what particular crime they imputed to the plaintiff. The case made for her was equally indefinite. The alleged slanderous statement, as proven in her behalf, was as follows: The plaintiff met the defendant and his wife, with some others. She said to his wife: "I understand I am accused of writing those letters?"—meaning the anonymous letters. The defendant replied: "Yes; you wrote them, and you wrote your name on the hotel register. They are scurrilous. It is a criminal offense. It is a state prison offense. I shall have you arrested." There is nothing in the plaintiff's declaration, nor in the conversation as represented by her evidence, which in terms connects itself with any United States statute. Nevertheless, in its charge to the jury, the court used the following language:

"If you find that the words were uttered substantially as alleged, then my instruction is that the words, in their natural import, amount to a charge of a crime against the laws of the United States, and, if they are not true, then the plaintiff is entitled to recover, and is entitled to some damages."

It is not claimed that the court in any way modified this to the advantage of the defendant.

It is to be observed that this was a positive instruction, and that the jury was left to find only whether the words were uttered substantially as alleged, and whether they were true. The deductions or inferences to be drawn from them, and that in their natural import they alleged a crime against the United States, were ruled absolutely. We find nothing suggested by the plaintiff on this point, except only the general proposition that, taking the words all together, they could not be construed other than as charging her with the crime of having used the mails for sending anonymous, scurrilous letters. We wish that the position of the circuit court in regard to this topic, and the standpoint from which it made its ruling, were more clearly explained to us. In view of the statute in force at the time of the alleged slander,—that of September 26, 1888 (25 Stat. 496),—and of the only decisions of the supreme court which touch this topic (*Swearingen v. U. S.*, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765; *Price v. U. S.*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727; and *Dunlop v. U. S.*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799), we are unable to find anything which contains a proper suggestion of a federal crime in the mere charge of writing anonymous, scurrilous letters. Indeed, there would not be such even in a charge of both writing and mailing.

It is true that under the federal statutes the mailing of scurrilous matter imprinted on a postal card, or exposed on the exterior of a sealed letter, may be criminal; and it is also true that a crime of that character is punishable by imprisonment, which may be in the penitentiary, amounting, therefore, by the common understanding, to a "state prison offense," as alleged in the plaintiff's declaration. An

unjustifiable charge of mailing such nonmailable matter, as it involves a crime punishable by imprisonment, might furnish a basis for an action of slander, even without any proof of special damage. This is such a well-settled rule of law that it would be a waste of time to cite authorities in reference thereto. But it requires a stretch of the imagination, in which the law could not indulge, to hold that a declaration or proofs which, without colloquium or innuendo, merely allege the writing of anonymous and scurrilous letters, could cover a charge of mailing postal cards or of imprinting objectionable matter on the exteriors of envelopes. *U. S. v. Chase*, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117, carefully explained that the then statute with reference to nonmailable matter was to be so construed that the word "letter" had relation only to the contents of sealed matter. Subsequently the statute was amended to meet that decision, as shown by the act of 1888, to which we have already referred, and as explained in *Andrews v. U. S.*, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023. Nevertheless, there never has been any statutory amendment which authorizes any interpretation to be put on the word "letter" beyond that given in *U. S. v. Chase*; and there is nothing in the common use of language by force of which the same word, as used by the pleadings and the witnesses in the case before us, has any different meaning.

Moreover, the language alleged to have been used may well have been construed to import a crime under the laws of Massachusetts. It may be true that not every scurrilous letter is criminally libelous; but, inasmuch as the language alleged to have been used charged certain particular letters to have been criminal, it looked towards an offense against the law of that state, punishable by fine or imprisonment, or by both. While, without colloquium or innuendo, it was technically inadequate for either, the matter alleged and proven approaches more nearly a charge of such an offense than of any under the federal statutes. While it is true that a criminal libel is not a "state prison offense," there was nevertheless not enough in this expression to enable the court to determine whether the alleged slanderous words had relation to the federal statutes, or to the law of Massachusetts concerning such a libel. In any event, as we have said, the intervening gap between the words charged in the declaration, or those proven, on the one side, and, on the other, the specific act of mailing a scurrilous postal card, or something else with scurrilous language imprinted on the exterior of it, was altogether too wide to be filled by the law. It was therefore the duty of the court to have instructed the jury that there was not proof enough to fill this gap, or, at the best, to have submitted that question to be determined, under all the circumstances, as one of fact.

As the verdict must be set aside for the reasons already stated, it is not necessary to touch particularly on all the other questions presented to us. We should, however, notice two of them. The conversation containing the alleged slander was brought on by a question from the plaintiff. Therefore, with some possible qualifications, if the answer of the defendant did not go beyond the plaintiff's ques-

tion or the occasion, the suit could not be maintained. *Odger, Libel & S.* (3d Ed.) 255. There is no need for enlarging on this, beyond referring to *Brow v. Hathaway*, 13 Allen, 239, which may be held as laying down the rule in a general way for the state and the district in which the suit was tried. It may also be observed that in *Brow v. Hathaway* the original issue arose with the wife, but it was taken up by the husband, as at bar. In both cases this was his privilege and his duty, provided he conducted himself appropriately with reference thereto. We wish, however, to add the caution that we do not undertake to do more than lay down general propositions, leaving the terms in which they should be submitted at a new trial, if one occurs, and also the limitations and explanations thereof, to be then settled according as the actual facts then develop.

The defendant demurred to the various counts in the declaration on the ground that the language therein set out did not allege anything beyond the mere writing of anonymous and scurrilous letters; especially, that it did not allege that there was any publication or "posting," meaning thereby delivery to the mail. The demurrer was overruled by the court below, and it appears the defendant did not in fact waive it, because exceptions were taken. Proceeding to trial on an issue of fact waived a demurrer at common law, but as this related to matters of substance, and to defects which were not cured by the verdict, a different rule prevails under the Massachusetts practice act (Pub. St. 1882, c. 167, § 67). *Kellogg v. Kimball*, 122 Mass. 163; *Hobson v. Satterlee*, 163 Mass. 402, 40 N. E. 189.

Of course, whatever the criminal offense which the slanderous words were claimed to have charged, there should have been, on the common-law rules of pleading, enough in the declaration to cover, either in terms or by direct inference, a publication or a deposit in the mail of the alleged offensive matter, in order to make the alleged slander a complete expression of such an offense; and, if the matter related to an offense under the federal statutes, there should likewise have been enough to cover the use of a postal card, or the imprint on the exterior of some other mailable matter, as we have already explained. Intricacies have arisen from the attempt of the Massachusetts practice acts to improve on the clear and settled rules of the common law with reference to the proper allegations in actions of slander and libel, as shown in *Lee v. Kane*, 6 Gray, 495; *Tebbetts v. Goding*, 9 Gray, 254; *York v. Johnson*, 116 Mass. 482; *Thomas v. Blasdale*, 147 Mass. 438, 18 N. E. 214; and *Lovejoy v. Whitcomb*, 174 Mass. 586, 55 N. E. 322; but we find enough to clearly meet the necessities of the case now presented to us.

The practice act applicable is Pub. St. 1882, c. 167, already cited. Passing by the general provisions contained therein, which were intended only to obviate unnecessary technicalities, but which cannot be held, and never have been held, to dispense with a statement with certainty of the substance of the facts necessary to constitute a cause of action, the only matter to which we need call attention is the schedule of forms contained in section 94, permissible, but not required. This, in giving the form for a declaration in an action

of slander for an alleged charge of a crime, directs that the specific crime shall be named, and adds: "Here set forth the words; no innuendoes are necessary." It has been held in *Lee v. Kane*, already referred to, that a declaration in slander under this statute must set forth substantially the words spoken. This, we understand, is complied with in the present declaration. At any rate, we hear no objection on that score. In *Tebbetts v. Goding*, 9 Gray, 254, the declaration set out substantially the alleged slanderous words, but did not specifically designate the crime with which the plaintiff was charged, as is prescribed by the form to which we have referred. The court held that the declaration was insufficient, because allegations of specific facts were necessary to give full significance to the spoken words. The form of declaration in the act of 1852 (chapter 312), on which *Tebbetts v. Goding* was decided, seems to have been the same as that in Pub. St. 1882, including the matter of specifying the crime charged, and also the setting out substantially the words spoken, and the provision that no innuendoes are necessary. So that *Tebbetts v. Goding* somewhat resembles the case at bar, in that there is an absolute omission to state the specific offense with which the defendant is said to have charged the plaintiff. Except for this, the circuit court would have been guided, as it was not guided, with reference to the question whether it could properly direct the jury that the words alleged charged a crime under the federal statutes. But aside from *Tebbetts v. Goding*, we have here no allegation of a specific offense, which is found in all the cases relied on by the plaintiff, and which might, under some circumstances, aid the inference to be drawn from the rest of the declaration; nor have we, in the statement of the words spoken, sufficient to cover substantially the essential elements of a crime, either at common law or under the federal statutes. The demurrer should have been sustained.

The judgment of the circuit court is reversed, the verdict is set aside, the interlocutory judgment overruling the defendant's demurrer is also reversed, the case is remanded to that court for further proceedings in accordance with the opinion passed down this day, and the plaintiff in error will recover the costs of appeal.

WEBB, District Judge, sat at the hearing of this cause, but he resigned before it was decided.

## In re PEABODY.

(Circuit Court of Appeals, First Circuit. July 29, 1902.)

No. 428.

**1. RESULTING TRUST—PAYMENT OF CONSIDERATION FOR CONVEYANCE—INTENDED TRUST IN FAVOR OF THIRD PARTIES.**

A woman purchased real estate, paying the purchase money, and stating to the vendor that she intended it for the benefit of her grandchildren, which was in fact her intention. The vendor, without her knowledge, had the deed made to her daughter, the mother of the grandchildren. On the advice of the vendor she accepted the deed. She took possession of the property, received the rents, and paid the taxes, and held such possession exclusively for a number of years prior to the bankruptcy of her daughter. *Held*, that a trust in her favor resulted from her payment of the purchase money, any presumption to the contrary from the fact that the grantee was her daughter being rebutted by the facts shown, and that neither the daughter nor her trustee took any interest which would defeat such resulting trust, whether or not a trust in favor of the grandchildren was enforceable.

**2. SAME—TRUST RAISED ON A TRUST.**

It being shown that it was the intention of the purchaser to retain in herself the possession and control of the property, her intention to devote the same entirely to the use and benefit of her grandchildren, even if it gave them an equity which they could enforce, would not defeat the trust resulting from her payment of the purchase money, since in such case one trust may be raised upon another.

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

See 112 Fed. 129.

Robert D. Weston-Smith (Charles Walcott, on the brief), for petitioner.

Edward J. Baker, for respondent Lucinda B. Sullivan.

Before COLT and PUTNAM, Circuit Judges.

PUTNAM, Circuit Judge. This case arose out of an adverse proceeding commenced in the district court against Peabody, as trustee in bankruptcy of Mrs. Lillian Davis, to compel a release by him, as such trustee, to the petitioner, of certain parcels of real estate, the title to which was in the name of the bankrupt. No objection was taken in the district court on the question of jurisdiction, but both parties proceeded to present the merits of the case, and assented to the court taking full control thereof. The decision being against the trustee in bankruptcy, he commenced this proceeding as an original one in the form of a revisory petition under section 24b of the act establishing a uniform system of bankruptcy, approved July 1, 1898. Neither party has questioned the propriety of this proceeding, and both have gone to a hearing on the merits before us without raising any issue of jurisdiction. Consequently, we accept jurisdiction, reserving what we said on that topic in *Hutchinson v. Otis* (decided by us May 22, 1902) 115 Fed. 937. What we there said is re-enforced by the opinion

of the circuit court of appeals for the Seventh circuit in *Walter Scott & Co. v. Wilson*, 115 Fed. 284, where it was held that an adversary proceeding of this character is in the nature of a bill in equity, from which an appeal can be taken under the provisions of the statute establishing this court.

The proponent in the district court was Mrs. Lucinda B. Sullivan, the mother of Mrs. Lillian Davis. It appearing that the children of Mrs. Davis—the grandchildren, therefore, of Mrs. Sullivan—had a possible interest in the question, the petition in that court was amended, making them parties. As already said, this prayed that the trustee should release certain parcels of real estate described therein, and the court entered a final decree accordingly.

The important facts are as follows: Mrs. Sullivan bought the estate in question in May, 1895, and, so far as any payments have been made towards it, they were made by her from her own funds. The purchase was from one Brown. In her conversations with him before the purchase she told him she was acquiring the property for her grandchildren, and especially for the purpose of giving them a collegiate education. Such, in fact, was her intention. The grandchildren were then respectively about eight years and four years old. Mrs. Sullivan requested Brown to meet her at the registry of deeds with the deed, where the purchase money was to be paid. Brown, knowing that the grandchildren were children of Mrs. Davis, of his own motion, and without the knowledge of Mrs. Sullivan, had caused the deed to be drawn from himself, as grantor, to Mrs. Davis. When Mrs. Sullivan and Brown met at the registry, she first learned that the deed was made to Mrs. Davis. She then said to Brown that she objected to Mrs. Davis appearing as grantee; that she did not intend that Mrs. Davis should have any interest in the property; and that she was buying it for her grandchildren, and especially for the purpose of giving them an education. She also said that she wished some kind of a "trust deed," but she had no correct idea what such a deed is. Brown replied that it would cost her something to have the deed drawn over again, and that it would be better to leave it as it was; and it so remained.

Mrs. Sullivan had no conception of the technical meaning of the words "equitable estate," yet she intended the property for her grandchildren's benefit in some sense. Nevertheless, a fair construction of the record is that she did not intend that they should have an interest which they could assert by law, but that her purpose was to use, in a general way, the property for their benefit, meanwhile reserving to herself the right to control it. The record at one point states that she never intended to take any title, legal or equitable; but this is clearly a slip, and must be rejected.

After the conveyance was made, Mrs. Sullivan took possession of the property, and she has since had the exclusive care and control of it. She let it to tenants, received the rents, paid all the taxes, \$100 towards a new sidewalk, the interest on mortgages resting on the property when she purchased, and portions of the principal thereof, and generally did all those things which the owners of real estate

naturally and properly do. She retained the deed in her possession until it was abstracted therefrom by Mrs. Davis, or her husband, without her knowledge. There are other matters which are shown by the record, but all subsequent to the purchase, and of such a kind that, by all the leading authorities relating to the rules for establishing or defeating alleged resulting trusts, they cannot affect the interests of the parties hereto; and we have no occasion to consider them.

There is sufficient in what we have said to overcome those presumptions arising from the fact that Mrs. Davis was the daughter of Mrs. Sullivan, which commonly rebut the existence of the usual resulting trust. In this case, also, we have not only the fact that the purchase money was paid by Mrs. Sullivan, but the further fact that she in all respects conducted herself, and was permitted to conduct herself, as the *de facto* and equitable owner of the property, by retaining possession of it and of its fruits, and its exclusive and absolute control. Thus there applies, not only the presumption of a resulting trust in her favor through her advancing the purchase money, but, also, that presumption arising from the well-settled practice of the equity courts, by the aid of which they apply the rule that what is agreed to be done is held to have been done. *Sugd. Vend.* (8th Am. Ed.) 270. Indeed, this undisputed possession and control have, according to the rules of equity, under the circumstances, the force of a formal declaration of trust by Mrs. Davis.

This control continued for more than five years,—that is, from the date of the purchase until the commencement by Mrs. Davis of the proceedings in bankruptcy in November, 1900; and, so far as the record shows, it has ever since continued. Under the circumstances the rules of equity hold this fact of so much weight as to be practically conclusive against the assertion of an interest in Mrs. Davis. These rules are so well settled as not to require the citation of authorities; but the cases will be found grouped in *Godef. Trusts* (2d Ed.) 180. There is, apparently, a typographical error in the text, which explains itself, and which is further explained by reference to one of the cases cited,—*Murless v. Franklin*, 1 *Swanst.* 13, 19. Of course, the rules would not apply here if Mrs. Davis were a minor, but, she being of full age, they are of perfect effect. Therefore on this record there is no doubt that, as a matter of fact, Mrs. Davis never acquired any equitable interest in the property, or that the chancery courts would have interfered to prevent her controlling it contrary to any purpose of Mrs. Sullivan, or to compel her to release to Mrs. Sullivan on Mrs. Sullivan's request, if the bankruptcy had not intervened; and, as we have several times held, the equitable rights of a trustee in bankruptcy cannot rise higher than those of the bankrupt.

Neither have we any occasion to consider any question of relative rights as between Mrs. Sullivan and her grandchildren. The trustee in bankruptcy has no interest therein, and he is the sole petitioner before us. If the facts raised a proper trust in favor of the grandchildren, there would remain no doubt that the trustee had no interest which he could call upon us to protect. If, on the other hand, no proper trust was raised on their behalf, there could be nothing to

bring the case within the common rule that an express trust rebuts a resulting trust, because what is invalid in law is nothing in law, and an intention to create an express trust which is ineffective is a mere nullity. For this proposition it is not necessary to look further than the text-book which is a leading authority,—Hill, *Trustees* (4th Am. Ed.) 182,—where it is stated as follows:

“Where the trust is insufficiently or ineffectually declared, the effect would be the same as if it had not been declared at all; and a resulting trust will be decreed, provided that the imperfect declaration, though insufficient to establish the particular purpose contemplated, sufficiently prove it to have been the intention of the donor that the donee should in no event be entitled to the beneficial interest.”

That the condition referred to at the close of this paragraph is complied with, in that it was not the intention of Mrs. Sullivan that her daughter, Mrs. Davis, should have any beneficial interest in the property in question, appears sufficiently from what we have already said.

Ample illustration of the rule thus stated by Mr. Hill will be found in *Godef. Trusts* (2d Ed.), beginning at page 168, and going through to page 176. Although many of the instances of resulting trusts there referred to arose otherwise than by payment of the purchase money, yet the principle involved throughout is precisely the same. At page 176, this authoritative text-book states the rule to which we have already referred, that “where there is a parol express trust of the purchase money, the resulting trust is rebutted”; but it completes the statement of the entire subject-matter, as applicable to the case at bar, where it says, on page 170, that, “if the trusts declared are too uncertain to be executed, but it is clear that the donees are to take as trustees, and not beneficially, the property results.”

We may add that, even if the intentions of Mrs. Sullivan towards her grandchildren had been such as to raise an equity which they could have enforced, that would not have assisted the title of Mrs. Davis, or of her trustee in bankruptcy. There may be a trust raised or a trust; and, of course, the ordinary rule that an express trust bars an implied trust has no application merely because the purchaser, in whom the circumstances ordinarily vest the resulting trust, has an incidental intention which is entirely consistent with it. That is to say, where one forms the design of keeping a general control of property for the purpose of working out an advantage for some other individual or individuals, there is no such inconsistency as would rebut the right of such control, or any resulting trust which it may represent. Such is the condition of this case in the most favorable light that could be suggested for the trustee in bankruptcy. In other words, to repeat briefly: Even a trust arising in behalf of the grandchildren, if it had been an effectual one, would not be inconsistent with a resulting trust, because it would be built upon it. The record puts it beyond question that it was the intention of Mrs. Sullivan to control the property, and this was, in equity, entirely in harmony with all her other possible purposes.

This raising a trust on a trust is, by common consent, of acknowledged propriety. For example, there is no difficulty in devising an



estate in trust for the payment of the income to a father, with a further trust, imposed on the father, to apply a portion thereof for the education, or the other benefit, of certain of his children. The courts ingeniously avoided the statutes of uses by holding that a use could not be limited upon a use. This was, however, merely a rule of the common law, the equity courts holding that the second use was a trust. 2 Bl. Comm. 335, 336; 1 Greenl. Cruise, Real Prop. 382.

Both parties rely on *Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793. This citation, however, is not directly in point, but, so far as it has any bearing, it sustains the decree of the district court. Much of the opinion must be regarded as dicta, as the case was finally disposed of on the doctrine of election, which would have had sufficient application on the general principles of law, and had special application under the peculiar provisions of a will there in question. Therefore it is impossible to say whether all the justices of the supreme court concurred in all the reasoning which the opinion contains, and very little of it is binding on us within the rules stated by us in *King v. Asylum*, 12 C. C. A. 145, 64 Fed. 331, 340, and *Foreman v. Burleigh*, 48 C. C. A. 376, 109 Fed. 313, 314.

The record contains some special findings by the learned judge of the district court. The respondent raises some question whether they were properly made, but, inasmuch as without them the record would be so defective that the decree of the court below in favor of the respondent would necessarily be affirmed, we have considered the findings, without passing on the issue which the respondent makes in this particular.

There will be a decree confirming the decree of the district court, with costs on this petition for the respondent, and directing the district court to give effect to this decree, both as to the principal matter and the costs.

Judge WEBB sat at the hearing of this cause, but resigned before it was decided.

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#### JAQUITH v. ALDEN.

In re WOODWARD et al.

(Circuit Court of Appeals, First Circuit. October 28, 1902.)

No. 444.

1. BANKRUPTCY—PREFERENCES—CREDITS IN EXCESS OF PAYMENTS RECEIVED.

A creditor whose debt was all created within four months prior to the debtor's bankruptcy, and while he was insolvent, but not to the creditor's knowledge, and was for goods sold to the debtor from time to time, is not chargeable with having received preferences which he is required to surrender before proving his claim, because of payments received on account during the same time, although the greater part of the debt claimed was for goods sold prior to the last payment.

Appeal from the District Court of the United States for the District of Massachusetts.

The following is the opinion of the district court, by LOWELL, District Judge:

The bankrupts filed their voluntary petition November 26, 1901. They were insolvent since August 15th. The creditor who seeks to prove was ignorant of this fact. On August 15th the bankrupts were not indebted to the creditor. Subsequent to that time the sales by the creditor to the bankrupts and the payments by the bankrupts to the creditor were as follows:

Sales to Bankrupts by Creditor.

Aug. 17, 1901.	Rubber	.....	\$289 46	
28, "	"	.....	657 89	
Sept. 30, "	"	.....	644 28	
Oct. 18, "	"	.....	535 99	
18, "	Cartage	.....	50	
31, "	Asbestine	.....	10 40	
				<hr/>
				\$2,138 52

Payments by Bankrupts to Creditor.

Sept. 4, 1901.	Payment of bill	Aug. 17.....	\$289 46	
28, "	" " " "	28.....	657 89	
Oct. 29, "	" " " "	Sept. 30.....	644 28	
				<hr/>
				\$1,591 63
Balance.....				546 89

If all these transactions be treated as one, it follows, under the rule of *Dickson v. Wyman*, 49 C. C. A. 574, 111 Fed. 726, that no preference was given. The trustee contends, however, that only those advances made by the creditor after the last payment received by the creditor from the bankrupts are to be taken into account in determining whether a preference was received or not. The contrary was decided by this court in *Re Topliff* (D. C.) 114 Fed. 323, and no sufficient reason has been shown in the learned and elaborate brief of counsel for the trustee to overrule the decision there reached.

The facts in the other cases submitted, viz., *In re Woodward*, *Ex parte Atlas Chemical Co.*, were substantially the same, and no preference was given in either case.

The judgment of the referee is reversed, and the claims are allowed proof.

Harry J. Jaquith, in pro. per.

Arthur T. Johnson and Alonzo R. Weed, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. On the facts of this case, it is governed by *Dickson v. Wyman*, 49 C. C. A. 574, 111 Fed. 726, in which our opinion was passed down on November 15, 1901.

The decree of the district court is affirmed, and the appellee is awarded the costs of appeal.

## BARBER v. COIT.

(Circuit Court of Appeals, Sixth Circuit. October 17, 1902.)

No. 1,077.

## 1. APPEAL—REVERSAL—INCOMPLETENESS OF RECORD.

Where the record fails to show facts which are essential to enable the appellate court to safely decide the cause, it will reverse the decree on its own motion, and remand the case for a rehearing.

Appeal from the District Court of the United States for the Northern District of Ohio.

I. T. Siddall, for appellant.

W. M. Duncan, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

PER CURIAM. In this case the court, upon consideration, is of opinion that in order to give due effect to the decree of the circuit court for Portage county, Ohio, in the suit of the First National Bank of Garrettsburg and A. A. Barber, trustee, against Leroy H. Payne et al., the pleadings in that case should be filed, that the decree may be examined in connection therewith. It is therefore ordered that the decree of the district court of the United States be reversed, and the cause remanded to said court, with directions that the cause be remitted to the referee by said court, with directions that he take proof of the pleadings in said Ohio case, and that, upon the record as thus completed, the referee proceed to rehear the matter. This order is made because the case is not properly prepared for decision, and because great injustice may be done if the cause is to be decided on the present record. The order is made upon our own motion, on authority of *Estho v. Lear*, 7 Pet. 130, 131, 8 L. Ed. 632, and *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018. The costs of this appeal will be divided.

## McCUNE v. ESSIG et ux.

(Circuit Court, D. Washington, E. D. October 29, 1902.)

No. 954.

## 1. REMOVAL OF CAUSES—FEDERAL QUESTION.

A suit by the daughter of a deceased homestead settler to recover an interest in the land, which after his death was patented to his widow under the homestead law, necessarily involves a construction of such law, and is removable on that ground.

## 2. PUBLIC LANDS—TITLE ACQUIRED UNDER HOMESTEAD LAW—EFFECT OF PATENT TO WIDOW OF SETTLER.

A patent issued to the widow of a homestead settler upon her making the final proof, in accordance with the provision of the homestead law, conveys the land to her absolutely, and no interest therein passes by inheritance to the children of her husband.

**Suit in Equity.** Heard upon motion to remand the case to the state court in which it was commenced, and upon a demurrer to the bill of complaint. Motion denied, and demurrer sustained.

The parties to this suit are all citizens of the state of Washington. The material facts averred by the amended bill of complaint are that the complainant is a minor and a daughter of William McCune, deceased, and his wife, Sarah McCune, now Sarah Donahue, and a stepdaughter of Daniel Donahue, who appears as her guardian ad litem; that her parents settled upon a quarter section of land, situated in Lincoln county, in this state, while they were living together as husband and wife, the land being then part of the public domain of the United States, and subject to entry under the homestead law, and after having made their settlement thereon William McCune on the 4th day of April, 1884, filed a claim to said land as a homestead in the proper district land office; that in the same year William McCune died intestate, his only surviving heirs being his widow and the complainant, who continued to reside upon the land until December 17, 1889, on which date the mother of complainant made the required proof in the land office of full compliance with all the requirements of the homestead law, and on the 6th day of March, 1891, a patent for said land was issued to her; that in the year 1892 Mrs. Donahue sold and conveyed the land to the defendants, and they have been in possession ever since, and have appropriated the rents, issues, and profits to their own use, and claim title to the whole of said land adversely to the complainant; that the value of the land is \$6,400; and that the complainant is the owner of an undivided one-half thereof, and entitled to half the rents, issues, and profits thereof from the time defendants took possession. A copy of the patent is annexed to the amended bill of complaint as an exhibit, from which it appears that the grantee is described therein as "Sarah Donahue, formerly the widow of William McCune, deceased," and the granting words are as follows: "That there is therefore granted by the United States unto the said Sarah Donahue the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said Sarah Donahue, and to her heirs and assigns, forever." The object of the suit indicated by the averments and prayer of the bill is to obtain a decree establishing the complainant's claim of title to an undivided one-half of the land; for partition; or, if that is impracticable, to have the land sold and the proceeds divided, and to recover one-half the rents, issues, and profits.

The homestead law, after prescribing the conditions under which public

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¶ 1. Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

lands may be entered and the manner of making entries, provides that no certificate shall be given or patent issued therefor until the expiration of five years from the date of the entry; "and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; \* \* \* proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit," and makes an affidavit of nonalienation, and takes an oath of allegiance to the government of the United States, then "he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." The law further provides as follows: "In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children." Rev. St. U. S. §§ 2291, 2292. The laws of Washington territory, in force in the year 1884, and still in force as laws of the state of Washington, provide that all property acquired during coverture by either husband or wife shall be community property, and to dispose of or incumber community real estate the husband and wife must join in the execution of a "deed or other instrument of conveyance," and upon the death of either, leaving surviving children, if no testamentary disposition has been made of any part of the community property, one half thereof goes to the survivor and the other half descends to the children. 1 Ballinger's Ann. Codes & St. Wash. §§ 4488-4490, 4621.

This suit was commenced in the superior court of the state of Washington for Lincoln county by service upon the defendants of a summons and copy of the complaint on the 29th day of April, 1902. A stipulation was signed by the solicitors who have appeared for the respective parties, whereby it was agreed that an amended complaint should be filed, and that the defendants should have 30 days after service thereof within which to enter their appearance. Within the stipulated time the defendants filed a demurrer to the amended complaint, and at the same time filed their petition and bond for removal of the case into this court, on the ground that the amended complaint tenders an issue which requires for its determination the construction and application of specified provisions of the laws of the United States. A transcript of the record was filed, and the case docketed in this court in due time. The complainant has failed to file any new pleading in this court, but has moved to remand the case to the state court, alleging in the motion three grounds, viz.: "(1) The petition does not contain facts sufficient to warrant removal, nor to show that this court has jurisdiction; (2) the case does not involve any disputed question of federal law; (3) the controversy between the parties must be determined by the laws of the state of Washington." The court denied the motion to remand, and the case was thereupon argued and submitted upon a demurrer to the amended bill of complaint.

The complainant's case is grounded upon the theory that by the entry William McCune acquired a vested interest in the land; that the law entitles the widow of a deceased settler to receive the patent, but does not entitle her to any beneficial interest in the land greater than, or different from, her interest therein at the time of the entry; that the patent when issued relates back to the date of the entry and confirms the title of the settler as if the grant had been perfected and title conveyed on that date; that the community property law of this state operates uniformly upon all property acquired by married persons, including property acquired by grant from the government of the United States, so that in this instance the land in controversy is, by the doctrine of relation, to be deemed to have been acquired by Mr. and Mrs. McCune by purchase on April 4, 1884, and upon the death of William McCune in that year the title to an undivided one-half thereof passed by descent to the complainant. In their argument upon the motion to remand and upon the demurrer, the solicitors for the complainant contended that the several propositions above stated are settled by previous decisions of the supreme court of the United States, so that there is now no disputed question of federal law to be decided in adjudicating the rights of the parties to this suit.

Merritt & Merritt, for complainant.  
Graves & Graves, for defendants.

HANFORD, District Judge (after stating the facts). The demurrer does not attack the bill of complaint on the ground of multifariousness, but is framed especially to raise the questions whether, under the homestead law, William McCune acquired any inheritable interest in the land, and whether the patent conveyed the title to the grantee in her own right, or constituted her a trustee for the complainant as to an undivided one-half of the land.

It appears to me that the vital question in this case is one of federal law. The government of the United States is the grantor of the title; the grant is made pursuant to the laws of the United States providing for the disposition of the public lands; the state of Washington is not a party to the grant; it never had power to legislate with respect to the disposition of the public lands of the United States within its boundaries; and the complainant does not deraign title from the state, but claims an undivided one-half of the estate conveyed by the patent, although her name does not appear in it, and she cannot brush the patent aside without impairing the foundation of her claim. If the patent could be eliminated, the complainant would then have to go back of the patent and rest her claim upon the law, and it is a national law and not a law of the state which must be applied and construed. In their argument upon the demurrer counsel for complainant called my attention to the following very excellent rule, found in the opinion of the supreme court in the case of *Wilcox v. Jackson*, 13 Pet. 517, 10 L. Ed. 264:

"We hold the true principle to be this: that whenever the question in any court, state or federal, is whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

Under this rule, to bar the jurisdiction of a United States circuit court it is necessary for the complainant to admit not only that the title of the United States has been conveyed, but also that the title "vested according to the laws of the United States," and it is impossible to keep questions of federal law out of the case, without a plain admission that the patent conveyed the title to the patentee absolutely. That admission, if made, would leave no controversy for any court to settle. The complainant denies that the title vested in the patentee absolutely, and claims adversely to the patentee; therefore the question whether her claim is valid or not "must be resolved by the laws of the United States."

If it were true that the complainant's claim to an undivided one-half of the land in controversy rests upon settled principles of law, an easy way to prove it would be to cite decisions of the supreme court of the United States applicable to the facts of the case; but if the supreme court has ever decided that a homestead settler by his entry acquires

a vested interest in the land before he has fulfilled the conditions prescribed by the law, or that a patent issued to the widow of a deceased settler conveys any beneficial interest to the heirs of the deceased settler, or that any state law can be in any case effective, to divert the transmission of the title to public land from the national government to the one designated by the law to receive the patent, so as to vest the title in a person other than the patentee, my attention has not been directed to the decision.

All of the supreme court decisions cited in the argument in behalf of the complainant approach the questions in the case only remotely, and the general principles which they confirm are not applicable to the facts of this case. I will review them in chronological order.

*Witherspoon v. Duncan*, 4 Wall. 210-220, 18 L. Ed. 339, was a tax case, and the question was whether the land, which had been granted by an act of congress to individuals, could be taxed by the state before the patent issued; and the court decided that as the grantees had performed all the conditions precedent, and obtained a certificate of entry, the land was private property, and subject to taxation. In the opinion the court said:

"In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. \* \* \* The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal title in trust for the purchaser, who has the equitable title. \* \* \* The power to tax exists as soon as the ownership is changed, and this is effected when the entry is made on the terms and in the modes allowed by law."

In this decision the court applied the same principle which had previously been announced in the case of *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671, in which the lands affected had been acquired by cash entry to land donated by an act of congress. The entries referred to in these decisions were the transactions in the land office when the price was paid for the land by a purchaser, or when the final proof was made in compliance with conditions precedent to the acquisition of ownership under a donation law. Such entries are quite different from the transaction designated as a "homestead entry," which is the initial step taken in the land office towards acquiring ownership under the homestead law, and precedes the performance on the part of a homestead claimant of the conditions of residence upon and improvement of the land, which constitute the real consideration for the transfer of the title, and which are conditions precedent to the vesting of title in the homestead settler. Upon the argument it was confessed that the supreme court has not decided in any case that unpatented lands become subject to taxation by a state government before full compliance on the part of grantees with the requirements of the laws of the United States, which must precede the conveyance of title from the national government.

In the case of *Shepley v. Cowan*, 91 U. S. 330-340, 23 L. Ed. 424, the supreme court announced the rule that the party who is first in taking the initiatory step towards acquiring lands from the United States pursuant to laws enacted by congress, "if followed up to patent,

is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants." And the court also said in that case:

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States shall have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be the first in right."

In the preceding paragraph of the opinion reference is made to previous decisions of the court in *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, and the *Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82, in which it was decided that settlers claiming lands under the pre-emption laws did not thereby acquire such a vested interest in the premises as to deprive the government of the power to include the lands which they claimed within a reservation for public uses or to make other disposition thereof.

The opinion in *Shepley v. Cowan* was written by Mr. Justice Field, and the doctrine of relation, to which reference is made, will be better understood by referring to the explanation of that doctrine which the same learned justice had previously given in the opinion of the supreme court in the case of *Gibson v. Chouteau*, 13 Wall. 100, 20 L. Ed. 534, as follows:

"By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of the parties deriving their interests from him, the patent is held to take effect by relation as of that date. The supreme court of Missouri, considering that by this doctrine of relation the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. 'The legal title,' said the court, 'in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before.' The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title."

This court would commit a much more transparent error than the one pointed out in the decision of the supreme court of Missouri by granting a decree in favor of the complainant upon the theory



that by this doctrine of relation the legal title to the land in controversy, when it passed out of the United States by the patent to Mrs. Donahue, instantly dropped back in time to the inception of her deceased husband's claim, and that the community property law of this state intercepted the title as it passed from the United States to the patentee, and, operating in combination with the doctrine of relation, created a vested estate in a dead man.

In the case of *Railroad Co. v. Whitney*, 132 U. S. 357-366, 10 Sup. Ct. 112, 33 L. Ed. 363, the court held that a homestead entry valid upon its face, and regarded as legal by the officers of the land department, is such an appropriation of the tract as segregates it from the mass of public land, and excepts it from a subsequent grant by congress to a state for the purpose of aiding in the construction of a railroad, reaffirming the doctrine in the case of *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264, "that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it." The opinion contains an inaccurate statement, to the effect that in *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339, and *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671, the court had held the rule that "lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained," to be applicable "as well to homestead and pre-emption as to cash entries." This decision falls far short of being an authoritative declaration that the ownership of public land becomes changed by the initial filing in the land office of a homestead claim. It is in line with numerous decisions of the supreme court holding that homestead and pre-emption claims appearing of record in the land office except the tracts which they cover from grants made in aid of railroad construction, and it does not purport to be a decision of the question as to the time when a homestead settler acquires an inheritable interest in land.

*Sturr v. Beck*, 133 U. S. 541-552, 10 Sup. Ct. 350, 33 L. Ed. 761, involved a contest with respect to water rights between parties claiming title to separate tracts of land which had been patented under the homestead law, and in the decision the court again applied the familiar rule of equity that, in a contest between parties whose equities are in other respects equal, priority in time gives superiority of right. The condensed statement of the decision in the syllabus of the case is as follows:

"The filing of a homestead entry of a tract across which a stream of water runs in its natural channel with no right or claim of right to divert it therefrom confers a right to have the stream continue to run in that channel, without diversion, which right, when completed by full compliance with the requirements of the statutes on the part of the settler and the issue of a patent, relates back to the date of the filing, and cuts off intervening adverse claims to the water."

The decision quotes from an opinion by Attorney General MacVeagh, to the effect that, "where a homestead entry of public land has been made by a settler, the land so entered cannot, while such entry

stands, be set apart by the president for a military reservation, even prior to the completion of full title in the settler," and that the right of a homestead settler amounts to an equitable interest in the land, and until forfeited by failure to perform the conditions it must prevail not only against individuals, but against the government. The opinion also contains other quotations, and a general discussion of different features of the public land laws, but without adopting the decision of the attorney general referred to or announcing any rule of law applicable to the questions which this court has now to consider. The question in that case, as stated in the opinion of the court, was not as to the extent of a homestead settler's interest in his homestead as against the government, but was whether, as against his adversary, prior occupancy and settlement and entry was a lawful prior appropriation of the water in the stream flowing through his homestead. One paragraph of the opinion contains the following commentary on that part of the opinion in the case of *Witherspoon v. Duncan* which I have quoted:

"It may be said that this language refers to the certificate issued on final proof; but if the word 'entry,' as applied to the appropriation of land, means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim (*Chotard v. Pope*, 12 Wheat. 586-588, 6 L. Ed. 737), the principle has a wider scope."

This is a mere suggestion rather than a conclusion or decision that under the homestead law a settler on public land by filing his preliminary application acquires anything more than an inchoate right. In the case of *Dealy v. U. S.*, 152 U. S. 539-547, 14 Sup. Ct. 680, 38 L. Ed. 545, the supreme court recognized a substantial difference in the meaning of the word "entry" in cash purchase and pre-emption cases from the popular understanding of the word when used in connection with proceedings to acquire title under the homestead law, and gave to the word a broad interpretation according to popular understanding, comprehending the proceedings as a whole to complete the transfer of title, which in a homestead case is equivalent to an entry when land is sold by the government for cash.

In the case of *Bardon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806, which is the last of the supreme court decisions cited in support of the argument in behalf of the complainant, the supreme court found the facts to be that the claim to the land in controversy was initiated in the year 1855; that the settler subsequently filed his declaratory statement, pursuant to the pre-emption laws, and after his death his heirs paid the purchase price for the land and a certificate of the entry was issued to them; that the entry remained of record in the land office until August 5, 1865, on which date it was canceled. Upon these facts, the court decided that the land was excepted from the grant made to the Northern Pacific Railroad Company by the act of congress of July 2, 1864, and that the cancellation of the entry in 1865 did not bring the land under the operation of the grant to the railroad company. The decision reaffirms the declaration, often repeated in the decisions of the supreme court, to the effect that when the records of the land department show that a tract of land has been claimed pursuant to law, and a right to it in-

itiated by a filing which is apparently regular, it is segregated from the mass of public lands, and until such claim has been extinguished such tract is deemed to be appropriated and excepted from any grant of public lands made while it is in that condition, and this is so whether the claim is valid in law or invalid for any reason. This rule of law is fully expounded in the later decisions of the supreme court in *Whitney v. Taylor*, 158 U. S. 85-98, 15 Sup. Ct. 796, 39 L. Ed. 906; *Parsons v. Venzke*, 164 U. S. 89-92, 17 Sup. Ct. 27, 41 L. Ed. 360; *Railroad Co. v. Colburn*, 164 U. S. 383-388, 17 Sup. Ct. 98, 41 L. Ed. 479; *Same v. Sanders*, 166 U. S. 620-637, 17 Sup. Ct. 671, 41 L. Ed. 1139; *Same v. De Lacey*, 174 U. S. 622-639, 19 Sup. Ct. 791, 43 L. Ed. 1111.

The decisions of the supreme court cited and relied upon, whether considered singly or with respect to any general rule deducible from all of them, do not support the contention that the complainant's claim of ownership to an undivided one-half of the land in controversy is founded upon provisions of the homestead law which have been construed and settled by the supreme court.

A vested right to a patent conveying the title to a tract of land is equivalent to a patent issued, and refers back to the inception of the right of the patentee, but only so far as it may be necessary to cut off intervening claimants. *Stark v. Starr*, 6 Wall. 418, 18 L. Ed. 925. This rule is not available to diminish the estate conveyed by the patent, nor to support a claim adverse to the patentee. No right to a patent is acquired under the homestead law, until all the conditions precedent prescribed by law have been fully performed. The death of a man who has initiated a right, occurring before he has fulfilled the prescribed conditions, intercepts his right; and then his widow, if there be a surviving widow, becomes his successor in right, and may complete what he has left undone, and become entitled to a patent conveying the full title to her in her own right as the direct grantee of the government, and not by inheritance from her deceased husband, and while she survives children can acquire no right to any interest in the homestead. This is the policy of the homestead law plainly expressed in its provisions. If the community property law of this state has any effect upon the rights of the parties in this case, it would apply as well to a supposable case where a man who at the time of filing his homestead application is a naturalized citizen and a widower, having alien children living in Europe, and who, while occupying the land and claiming it, becomes married to a second wife, and afterwards dies before the expiration of five years from the date of filing his homestead application. If the argument made in this case is sound, in the supposed case the homestead would be the husband's separate property, and the surviving widow, by fulfilling the requirements of the law and obtaining a patent, would become the owner of only an undivided one-third of the land, and the alien children would take the other two-thirds by inheritance from their deceased father, contrary to the intention of congress, expressed in the homestead law, to bestow the bounty of the government only upon citizens of this country who occupy and improve the portions which they receive.

The provisions of the homestead law are similar to the Oregon donation law, and the policy of the government is identical in both statutes, and it is my opinion that the decision of this case must be controlled by the case of *Hall v. Russell*, 101 U. S. 503-514, 25 L. Ed. 829, in which the supreme court construed the provisions of the donation law, and held that it made no grant of land to a settler until the completion of his residence upon and cultivation of the land for the prescribed period; that down to that time he was an authorized settler, but not a grantee; that upon his death prior to the expiration of that period his rights, but not the land, descended to his heirs; that upon making the required proof the heirs became entitled to a patent conveying the title to them as donees of the government, but that the title was not by inheritance from the deceased but by grant directly from the United States; and that a statute enacted by the legislature of Oregon territory, providing that a settler's claim might descend to his heirs as real estate, and that his possessory right might be disposed of by will, conflicts with the act of congress, and that the territorial government could not add to nor take from the grant. See, also, *Hershberger v. Blewett* (C. C.) 55 Fed. 170. Uniformity in the rules to be applied in the interpretation of similar statutes is desirable, and as the supreme court has not construed the homestead law differently I consider the principles of the decision in *Hall v. Russell* to be the safest and best which can be applied to it, and by those principles I am guided to the conclusion that a patent issued to a widow pursuant to the homestead law conveys the land to her absolutely, and that no interest therein passes by inheritance to children of her husband. *Cooper v. Wilder* (Cal.) 43 Pac. 591, 52 Am. St. Rep. 163.

The demurrer is sustained, and a decree will be entered denying that the complainant has any equitable right to, or interest in, the land described in her bill of complaint.

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In re CODDINGTON.

(District Court, M. D. Pennsylvania. October 31, 1902.)

No. 185.

1. BANKRUPTCY—CROSS-EXAMINATION OF ALLEGED BANKRUPT.

Where the act of bankruptcy charged is the preferential transfer of property while insolvent, the person against whom the petition has been filed is required by section 3d of the bankruptcy act to appear at the hearing with his books, papers, and accounts, and submit to an examination; and upon his failure to do so the burden of proving his solvency is thrown upon him. He may therefore be called and cross-examined by creditors at such hearing.

2. SAME—INSOLVENCY—VALUATION OF CREDITS.

In determining the question of the insolvency of an alleged bankrupt, his credits must be estimated at their actual, and not their nominal, value, where their collectibility is doubtful.

In Bankruptcy. On exceptions to report of referee.

L. P. Wedeman, for bankrupt.

George Little, for certain creditors.

ARCHBALD, District Judge. It is objected that the only evidence on the subject of the respondent's insolvency was that which was obtained by calling and cross-examining him, which, it is claimed, the creditors had no right to do. But by section 3 d of the bankrupt act it is specially provided that, where a preferential transfer of property while insolvent is charged as the act of bankruptcy relied upon, the person against whom the petition has been filed is required to appear at the hearing with his books, papers, and accounts, and submit to an examination, as well as give testimony as to all matters tending to establish his insolvency, and upon his failure to do so the burden of proving his solvency is thrown upon him. This is a sufficient answer to the objection.

To maintain his solvency, the respondent relies upon certain book accounts, aggregating about \$1,800, which, outside of the debt to Boyle, his brother-in-law, to whom he turned over his stock of merchandise, is the amount of his indebtedness. These accounts, he claims, would enable him in time to pay dollar for dollar of all that he owes, but this expectation is hardly warranted by what he has further to say with regard to them. About one-third—\$600—is what is coming to him from accounts due the firm of Boyle & Coddington, which has been out of business for at least two years, during which time nothing substantial has apparently been collected upon them, which is very fair proof that they are not at present collectible. Of the accounts on his own books, which have been gathering since he has been in business by himself, some are against parties who admittedly have no property, and are simply expected to pay because they are honest. Expectations and reliances such as these are too uncertain to stand as property of value when balancing up the assets and liabilities of an alleged bankrupt. It may be that something could be realized out of them in time by patient and persistent effort, but that does not satisfy the law. It is their value now that is to be taken, and that can be but little, under the circumstances. If they had any real worth, it may be well asked why the bankrupt did not turn them over to his brother-in-law and go on with his store instead of transferring his whole stock of merchandise, which put him out of business.

The exceptions to the report of the referee are overruled, and an adjudication directed in accordance with his recommendations.

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In re HUNT et al.

(District Court, N. D. Iowa, C. D. November 5, 1902.)

**1. \*BANKRUPTCY—INVOLUNTARY PETITION—SIGNING AND VERIFICATION BY ATTORNEY.**

The attorney of a creditor may sign his client's name to a petition in involuntary bankruptcy, and may verify the same, where he is shown to have knowledge of the facts stated therein.

In Bankruptcy. On motion to dismiss petition because insufficiently signed and verified.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 123.

C. A. Hunt and M. A. Hunt, pro se.  
John A. Senneff and John Hammill, for creditors.

SHIRAS, District Judge. In this case a petition in involuntary bankruptcy was filed by certain creditors, the same being verified by the oath of the attorney at law and agent of the petitioners, by whom the names of the petitioners are signed to the petition, and who states in the verification that he is the duly authorized agent of the petitioners, and has knowledge of the facts recited in the petition.

In general order in bankruptcy No. 4 (89 Fed. iv) it is provided that:

"Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district courts."

In clause 9 of section 1 of the bankrupt act it is provided that the word "creditor" shall include any one who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy."

These provisions are ample to authorize the signing of the names of the creditors to the petition by their attorney and agent, as was done in this case. In section 18 of the act, which deals with the mode of procedure in involuntary cases, it is enacted that "all pleadings setting up matters of law shall be verified under oath." As it is not declared that the petition shall be verified by the creditor in person, the verification will be sufficient if made by the agent or attorney representing the creditor, it being made to appear that the affiant has knowledge of the facts verified.

The motion to dismiss the petition filed in this case is therefore overruled

## SLOAN v. UNITED STATES.

(Circuit Court, D. Nebraska. October 31, 1902.)

### 1. INDIANS—SUITS FOR ALLOTMENTS OF LANDS—SPECIAL JURISDICTION OF CIRCUIT COURT.

Act Aug. 15, 1894 (28 Stat. 305), amended by Act Feb. 6, 1901 (31 Stat. 760), conferring upon the circuit courts "jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty," and further providing that any one in whole or in part of Indian blood, who claimed "to have been unlawfully denied or excluded from any allotment or parcel of land," might bring suit in the proper circuit court for the enforcement of his rights, was intended to vest such courts with full authority to hear and determine every question arising in any suit brought by a claimant to an allotment; and the fact that such questions have been decided by the land department adversely to the claimant neither affects the court's jurisdiction nor concludes it on any matter of law or fact.

### 2. SAME—CONSTRUCTION OF ACTS AND CONVENTIONS.

In construing treaties or conventions made with the Indians, the terms "half blood" and "mixed blood" are to be given their ordinarily under-

stood meaning, and no distinction can be drawn between those who derive their Indian blood from the mother and those who derive it from the father.

**3. SAME—LANDS OF OMAHA TRIBE—ACT PROVIDING FOR ALLOTMENTS IN SEVERALTY.**

Act Aug. 7, 1882 (22 Stat. 341), relating to the lands of the Omaha tribe of Indians in Nebraska, and providing that with the consent of the tribe allotments in severalty should be made from certain lands within its reservation, superseded all previous legislation on the subject, and dealt with the tribe as it existed at the date of the act; and the right to allotments thereunder is not confined to such persons as were members of the tribe at the date of the treaty of March 7, 1865, and entitled to allotments under its provisions.

**4. SAME—CONSTRUCTION—PERSONS OF MIXED BLOOD.**

Such act makes no distinction, with respect to the right to an allotment, between Indians of the full blood and those of mixed blood, who were at the time living on the reservation in the tribal relation, but does not confer such right, as one which is legally enforceable, upon persons who were not so living in the tribal relation, merely because they are of mixed blood.

**5. SAME—NONRESIDENTS OF RESERVATION.**

A liberal construction should be given the act, however, to effectuate its purpose, which was to encourage the Indians to break up the tribal relation, and adopt the habits of civilized life; and persons of mixed blood, who, although not living on the reservation, were recognized by the tribe as members thereof, and have been formally declared such by the tribe in council or the equivalent, may properly be given allotments; but on the question whether they have been so recognized the courts will follow the rulings of the land department.

**6. SAME.**

A person of mixed blood, who did not reside upon the reservation at the date of the passage of the act, could not, by coming thereon afterward, although prior to the time when the tribe gave the consent required to render the act effective, become a member of the tribe, and entitled to the benefit of the act, unless his application for membership was approved, and he was recognized by the tribe as a member.

**7. SAME—PRIOR ALLOTMENT TO HALF-BREEDS—CHILDREN OF ALLOTTEES.**

Half-breed members of the tribe who secured allotments of land in severalty in the Nemaha reservation under the terms of the treaty of 1830 are not entitled to a second allotment under the act of 1882, although at the time of its passage they were residing on the reservation in the tribal relation; but the fact of such prior allotment does not affect the rights of the children of an allottee, which, under the latter act, are independent of those of the parents.

**8. SAME—QUANTITY OF LAND.**

The quantity of land to which an allottee is entitled under the act of 1882 and the amendatory act of March 3, 1893 (27 Stat. 630), which is dependent on whether or not he is the head of a family, or his or her age, if single, is to be determined by his status at the time when the allotment is made, and not at the date of the act.

**9. SAME—INHERITANCE FROM ALLOTTEE—DEATH BEFORE ISSUANCE OF PATENT.**

Under section 6 of the act of 1882, providing that the law with respect to descent in force in Nebraska shall apply to the lands allotted after patents therefor have been executed and delivered, an allottee has no title to the land allotted, prior to the issuance of a patent therefor, which will descend to his heirs in case of his death, but the land in that case remains a part of the tribal property.

This case, with 24 others in favor of different plaintiffs, were submitted to the court at the same time, and are all disposed of in the following opinion.

Thomas L. Sloan, Charles E. Clapp, H. C. Brome, and Anderson & Keefe, for plaintiffs.

John L. Webster and W. S. Summers, U. S. Dist. Atty., for defendant.

SHIRAS, District Judge. These several suits, the United States being the defendant therein, are brought under the provisions of the act of congress approved February 6, 1901 (31 Stat. 760), which enacts:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of congress, or who claim to be so entitled to land under any allotment act or under any grant made by congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant."

The plaintiffs in the several cases aver, in substance, that they are in part of Indian blood, being members of the Omaha tribe, and are, therefore, entitled to allotments of land in the reservation of that tribe situated in Thurston county, in the state of Nebraska; that their applications for allotments have been unlawfully denied them by the officers and agents of the United States charged with the duty of allotting the lands of that tribe in severalty, and therefore they invoke the jurisdiction conferred upon the court by the act of congress just cited for the ascertainment and enforcement of their rights. On behalf of the government it is contended that the provisions of the act of congress of February 6, 1901, above cited, do not confer upon the courts jurisdiction to review or vacate the decisions rendered by the interior department upon the applications of the several plaintiffs herein, nor to hear and determine whether the plaintiffs are members of the Omaha tribe in such sense that they are entitled to allotments in severalty of portions of the tribal reservation. This construction of the act practically defeats the evident purpose of the enactment, which is to provide a method for enabling parties, whose claims to allotments have been denied by the department, to obtain an adjudication upon their rights in the proper courts. While due weight must be given to the rulings and decisions of the department as affecting the merits of the cases, yet it cannot be held, in view of the express terms of the act of congress, that the rendition of a decision in a given case adverse to the claim of a particular person prevents the proper court from taking jurisdiction over a suit brought by such person to establish the right or claim denied to him by the action of the department. *Sloan v. U. S.* (C. C.) 95 Fed. 193; *Smith v. He-yu-tse-mil-kin* (C. C.) 110 Fed. 60. When the case of *Sloan v. U. S.* was before the court upon demurrer to the bill, it was held, in substance, that the act of 1882 (22 Stat. 341) was intended



to take the place of the previous acts and treaties providing for the allotment in severalty of the lands forming the Omaha reservation, and I see no sufficient reason for departing from that conclusion, and therefore the fundamental question to be solved is as to the persons who, under the terms of that act, are entitled to claim allotments in severalty. Section 5 of the act provides as follows:

"That with the consent of said Indians as aforesaid, the secretary of the interior be and he is hereby authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April 19th, 1880, approved by the Acting Secretary of the Interior July 27th, 1880, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one eighth of a section; to each orphan child, under eighteen years of age, one eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments, provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the commissioner of Indian affairs, as in said article provided: provided, that any Indian to whom a tract of land has been assigned, and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: provided further, that all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the commissioner of Indian affairs as aforesaid shall be deemed and held to be null and void."

Counsel for the United States earnestly contend that this section must be read in connection with the limitations found in article 4 of the treaty of 1865 (14 Stat. 667), which declares that: "The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purpose;" and that, so reading it, allotments under the act of 1882 can be made only to the mixed blood relatives who were on the reservation when the treaty of 1865 was adopted. I can see no good reason for adopting this view of these statutes. The treaty of 1865 made provision for the allotment in severalty to "members of the tribe," it being declared that the half or mixed blood relatives then residing on the reservation should be deemed to be members of the tribe. The treaty does not recognize the mixed bloods as a separate and distinct class, and does not confer any rights upon them by reason of their being mixed bloods, but the declaration of the treaty in substance is that the mixed bloods

residing on the reservation shall be deemed to be members of the Omaha tribe, and as such to be entitled to the right of allotment. The act of 1882 makes provision for the allotment of the lands of the Omaha tribe of Indians, and in determining who are to be included within this designation weight can be given to the fact that in the treaty of 1865 mixed bloods residing on the reservation were declared to be members of the tribe; but it cannot be held that the right of allotment under the terms of the act of 1882 can only be exercised by those who could assert such right under the terms of the treaty of 1865. When, in section 5 of the act of 1882, it is declared that, with the consent of the Indians, the secretary of the interior is authorized "to allot in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section, to each single person over eighteen years of age, one eighth of a section, and to each other person under eighteen years of age one sixteenth of a section,"—it was certainly not intended to limit this right to an allotment to the members of the tribe who were such in 1865. Many of the members of the tribe now upon the reservation have been born since 1865, yet their right to an allotment, if living upon the reservation when the act of 1882 was adopted, is not and cannot be questioned; and by the provisions of the amendment contained in the Indian appropriation act of March 3, 1893 (27 Stat. 630), it is enacted:

"That the act of Congress approved August 7, 1882, \* \* \* be and the same is hereby amended so as to authorize the secretary of the interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the interior department, to each Indian woman and child of said tribe born since allotments of lands were made in severalty to the members thereof under the provisions of said act, and now living, one eighth of a section of the residue lands held by that tribe in common, instead of one sixteenth of a section as therein provided."

Taking into consideration the express provisions of the act of 1882 and of the amendatory act of 1893, it is clear that it was not the intent of congress to limit the right to allotments in the Omaha reservation to such persons only as could have asserted the right under the terms of the treaty of 1865. If such had been the legislative intent, apt words of limitation to that end would undoubtedly have been incorporated in these acts; but none of that import are to be found therein.

The act of 1882, in the first section thereof, declares "that with the consent of the Omaha tribe of Indians, expressed in open council, the secretary of the interior be, and hereby is, authorized to cause to be surveyed," etc.; and in section 5 it is declared "that with the consent of said Indians as aforesaid the secretary of the interior be and is hereby authorized \* \* \* to allot the lands," etc. The tribe whose consent was to be obtained was the Omaha tribe as it existed in 1882, and not the tribe of 1865. The allotment in severalty was not to be made to the members of the tribe living in 1865, but to the members living in 1882. The purpose of the government in inducing the Indians to take allotments in severalty was to provide for the breaking up of the tribal relation, and to place the several

members of the tribe in such condition that they would be enabled to gain a support for themselves and their families by the cultivation and use of the allotments. Unquestionably the parties entitled to allotments under the act of 1882 were the members of the tribe as it then existed, and the question to be determined is whether the several claimants who are the plaintiffs in the cases now before the court were in fact members of the tribe when the act of 1882 took effect. Counsel for the government contend that in determining the status of the plaintiffs the rule of the common law must be applied that children of freeborn parents take the legal status of the father; and therefore in these cases children of a white father and Indian mother must be held to be whites, and as such to be disqualified from sharing in the tribal property belonging to the Indians. In the several treaties entered into between the United States and the Omahas frequent reference is made to half bloods and mixed bloods, but in none is there a distinction made between those deriving their Indian blood from the mother and those deriving it from the father. It is not to be supposed that the Indians, when called upon to agree to an allotment of their lands under the provisions of the treaty of 1865 and the act of 1882, had knowledge of the artificial rule of the common law, which, if it was applied in these cases, would require the ruling that a half blood residing with the tribe, the child of a white father and an Indian mother, could not be deemed to be of mixed Indian blood, whereas a child of an Indian father and a white mother would be held to be of Indian blood, and therefore entitled to share in the tribal property. As ordinarily understood by white people, a person of white and Indian parentage is deemed to be a mixed blood, without regard to the source of the Indian blood. In other words, in common parlance the child of a white father and an Indian mother, as well as a child of an Indian father and a white mother, are equally of mixed blood; and therefore, when, in a convention with the Indians, half or mixed bloods are included, no distinction can be drawn between those who derive the Indian blood from the mother and those who derive it from the father. Thus, in *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, it is said by the supreme court:

"In construing any treaty between the United States and an Indian tribe, \* \* \* the treaty must, therefore, be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

As further evidence that it is not the intent of congress, in determining the status of mixed bloods, that the technical rule of the common law should govern, reference may be made to the general Indian appropriation act of June 7, 1897 (30 Stat. 90), wherein it is declared:

"That all children, born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belong, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of congress shall be construed as to debar such child of such right."

As I construe the act of 1882, it was the intent thereof to establish by the terms of that act the rules to be followed in allotting the lands of the Omaha tribe. In the treaty of 1865 provision had been made for allotments in severalty, and for the issuance of certificates by the commissioner of Indian affairs to the allottees; it being provided that to each head of a family there should be assigned not to exceed 160 acres, and to each male person of 18 years or upwards, without a family, a tract not exceeding 40 acres. It does not appear that much progress in making allotments had been made under this treaty, and in 1882 congress again dealt with the situation by the adoption of the act of June 7th of that year. The act provides that, with the consent of the Omaha tribe of Indians, the secretary of the interior is authorized to allot the lands lying east of the right of way granted to the Sioux City & Nebraska Railroad Company "in severalty to the Indians of said tribe in quantity as follows: To each head of a family one quarter of a section; to each single person over eighteen years of age, one eighth of a section; to each orphan child, under eighteen years of age, one eighth of a section; which allotments shall be deemed to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865"; it being further provided that any Indian who had made improvements upon any tract assigned under the treaty of 1865 should have the preference right to select such tract for allotment under the act of 1882, and that, when the allotments had been made, the certificates issued by the commissioner should be null and void, provision being made for the issuance of patents to the allottees. It thus appears that, based upon the consent of the Omaha tribe, the provisions of the treaty of 1865 with respect to the allotment of the lands in severalty are superseded by the provisions of the new agreement or convention evidenced by the act of 1882, and therefore the rights of the plaintiffs to allotments must be adjudged according to the true intent and meaning of that act, and the right to an allotment of a person coming within the terms of that act cannot be rightfully denied him simply because he could not bring himself within the terms of the treaty of 1865. Under that treaty no woman, unless she was the head of a family, and no child under the age of 18, was entitled to an allotment, whereas under the act of 1882 each single person, regardless of sex, over 18, is entitled to one-eighth of a section, and each orphan child under 18 is entitled to a like amount, and each other person under 18 is entitled to one-sixteenth of a section. These radical changes in the terms of the act of 1882, as well as the provisions therein contained that the certificates issued by the commissioner under the provisions of the treaty of 1865 are to be deemed to be null and void, clearly justify the conclusion that recourse must be had to the act of 1882 in determining who are entitled to allotments in severalty on the reservation belonging to the Omaha Indians, and that limitations found in previous acts or treaties, but not repeated in the latter act, cannot be read into it, in order to defeat the rights of one who fairly comes within the terms of the latest convention between the Indians and the government, as evidenced by the act of 1882. Thus we reach the question of the con-

struction to be given to the terms used in that act, whereby provision is made for the allotment in severalty to the Indians of the tribe of portions of the reservation occupied by them.

Counsel for the government strongly contend that the court is practically bound to follow the rulings and decisions of the department of the interior in these cases, upon two grounds: First, that the construction given by the department charged with the duty of supervising the affairs of the Indians to the statutes and treaties dealing therewith are entitled to great weight, and in doubtful cases should control the judgment of the court; and, second, that the rights of the claimants present cases of mixed questions of law and fact, which prevents the court from considering the same under the recognized rule that courts will not re-examine questions of fact decided by the department in the disposition of the lands placed in its charge, but are limited to a consideration only of questions of law. When congress adopted the act of August 15, 1894, and amended it by the act of February 6, 1901, conferring upon the circuit courts of the United States "jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty," and further provided that any one in whole or in part of Indian blood or descent, who claimed "to have been unlawfully denied or excluded from any allotment or parcel of land," might bring suit in the proper circuit court for the enforcement of his rights, it certainly must have been the legislative intent to confer upon the courts full authority and right to hear and determine every question arising in any suit brought by a claimant to an allotment. These acts were adopted by congress because it was brought to its attention that many persons, claiming allotments, had been denied that right by the department, and it was sought to make provision for a method whereby such persons could reassert their claims before a judicial tribunal. The real purpose of the acts conferring jurisdiction upon the courts in this class of cases would be practically nullified if the contention of counsel should be sustained to the effect that in all cases wherein the department had ruled against the claimant the courts are bound to follow the decision of the department. The remedial intent of the legislation in question must be given fair and full force, and this imposes upon the court the duty of hearing and deciding all questions of law and fact necessary to the full consideration and determination of the rights of the several claimants.

The first question presented for consideration is the construction to be given to the act of 1882 in ascertaining the class of persons entitled to allotments under its provisions. As already stated, I cannot concur in the view that only those entitled to allotments under the provisions of the treaty of 1865 can claim the right under the act of 1882. The latter act was intended to deal with the situation as it existed at the time of its passage. At that time there was in existence the Omaha tribe of Indians, inhabiting their reservation in Thurston county, Neb. The earnest desire of the government was to bring about the abolition of the tribal system and community of

property, and to that end provision was made for the allotment of the tribal lands in severalty among the Indians constituting the tribe. If such a construction should be put upon the act that a portion of the persons of Indian blood residing on the reservation in the tribal relation should be excluded from the right to an allotment, it would follow that these persons would be deprived of the benefit they enjoyed as members of the tribe, without receiving any share in the tribal land,—an unjust result, which certainly cannot be defended upon the words of the act, or upon a fair construction of its real purpose. It certainly was not the purpose of the government, in seeking to bring about the severance of the tribal relation through the allotment of the lands in severalty, to sever such relation in any case without awarding compensation through an allotment in severalty. It was certainly well known to congress, when that act was adopted, that the Omaha tribe was not composed alone of Indians of the full blood, but that there were then upon the reservation, living with the tribe, many half or mixed bloods. The reasons for awarding to these persons lands in severalty in order to sever the tribal relation were just as strong as in case of the full bloods, and there is nothing in the language of the act that necessarily restricts the right to an allotment to the full bloods alone. Indeed, counsel for the government admit that there are mixed bloods who are entitled to an allotment, but their contention is that only those mixed bloods who were on the reservation in 1865 are entitled to allotments. Under the treaty of 1865 the mixed-blood members of the tribe were entitled to allotment, and I can see no sufficient reason for holding that congress intended to exclude such members when enacting the act of 1882. As already said, that act was intended to deal with the situation as it then existed, and to provide for allotment to the members of the tribe who would otherwise be deprived of their existing tribal rights. As I construe the act of 1882, it was not intended to make a distinction, with respect to the right to an allotment, between Indians of the full blood and of mixed blood residing on the reservation in the tribal relation, with one exception, to be hereafter noticed; but I am further of the opinion that this right is not possessed by the mixed bloods who were not living on the reservation as members of the tribe when the act of 1882 was adopted. As was well said by Commissioner Price in a letter of instructions issued under date of October 5, 1883:

“It would be absurd to contend that the treaty of 1865, or the more recent act of congress, under which the allotments are being made, were intended as a general invitation to all persons everywhere, who might be able to prove the existence of a drop or more of Indian blood in their veins, to repair to the reservation and select an allotment. Manifestly, such was not the intention, nor will any such construction be admitted in making the allotments.”

It may be that in some exceptional cases persons might be recognized to be members of the tribe, and as such to be entitled to allotments, although not upon the reservation when the act of 1882 took effect; but such recognition should be limited to those persons, if any, whom the tribe clearly deemed to be members. It must be

kept in mind that in the adoption of the act of 1882 the congress was not granting or donating the property of the United States, which would justify the application of a strict rule of construction in favor of the United States. The act of 1882, as well as the treaty of 1865, is a convention between the Omaha tribe and the government, whereby, with a view to encourage the Indians in the habits of civilized life, provision was made for breaking up the tribal relation through the allotment of portions of the reservation in severalty. Therefore it seems to me that the department would be justified in making allotments, not only to the actual resident members of the tribe, but to such others as the tribe, acting in open council, or the equivalent, should declare to be members of the tribe, and entitled to share in the allotment of the tribal land. Such allotments, however, would be matters of favor, depending upon the action of the tribe, and not upon the rights created by the act of 1882; and therefore claimants who cannot bring themselves within the provisions of the act of 1882 by showing that when that act took effect, they were residing on the reservation in the tribal relation, but who claim that, as a matter of fact, they were recognized by the tribe to be members thereof, cannot rightfully expect that the courts will refuse to accept and follow the ruling of the department upon the question of such recognition. The agents charged with the duty of making the allotments, who visit the tribe, have a much better knowledge of the action taken by the tribe than can be gained by the court; and their decision upon a fact of this nature, especially when duly affirmed by the officers of the interior department, should ordinarily be accepted as conclusive. In the numerous reports of the allotting agents introduced in evidence in these cases it is reported that none of the several claimants are recognized by the tribe as members entitled to allotments, and these findings of fact have been approved by the secretary of the interior, and they will, for the reasons stated, be accepted as final by this court in the further consideration of these suits.

It is further contended on behalf of plaintiffs that the act of 1882 did not take effect until the consent of the tribe was obtained thereto, and therefore all mixed bloods who had returned to the reservation at that date are to be deemed to be within its terms, the same as though they were residents on the reservation in 1882. It is shown in the evidence that a special agent to make the allotment was sent to the reservation in the early part of 1883, and the assent of the tribe to the provisions of the act had evidently been had by that time. Even if it should not be properly held that the rights of the parties are to be determined by the actual situation as it existed on the 7th day of August, 1882, being the date of the adoption, by congress, of the act in question, yet it cannot be held that a mixed blood, who was not at that date an actual resident of the reservation, could make himself a member of the tribe in such sense as to entitle him to the rights created by the act of 1882, by simply coming upon the reservation, it not being shown that his action was approved by the tribe acting thereon. If the tribe had recognized and approved the application of a particular Indian, their action would have resulted in

his application being recognized by the allotting agent, but, in the absence of such recognition, it must be held that a mixed blood who was not a resident, in the tribal relation, of the reservation, when the act of 1882 was adopted by congress, could not force the tribe to recognize him as a member entitled to share in the allotment by coming upon the reservation, even though he did so by invitation of his relatives in the tribe.

A further question necessary to be considered is the effect to be given to an allotment made under the terms of the treaty of 1830, whereby what is known as the "Nemaha Reservation" was assigned for the use and occupancy of the half-breeds of the tribe, it being therein provided that "the president of the United States may hereafter assign to any of the said half breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of six hundred and forty acres to each individual." It cannot be held that it was the intent and purpose of this section of the cited treaty to confer upon the half-breeds of the tribe a greater interest or right than was possessed by the full bloods; and yet that would be the practical result if it should be ruled that a half-breed, after reaping the benefit of an allotment in the Nemaha reservation, should also be entitled to a further allotment in the present reservation; and, without further elaboration of the reasons for so ruling, I hold that all mixed bloods who have secured allotments in the Nemaha reservation are debarred from an allotment in the Thurston county reservation. Where, however, a mixed blood was living in the tribal relation upon the present reservation when the act of 1882 took effect, his right to an allotment, as a member of the Omaha tribe, would not be defeated because his parents, or either of them, had secured an allotment in the Nemaha reservation. Being of the mixed blood, and being in fact an actual resident in the tribal relation upon the reservation, he must be deemed to be an Indian of the Omaha tribe; and, as he had not received an allotment under the treaty of 1865, his rights under the act of 1882 cannot be defeated because his parents may have reaped the benefit of an allotment. Thus, under the express terms of the act of 1882, the heads of a family are entitled to an allotment, and so, also, are their children. In other words, under the act of 1882 the fact that an allotment under that act has been made to the parent does not defeat the right of the child to a personal allotment. This right of the child is not derived from the allotment right of the parent, nor is it property inherited from the parent, but it is a personal right conferred upon the individual because he is in fact an Indian of the Omaha tribe. If an allotment under the act of 1882 to the parent will not defeat the right of the child to a personal allotment, I can see no good reason for holding that an allotment to the parent under any previous act should be given that effect.

As the act of 1882 and the amendatory act of 1893 give to the heads of families one-quarter of a section, and to all others one-eighth, the question arises whether the quantity to be allotted in a given case is to be determined by the status of the claimant at the date of the act or at the time when the allotment is made. By sec-



tion 5 of the act of 1882 it is provided that the secretary of the interior is authorized to allot the lands in severalty. It is not declared that "there is hereby granted or allotted to each head of a family or other person" so much land, which language, if used, might possibly be construed to be an allotment then taking effect; but the provision is that the secretary of the interior, through agents to be by him selected, is to make an allotment in the future, and the fair construction of this provision is that the status of the parties when the allotment is made or claimed determines the quantity to be assigned. This I understand is the rule followed by the agents of the department in making allotments from time to time, and is the rule that will be adopted in dealing with the cases now before the court.

Having thus considered the questions of law pertaining to the cases in general, it will be necessary to determine in each case, from the facts thereof, the rights of the claimant under the construction given to the treaties and acts governing the situation as hereinbefore outlined, each suit being indicated by the name of the plaintiff therein.

Thomas L. Sloan: Claimant is a mixed blood, one-eighth Indian. Is the grandson of Margaret Sloan, the daughter of Michael Barada, a full-blood white man; and Taeglaha Haciendo, a full-blood Indian woman of the Omaha tribe. Margaret married one Thomas Sloan, a white man, in St. Louis; and in 1857, with her husband and children, came to the Nemaha reservation, and was allotted 320 acres therefrom. In 1881 Margaret Sloan, with her grandson, Thomas L. Sloan, came to the present reservation, and they were residents thereof when the act of 1882 was adopted. Thomas L. was educated by the United States government at the school at Hampton, Va., and, while the evidence shows that he is by habit, mode of life, and education a white man, that fact does not deprive him of the right to claim an allotment under the act of 1882, as he was at the date of its adoption living on the reservation, and is in fact of mixed blood. Being a married man, he is entitled to an allotment of 160 acres.

No. 174. John M. Sloan, Artemesia Frost, and Thomas L. Sloan: In this case plaintiffs claim as the heirs at law of Margaret Sloan, averring that during her lifetime, and while residing on the present reservation, she selected the land in the bill described for allotment purposes, and that upon her death, in 1898, the plaintiffs, as her heirs, succeeded to her rights. The evidence shows that Margaret Sloan received an allotment of 320 acres in the Nemaha reservation, which debarred her from claiming a further allotment. Furthermore, Margaret Sloan never obtained a patent or certificate conveying to her a title to a specific piece of land. Even though it might be true that she had, as a member of the Omaha tribe, an interest in the tribal land, that interest did not confer upon her heirs the right to demand the conveyance to them of this specific tract. In section 6 of the act of 1882 it is declared that the law with respect to descent in force in the state of Nebraska shall apply to the lands after patents therefore have been executed and delivered. Until a patent confirming a previous selection has been executed and delivered, the lands included therein would remain part of the tribal property, so far as the right of inheritance is concerned; and, as I view the situa-

tion, Margaret Sloan, at the date of her death, was not vested with the title to the land she was occupying in such sense that her death devolved or vested any title thereto in her heirs, but the land remained part of the tribal property. Under these circumstances plaintiffs have failed to show a right to or title in the land claimed by them, and their bill must be dismissed on the merits, and at their cost.

No. 175, Garry P. Myers: Being of mixed blood, and a resident of the reservation in 1882, Myers is entitled to an allotment, and his right thereto is not seriously questioned by the department, but the debatable point in the case is as to the amount to which he is entitled. It is averred in the answer in this case that Myers claimed to have selected the land for allotment in 1892, he being then a single man, of about 18 years of age, and therefore he is entitled to 80 acres only. The stipulation of facts in the case shows that Myers, by marriage, became the head of a family on March 5, 1893, and that he entered upon the occupancy of the quarter section claimed by him in the spring of 1894. I do not find in the record any evidence to sustain the averment in the answer that Myers made his selection in 1892, and under the facts stated in the stipulation it must be held that he made his selection in the spring of 1894, at which time he was the head of a family, and entitled to an allotment of 160 acres. The evidence further shows that Myers had occupied and improved the 160 acres by him selected in such sense that under the provisions of section 5 of the act he is entitled to be preferred over any other claimant, and the allotment of 80 acres of the land in question to Taehena Webster was, therefore, an error on part of the agent, Myers being entitled to the whole quarter section. A decree in this case will therefore be entered establishing Myers' right to the 160 acres described in the bill.

In all the other cases submitted to the court, being Nos. 265, 266, 267, 268, 269, 362, 363, 364, 365, 460, 461, 462, 502, 503, 504, 505, 506, 507, 508, 509, 574, and 579, docket T, the several plaintiffs therein have failed to show themselves entitled to the benefit of the allotment provisions of the act of 1882, as construed in the foregoing opinion, and therefore in each case a decree will be entered dismissing the bill on the merits, at the cost of the plaintiff therein.

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WIDDICOMBE v. ROSEMILLER et al. (two cases).

SAME v. MURPHY et al.

(Circuit Court, W. D. Missouri, C. D. October 21, 1902.)

Nos. 2,253, 2,254, 2,255.

1. RIPARIAN RIGHTS—ACCRETION AND RELICTION—LATERAL LIMITS OF RIGHT.

A riparian owner on a river is entitled to the land made by accretion or reliction in front of his property, and contiguous thereto, according to his shore line. His right cannot be extended laterally so as to exclude other riparian owners above or below him from access to the river.

2. SAME—LAW GOVERNING—ISLANDS.

An island in a navigable river, which had been surveyed prior to the admission of the state, so long as it remained undisposed of by the

United States, was governed by the rules of the common law with respect to riparian rights and the effect of erosion or submergence, and not by the law of the state.

**3. SAME—EFFECT OF SUBMERGENCE OF ISLAND—RELICION.**

Island No. 42 in the Missouri river, within the present state of Missouri, was surveyed by the United States in 1820, and then contained about 50 acres. Subsequently during floods it was submerged, and a portion of the surface was washed away; but on the subsidence of the waters a portion of it reappeared, and at no time was it washed away to the level of the bed of the river, a channel remaining between the island and the west bank of the river. About 1880 the river cut a new channel, commencing above the island, and returning to the old channel below it, making a curve to the eastward, which inclosed about 1,100 acres, and leaving the old channel and the island dry. Thereafter plaintiff entered the island as public land, and received a patent therefor according to the original survey. Under the law of Missouri the title of riparian owners on a navigable stream extends only to the water line. *Held*, that the title of the United States to the island was not lost by the erosion or submergence, and that, by its conveyance after it reappeared on the relicion of the waters, plaintiff took title thereto with the additions made by alluvion and accretion.

**4. SAME—ACCRETION.**

A considerable depression existed between the island and the former west bank of the river, where the channel had originally been. *Held*, that the center of such channel constituted the new boundary between the island site and the tract of land lying on such bank, and the new lands to the eastward, reaching to the new channel, were accretions to the island; not extending, however, farther to the north or south than the extremities of the island according to the original survey.

**At Law. Actions of ejectment.**

These are three separate actions of ejectment for the recovery of Island No. 42 in the Missouri river, located in section 19, township 46, range 13 W. of the fifth P. M., containing 48.62 acres, according to the United States survey thereof made in 1820. The defendants owned the land bordering on the west bank of the river in range 14; Fred Rosemiller owning the quarter section farthest north; the defendant Henry G. Rosemiller, the quarter section next south; and the defendant Hugh M. Murphy, the quarter section farthest south. The quarter section owned by Henry G. Rosemiller lay immediately west of the island. The river boundary line thereof at the time of the survey of the island was about 200 yards west of the island. Between 1870 and 1880 the channel of the river began to change about a mile and a half north of the Fred Rosemiller tract, over to the Boone county side, and, by process of erosion, cut into the Boone county shore until its course turned eastward, and then southeast, and then southwest, until it re-entered the old channel of the river, south of the Hugh M. Murphy tract, forming what is known as "Eureka Bend"; making a complete crescent, the apex of which was a mile and a half east of the original channel; thus forming in this crescent a body of land containing about 1,100 acres, the whole of which the plaintiff claims as an accretion to Island No. 42; the defendants claiming it as an accretion to their lands, respectively. The plaintiff entered this island in 1896, and obtained from the government therefor a patent. The defendants' contention, *inter alia*, is that this island was washed away by the floods of the Missouri river between 1870 and 1880, so that the channel of the river ran over it for such a length of time that it should be regarded as a part of the bed of the river, and that the reappearance of the dry land therein after the change in the channel of the river became the property of the state, and the alluvion forming over the same, being an accretion from the shore line, belonged to the riparian proprietors; the contention of the plaintiff being that the island, as such, was never obliterated, but a considerable integral part thereof remained intact, and, though overflowed in times of great floods in the river, on the retrocession of the high waters a

large portion of the island reappeared as dry land, and that the accreted lands belonged to the owner of the island. A jury being waived, the cause was submitted to the court, which made a special finding of facts, which is too voluminous for publication. Sufficient of them will appear in the following opinion for a proper understanding of the facts found, and the principles of law applied thereto.

John Cosgrove, W. S. Pope, C. D. Corum, and John Montgomery, Jr., for plaintiff.

Moore & Williams and W. M. Williams, for defendants Rosemiller and others.

Silver & Brown and Eli Penter, for defendants Murphy and others.

PHILIPS, District Judge (after stating the facts as above). As both parties to this controversy claim the lands between the original surveys and the present river front as accretions, and the court being of the opinion that said new lands outside of Island No. 42 in front of the Fred Rosemiller tract and the Hugh M. Murphy tract are accretions thereto, and the only claim asserted thereto by the plaintiff is that they are an accretion to Island No. 42, the issues as between the plaintiff and Fred Rosemiller and Hugh M. Murphy must be for the defendants as to said accreted lands. The rule of law, as I understand it, is aptly expressed by Chief Justice Ruger in *Mulry v. Norton*, 100 N. Y. 426, 3 N. E. 581, 53 Am. Rep. 206, the substance of which is that the riparian proprietor is entitled to the lands made by accretion or reliction in front of his property, and contiguous thereto, according to his shore line:

"However such accretions may be commenced or continued, the right of one owner of uplands to follow and appropriate them ceases when the formation passes laterally the line of his coterminous neighbor. A littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation. This right is his, only, and exists by virtue and respect of riparian proprietorship."

This doctrine is approved by Mr. Justice Blatchford in *St. Louis v. Rutz*, 138 U. S. 226, 250, 11 Sup. Ct. 337, 346, 34 L. Ed. 941, as follows:

"The right of accretion to an island in the river cannot be extended lengthwise of the river, so as to exclude the riparian proprietors above and below such island from access to the river as such riparian proprietors."

The real controversy in this case arises between the plaintiff and Henry Rosemiller. The contention of the plaintiff is that he is not only entitled to recover, in any event, 48.62 acres embraced in the original survey of Island No. 42, but also all the land in front of the Rosemiller tract to the present western bank of the Missouri river, as an accretion to the island. The defendant contends that said island at some time after the survey of 1820 was entirely swept away by floods or the process of erosion, so that for a considerable length of time the situs of the island was submerged and became a part of the bed of the river, and that, even if the dry land did at any time thereafter appear within the territory of Island No. 42, the plaintiff cannot claim it, nor any accretions thereto, as it became the property of the state,

subject, however, to the acquisition by accretion to the lands of Henry Rosemiller, the riparian proprietor.

Without stopping here to discuss what the court finds the facts to be respecting the effect of the force of the waters in the fluctuations of the channel of the Missouri river on this island, it is to be conceded to the contention of the defendants that Judge Gantt, speaking for division 2 of the supreme court of this state, in *Vogelsmeier v. Prendergast*, 137 Mo. 271, 39 S. W. 83, has ruled that as to an island surveyed in a navigable river, when the surface thereof is entirely washed away, giving place to the channel of the river, and at a subsequent period new land is formed within the area of the original survey, the owner of the island does not become the owner of the new dry land, which is not an accretion, merely because it forms in the area of its original survey. I feel constrained to challenge the applicability of this ruling to the facts of this case. It was ever the settled common law of England that the seas and all navigable tributaries in which the tide ebbed and flowed, and all beneath and in them of natural creation, belonged to the crown, and that all grants of land bordering on tide water extended only to the high-tide margin. This doctrine of the common law was imported into this country, and made applicable to our inland navigable streams, established or recognized as such by congress. Accordingly the congress of the United States has provided that the navigable rivers or streams in the territory of the United States in which lands are offered for sale should be deemed to be and remain public highways. Hence Mr. Justice Clifford, in *Railway Co. v. Schurmeir*, 7 Wall. 272, 288, 19 L. Ed. 74, said:

"Viewed in the light of these considerations, the court does not hesitate to decide that congress, in making the distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways."

These reservations and common-law rules were made applicable to riparian proprietors to whom concessions of the public land were made by the government. The settled doctrine of this state is that such riparian proprietor does not own to the main channel of the river, but only to the water's edge. *Benson v. Morrow*, 61 Mo. 347; *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589; *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913; *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300. This, being the established rule of property in this state, must be recognized by the federal courts in matters of controversy respecting titles to land granted by the government, bordering on the river.

Island No. 42, in question, was surveyed by the general government, and thus appropriated and reserved by it, in 1820, before the admission of the state into the Union. It and the control of the river never passed to the state under the act of admission. It continued to be the property of the United States until it was patented in 1896 to this plaintiff. While it was the property of the United States, it held it subject alone to the recognized laws and rules of the United States. In the absence of express legislation by congress, the rules of the

common law applied to its ownership of this island; and, as the plaintiff obtained the patent to this island in 1896, this action should be viewed as if the government itself at the time of the grant had found the defendant on the survey of Island No. 42, and had brought an action to evict him. While the common law recognized that the proprietorship of lands might be lost by erosion or submergence, as said by Chief Justice Ruger in *Mulry v. Norton*, 100 N. Y. 426, 3 N. E. 581, 53 Am. St. Rep. 206:

"It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. \* \* \* When the water disappears from the land, either by its gradual retirement therefrom, or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owner."

—Citing in support of this proposition the fundamental doctrine laid down by Sir Matthew Hale's *De Jure Maris*, that after—

"The reflex and recess of the sea the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiralty jurisdiction while it so continued. \* \* \* As touching islands arising in the sea, or in the arms of creeks or havens thereof, the same rule holds, which is before observed touching acquets by the reliction or recess of the sea, or such arms or creeks thereof. Of common right, and *prima facie* it is true, they belong to the crown; but where the interest of such *districtus maris*, or arm of the sea, or creek or haven, doth in point of property belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to the subject according to the limits and extents of such propriety."

Reference is made in that opinion, as supporting the doctrine, to the learned opinion of Judge Wilson in the case of *Morris v. Brooke*, found in a note to this case in 53 Am. Rep. 215, in which the controversy arose over an island called "Wilson's Bar," created by alluvion upon land formerly contained within the boundaries of an island called "Little Tinnicum," but which at some time had been worn away by the waters. The court said:

"The right to the new island, and also to land gained by alluvion or dereliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. \* \* \* Though the surface of the lower part of Little Tinnicum was destroyed by the force of the winds and the waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining land covered by the water. If it was regained either by natural or artificial means, it continued to belong to the original proprietor. The earth deposited on it became his by the right of alluvion, and, of course, this island formed on it by such deposits became his. And though it probably has extended beyond the limits of the old island, the addition is plainly alluvion."

The supreme court of the United States, in *St. Louis v. Rutz*, supra, approved and recognized this doctrine of the common law in respect of islands. Because of the fact that the rule in the state

of Illinois extends the fee of the riparian proprietor to lands bordering on a navigable river to the main channel of the current, it is there held that when the land of such proprietor, by erosion or avulsion, is suddenly carried away by the waters of the river, but afterwards, by recess and alluvion deposits, new land is re-formed within the area of the grant, it becomes the property of the original owner, notwithstanding the channel of the river may have at one time run over its surface. The court said:

"It is laid down by all the authorities that, if an island or dry land forms upon that part of the bed of the river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him, with the new deposits thereon."

The rule is otherwise in the state of Missouri in respect of riparian proprietors who own the land bordering on a river, because their title only extends to the water's edge, and they have no fee in the bed of the river. But in case of an island in the river, surveyed and appropriated by the United States, and which never passed to the state of Missouri, in which the whole fee remains in the United States, the common-law rule must apply. In the case, *supra*, Arsenal Island, as originally surveyed, was in the Mississippi river, and on the Missouri side of the channel. The court said:

"Dry land which should again form on the site where the Arsenal Island existed when it was surveyed in 1863 would be the property of the city of St. Louis."

While there is conceded to the state the right to establish and maintain its own rules of property with respect to land ceded by the government to the state, and to the citizens thereof after their acquisition by the state or the private citizen, I deny the application of these local regulations and rules to the domain of the general government within navigable waters which existed at the time of the admission of the state into the Union, and over which the government had not surrendered its jurisdiction at the time of the abnormal convulsion of the waters of the Missouri river, when it ran over the surface of this island, and doubtless, for the time being, so submerged it as to admit of navigation above it. When the unusual waters receded, and the dry land appeared within the area of the survey, whether from retrocession of the waters, or the elevation of the land by alluvion deposits, under the common-law rule it was the same island, held by the same title. And the supreme court, in the case of *St. Louis v. Rutz*, *supra*, approved the doctrine of the court of appeals of New York in the *Mulry-Norton Case*, which maintained that, on its reappearance by alluvion or reliction within the line of the survey, the land above the water became the property neither of the state nor of any intruder by occupation. The court does not feel called upon to say what would be the relation of a private owner to an island in the Missouri river, which, after its grant by the United States, should be submerged so as to become the bed, lying beneath navigable waters, on its reappearance as dry land. When this plaintiff acquired the patent of the government to this island, the ruling made in the case of *Vogelsmeier v. Prendergast*, *supra*, had not been

made; and any physical change which had occurred on the surface of Island No. 42 was, according to the defendant's contention, 20 years or more prior to the issue of the patent.

The court is persuaded from the reliant testimony in pais, and from the physical facts disclosed by the surveys of the Missouri river commission, that this island was at no time entirely washed away to the level of the bed of the river; that the waters of the river in times of extraordinary floods may have swept over its surface, and probably washed away the vegetation on the top of the soil thereof, but a very considerable portion thereof reappeared on the retirement of the abnormal waters, between which and the shore on the west side thereof one of the channels of the river was clearly running in 1869; and that this body of land, containing from 15 to 20 acres, within the lines of the original survey, formed the nucleus of the adhesion by accretion of the lands thereto, not only equal to the amount and quantity of the original survey, but extending laterally beyond the surveyed lines.

The defendants, in their testimony, as do their counsel in their brief, lay particular stress on the fact, as testified to by the defendants, that between the early part of 1873, perhaps, and 1876, the river bank west of the island site, and especially so in front of the Murphy tract, was eaten into by the current of the river, so that a considerable portion thereof fell into the river. Between the island site and said river shore was a distance of about 200 yards, more or less. I confess that it is not apparent to my mind how it could be inferred from this fact that the island itself was thus eaten away and destroyed. If the trend of the work of erosion was to eat into the bank of the river on the west side, it showed that the force of the channel was in that direction, and away from the island, and thus to force the channel from the direction of where the present Eureka Bend channel enters the old channel south of the Murphy tract. It would rather seem to indicate that the pressure of the channel on the island was diminished by its increased force against the west shore of the river.

The physical fact remains, however, that between the surveys of the Missouri river commission in 1869 and 1879 the pressure was rather on the north shore (the Boone county side) of the river, and so great that, beginning at the Bruce farm, a mile and half north of the Fred Rosemiller tract, and a greater distance north of the island tract, the whole channel abandoned the locality of the defendants' lands and the island site, so as to form the Eureka Bend, with its apex nearly a mile and a half east. So the survey of the Missouri river commission in 1879 showed an almost unbroken body of land within the whole area of this bend, amounting to nearly 1,100 acres. And the character of the alluvion deposit, the vegetable growth, and the large size of the cottonwood trees, which, the evidence indubitably establishes, existed on this island between 1880 and 1890, satisfied the mind of the court that no such work of diminution by the channel of the river occurred in and about the island between 1873 and 1879 as to completely obliterate the island, as claimed by the defendants.



Conceding, as counsel for the defendants do, that this formation in front of the lands in question was an accretion, all in front of the Henry Rosemiller tract would inure to his benefit, if the island tract presented no obstacle. Finding, as the court does, from the evidence, that between the survey of the island tract and the original river-front line of the Henry Rosemiller tract there existed and continues to exist a considerable depression, some 10 feet lower than the surface of the island tract, it is a physical demonstration that this depression broke the continuity of the accretion to the Henry Rosemiller tract, and that it must, in the nature of things, have proceeded on the west side from the island site to the center of the depression. Judge Napton, in *Benson v. Morrow*, 61 Mo. 353, in discussing a kindred question, said:

"Suppose the channel of the river between an island and the mainland is left dry by the water, and entirely filled up with deposits of mud, and the island and mainland are at last one continuous tract of land; could the owner of either claim the entire tract? Certainly the newly formed land would belong to the United States, or it would be divided between the opposite owners, upon the common-law principle applicable to nonnavigable streams, of each going to the thread of the channel as it was before it was deserted by the water. In the event supposed, the river might be regarded as ceasing to be a navigable one *pro hac vice*, or, rather, as being converted, at the slough between the island and the shore, into a nonnavigable one. In any event, the owner of the shore could not claim both the alluvion and the island, nor, vice versa, could the owner of the island claim the tract on the bank, with its accessions by alluvion."

It may be conceded to the defendants that so much of the assertion of the learned judge as held that "the newly formed land would belong to the United States" has since been, in effect, overruled by the supreme court of the state; that such lands, unless they be the subject of accretion, would belong to the state. Otherwise the doctrine of this case has not been overruled, but repeatedly affirmed, by the supreme court.

The land sought to be recovered in the suit against Henry Rosemiller is so described as to embrace all the land lying in front of the original surveyed tract of Henry Rosemiller, at or near the present west river front of the river. This is predicated of the theory that all the lands included in this description outside of the island survey are accretions to the island. It is quite evident, however, from the location of the island as originally surveyed in section 19, that it does not cover the entire front of the Henry Rosemiller quarter section. It is apparent from the survey of the island that the southern point thereof is 48.04 chains north of the south line of section 19, which would make the southern point of the island 8 chains and 4 links north of the half-section line, so that the island tract does not cover the whole front of the Henry Rosemiller tract, by 8 chains and 4 links on the south. The only land in controversy, therefore, to which the plaintiff is entitled by way of accretion eastward from the island, is that which covers the front of the east side of the island as originally surveyed, while the only land which the plaintiff can claim by way of accretion to the island on the west side is that to the center of the depression between the island and Henry Rosemiller, of which

no survey has been furnished to the court, and therefore there can be no description given in the finding and judgment of the court. While the field notes of the survey of Island No. 42 show that the northern extremity of the island passes beyond the north section line of section 19 into section 18, which would bring it in front of the lower portion of the Fred Rosemiller tract, it is of such inconsiderable amount as, in the judgment of the court, not to warrant any interruption of the finding made in favor of said Fred Rosemiller as to the accreted land.

As the maps in evidence before the court enable it to give a description of the island tract, and the accretion in front thereof, judgment will go therefor for the plaintiff. But as the plaintiff has failed to furnish the court with any survey, or such evidence as would enable the court, with any reasonable accuracy, to ascertain the quantity and describe the boundary of the accreted land on the west side of the island, no judgment will be rendered therefor.

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RHEINSTROM et al. v. UNITED STATES.

UNITED STATES v. RHEINSTROM et al.

(Circuit Court, S. D. Ohio, W. D. March 21, 1902.)

Nos. 5,293, 5,294, Consolidated.

1. CUSTOMS DUTIES—FRUITS IN SPIRITS—EXCESS OF ALCOHOL.

Under paragraph 263 of the tariff act of 1897, relating to fruits in spirits which imposes a duty of \$2.50 "per proof gallon on the alcohol contained therein in excess of 10 per centum," the duty is to be computed on all such excess, whether absorbed by the fruit or supernatant.

2. SAME—VALUATION—ADDITIONS TO ENTERED VALUE.

The French general internal revenue tax on alcohol, which is not collected on goods exported is a part of the dutiable value of such goods when purchased in the markets of France under the provisions of the customs administrative act of 1890, but local taxes, designated as "droit de ville" and "octroi," which vary with the locality, cannot properly be considered as elements of market value.

3. SAME—RECIPROCITY—AGREEMENT WITH FRANCE.

The president's proclamation of May 30, 1898, relating to reciprocity with France, and affecting the rate of duty on brandies and other spirits, does not apply to the excess of alcohol above 10 per centum used in preserving fruits, specially dutiable under paragraph 263 of the tariff act of 1897.

Cross-appeals by the importers and United States from a decision of the board of United States general appraisers, which reversed, in part, the decision of the surveyor of customs at the port of Cincinnati.

The following is the opinion of the board (Somerville, General Appraiser):

The importation in question consists of 38 casks of white cherries, imported August 1, 1898, from Bordeaux, France. The fruit was preserved in spirits, and contained over 10 per cent. of alcohol. It was assessed for duty under paragraph 263, Tariff Act July 24, 1897, which specially enumerates "fruits preserved in \* \* \* spirits," and provides that, "if containing over 10 per centum of alcohol and not specially provided for in this act," (they shall be dutiable at) "thirty-five per centum ad valorem, and in addition two dollars

and fifty cents per proof gallon on the alcohol contained therein in excess of ten per centum." In appraising the merchandise, as appears from the record and testimony in the case, the local appraiser added to the invoice and entered value a certain amount for the French internal revenue tax on alcohol, as follows (see Synopsis, 20,218):

	Francs.
Invoice and entered value.....	16,190.35
Add for French internal revenue tax on 44.12 liters, at 210.25 francs per 100 liters.....	9,276.44
	<hr/> 25,466.79

Duty was assessed upon this appraised value of 25,466.79 francs at the rate of 35 per cent. ad valorem, and, in addition thereto, a duty of \$2.50 per proof gallon was assessed on the alcohol contained in the importation in excess of 10 per cent. The so-called French internal revenue tax is explained by the report of the United States consul at Bordeaux, France, which was introduced in evidence by both the government and the importer, from which we make the following extract:

"From this knowledge, I further certify that the provisions of the French law in regard to the taxation of alcohol are as follows:

"(1) A general tax on alcohol consumed in France, without regard to its origin, which is the same throughout the entire country, amounting to 156 francs 25 centimes per hectoliter. This tax is not collected in case of exportation.

"(2) At Bordeaux there is a special tax for the benefit of the city of Bordeaux of 30 francs per hectoliter. This tax is not collected in case of exportation.

"(3) The 'octroi' duty on alcohol sold or consumed in the city of Bordeaux is 24 francs per hectoliter. This tax is not collected in case of exportation.

"The method pursued in the case of manufacturers who use alcohol in the preparation of their products is as follows: The manufacturer becomes a bonded warehouseman. He purchases alcohol from distilleries which are operated under government supervision, not paying the tax at the time of purchase, but being held responsible for same under specific regulations. When imported by him, the amount of alcohol in the manufactured article is determined by the customs officials, and the amount deducted from his stock in bond, and the manufacturer pays tax on the balance which remains in his hands after the expiration of a certain time, six or twelve months, as the case may be. If sold by him for consumption in France,—that is, for shipment to any point not in a foreign country,—the tax must be paid before it leaves the premises; that is, the bonded warehouseman is responsible for the tax on all alcohol which comes into his hands, except the amount for which he is able to produce vouchers from the customs administration, showing its actual exportation to a foreign country. The special 'droit de ville' and the 'octroi' are paid only on alcohol sold or consumed in this city. They also do not attach to the exported product. This is not what is technically termed a 'drawback' or 'remission of tax,' because the tax is levied by the law only on alcohol consumed in French territory, and so does not attach to the exported article. It is a 'droit de consommation,' or tax on consumption. The same is true of the 'droit de ville' and 'octroi.' They are taxes on the amount consumed in the city for which they are levied. It is not a rebate, because the liability of the bonded manufacturer is only for the amount consumed in France, not all that is manufactured there. When the bonded manufacturer settles his bonded liability, the amount exported is deducted from his taxable stock, and he pays the amount of all these taxes on the balance, amounting in the city of Bordeaux to—

	Francs.
General consommation tax, per hectoliter.....	156.25
Special droit de ville, per hectoliter.....	30.00
Octroi or general municipal, per hectoliter.....	24.00
Total.....	<hr/> 210.25

"This was the amount of taxation levied on all alcohol sold for consumption in Bordeaux in August, 1896, as well as at the present time. If sold by the warehouseman for shipment to any other port of France, alcohol does not pay the 'octroi' tax or special 'droit de ville' of Bordeaux. In that case the receipt of the customs officers showing shipment by rail or boat to another city relieves him of these taxes, and the buyer pays whatever the 'octroi' or other municipal duties, whatever they may be, at the place where it is entered for consumption."

In ascertaining the amount of alcohol contained in the importation, as appears from the testimony taken at the hearing, the local appraiser included not only the alcohol which was contained in the supernatant fluid surrounding the cherries in the casks, but also the alcohol which had been absorbed by the cherries. This was determined by expressing the juice from the cherries, and making a chemical analysis of the product, so as to ascertain the volume of alcohol contained therein. There is no question raised by the importer that the amount of alcohol reported by the appraiser was correct, if it be permissible, under the law, to levy a duty upon the amount contained both in the liquid and in the cherries. The following objections are urged against the action of the surveyor, without challenging the correctness of the classification as made under said paragraph 263: First. That duty should have been assessed only on the alcohol contained in the supernatant liquid, excluding that contained in the cherries. Second. That the appraiser, in making an appraisement of the merchandise, proceeded upon a wrong principle, and had no right to add any one of the items of internal revenue tax represented as follows: (1) The general internal revenue tax of 156.25 francs per hectoliter; (2) the special "droit de ville" tax for the city of Bordeaux of 30 francs per hectoliter; (3) the "octroi" tax also levied locally for the city of Bordeaux of 24 francs per hectoliter. Third. That the alcohol contained in the importation is subject to a duty of \$1.75, and not \$2.50, per gallon, by reason of the president's proclamation bearing date May 30, 1896, issued under the authority of section 3, Tariff Act July 24, 1897 (Synopsis, 19,405), and having reference to reciprocal commercial arrangements with France, and which reduces the rates of duty on "brandies or other spirits manufactured or distilled from grain or other materials," it being admitted that the goods in question were exported from France after the issue of said proclamation.

As to the first objection urged, we think it is untenable. The purpose of paragraph 263 is, very clearly, to levy a duty of \$2.50 per proof gallon on the alcohol contained in the goods in excess of 10 per cent., and not merely upon that which is contained in the liquid surrounding the fruit. In our judgment, the statute is not susceptible of a construction which would exclude from duty any portion of the alcohol contained in the importation, whether it be found in the liquid or in the fruit. We think the action of the appraiser was correct in adding the amount of general internal revenue tax on alcohol represented by the item of 156.25 francs per hectoliter. This was a general revenue tax prevailing throughout France, and levied upon all alcohol sold for consumption in any of the markets of that country, and is shown to have been remitted on all alcohol exported from that country, whether contained in fruits or otherwise. It was entirely analogous to the so-called "German duty," or "bonification tax," passed on by the supreme court in *Passavant's Case* (169 U. S. 16, 18 Sup. Ct. 219, 42 L. Ed. 644), and board decision in *Re Passavant* (G. A. 4,074). The appraiser proceeded upon no wrong principle in adding the amount of this tax as a part of the dutiable value of the merchandise in the markets of France.

We reach a different conclusion, however, as to the other two items of special local taxes, imposed by the city of Bordeaux, and designated as "special droit de ville," 30 francs per hectoliter, and the "octroi," or general municipal tax, of 24 francs per hectoliter. As shown by the report of the American consul at Bordeaux, these local taxes are paid only on alcohol sold or consumed in the city of Bordeaux. This is confirmed by the ordinary definition of the "octroi" tax, which is stated in the *Standard Dictionary* to be a tax "levied at the gates of a European city, especially in France, and also in the cities of British India, on articles about to be introduced"; and is further defined by the *Century Dictionary* as "a tax or duty levied at the gates of

cities, particularly in France and certain other countries of the European continent, on articles brought in." In the *Encyclopædia Britannica* (volume 9 [Ed. 1879] p. 523), this statement occurs: "Octroi.—In 1,510 towns a duty is levied on goods, especially upon provisions and liquors, brought to market for public sale or disposed of privately" in France. It is added: "This tax is far from being uniform, the percentage in some places—as Paris—being as low as 4.76 francs for every 100 inhabitants, and in some others as high as 13.55 (Amiens), 14.15 (Rouen), 14.98 (Bordeaux), and 15.56 (Versailles). It is fixed by a decision of the municipal council, subject to the sanction of the legislative chambers." This tax being purely local, and lacking uniformity throughout the dominions of France, cannot, in our judgment, be properly considered as a certain or fixed element of market value in the principal markets of that country in ascertaining the market value of merchandise under the provisions of the customs administrative act of June 10, 1890. Moreover, we are officially advised that the practice of the boards of reappraisement is uniformly to exclude these two items of "octroi" and "droit de ville" in making appraisements of similar merchandise exported from France. The appraiser and surveyor having proceeded upon a wrong principle in adding these two items of the market value of the goods in question, the surveyor's decision could properly be attacked by protest, and it was not necessary for the importers to call for a reappraisement, under section 13 of the act of June 10, 1890, under the rules declared in the *Passavant Case*, *supra*.

The third contention made in the protest, which claims a reduction of the rate of duty on the alcohol contained in the cherries by reason of the president's proclamation of May 30, 1898, must be overruled as entirely untenable, for the reasons fully stated in board decision in *Re Nicholas* (G. A. 4,311), where it was held that the proclamation in question embraced only "brandies or other spirits manufactured or distilled from grain or other materials" which were the product of France. In the present case the alcohol in which the cherries are preserved, in excess of 10 per cent., is specially provided for in said paragraph 263, under which the present classification was made, and is not included within the provisions of said paragraph 289, which embraces a class of merchandise entirely distinct for dutiable purposes.

The protest is sustained so far as it objects to the inclusion in the dutiable value of said merchandise of the items represented by the "octroi" and the "droit de ville" taxes, and the surveyor's decision is to this extent reversed, with instructions to reliquidate the entry upon a basis of value excluding any consideration of these two local taxes. In all other respects the protest is overruled, and the surveyor's decision affirmed.

James & Jones, for appellants.

Wm. E. Bundy, U. S. Atty.

THOMPSON, District Judge. The determination of the questions presented depends upon the construction to be given to paragraph 263 of the tariff act of July 24, 1897, which, in so far as it is pertinent to the controversy here, provides as follows, to wit:

"Fruits preserved in \* \* \* spirits, \* \* \* one cent per pound and thirty-five per centum ad valorem; if containing over ten per centum of alcohol, \* \* \* thirty-five per centum ad valorem and in addition \$2.50 per proof gallon of the alcohol contained therein in excess of ten per centum."

The objections to the assessment made by the local officers were stated by Judge Somerville, in delivering the opinion of the board of general appraisers, as follows: First. That duty should have been assessed only on the alcohol contained in the supernatant liquid, excluding that contained in the cherries. Second. That the appraiser, in making an appraisement of the merchandise, proceeded upon a wrong principle, and had no right to add any one of the items of in-

ternal revenue tax represented as follows: (1) The general internal revenue tax of 156.25 francs per hectoliter; (2) the special "droit de ville" tax for the city of Bordeaux of 30 francs per hectoliter; (3) the "octroi" tax also levied locally for the city of Bordeaux of 24 francs per hectoliter.

As to the first objection: The taxable subject is fruit preserved in spirits; the fruit and the spirits together constitute the taxable subject. If the spirits contain but 10 per centum, or less, of alcohol, the rates of duty to be levied on the fruit so preserved are 1 cent per pound and 35 per centum of its market value "in the principal markets of the country from whence imported." But if the spirits contain over 10 per centum of alcohol, the rates of duty to be levied on the fruit so preserved are 35 per centum of its market value in said markets, and \$2.50 per proof gallon of alcohol in excess of 10 per centum, whether absorbed by the fruit or supernatant. In the first case the duties rest on the alcohol only in so far as it contributes to the weight and value of the fruit and spirits, including 10 per centum of the alcohol. An additional specific duty is laid of \$2.50 per gallon on the excess of alcohol over the 10 per centum, and there is no suggestion in the language of the statute that in determining the amount of the excess the alcohol absorbed by the cherries should be eliminated from the computation.

As to the second objection: The ruling of the board of general appraisers is not seriously questioned by counsel on either side. The court approves the finding of the board of general appraisers.

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NORWICH & N. Y. TRANSP. CO. v. INSURANCE CO. OF NORTH AMERICA. SAME v. SECURITY INS. CO. SAME v. FIRE-MEN'S FUND INS. CO. SAME v. CHUBB et al.

(District Court, S. D. New York. November 3, 1902.)

1. SHIPPING—GENERAL AND PARTICULAR AVERAGE—PROXIMATE CAUSE OF LOSS.

If a maritime loss follows as a natural or inevitable result of the original and involuntary cause of danger, then such original cause should be regarded as the proximate cause; but when a voluntary act intervenes, which in itself is a cause of loss, such act being substituted for the original danger of loss with a design of saving, the substituted act should be regarded as the proximate cause for general average purposes.

2. SAME—VOLUNTARY STRANDING.

After a steamer had struck on a rock causing a serious leak forward and danger of her sinking, the master, in preference to running her upon the rocks in the vicinity, took her some distance, and beached her on what he supposed to be a sandy beach. Contrary to his expectation, the bottom was of soft mud, and the bow stuck in the mud and settled until the vessel sank, and the main deck, on which was the cargo, was submerged, and the cargo damaged. Had the bottom been of sand as supposed, so as to lift and sustain the bow, the vessel would probably have remained afloat, or at least with her deck above water. *Held*, that the loss was attributable to the attempted salvage as the proximate cause, and was a subject for general average.

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¶ 1. General average, see note to *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 357.

In Admiralty.

Butler, Notman, Joline & Mynderse, for libellant.  
Black & Kneeland, for respondents.

ADAMS, District Judge. These actions were brought by the libellant against the respective respondents to recover proportions of losses of particular and general average under policies of marine insurance covering certain risks upon the libellant's steamer *City of Worcester*, which was operated by it as a passenger and freight steamer on a line between New York and New London, Connecticut. The steamer left the latter place at about midnight on the 28th day of May, 1898, bound to New York by way of the Thames river and Long Island Sound. As she was passing from the river into the Sound, going at full speed, she ported to pass a tow and, getting too far to the westward, struck upon and passed over a rock, known as *Cormorant Rock*, which tore out a part of her forward bottom. She was found to be leaking too badly for control by her pumps and being in danger of sinking, was turned around under reduced speed until she obtained a direction towards a beaching place, when her engines were put at full speed again and she was run ashore upon some soft mud near *Green's Harbor* on the westerly side of the river, not far from New London. At the time she went ashore, no damage had been sustained by the cargo, which was carried on the main deck. The steamer gradually settled in the mud and the water subsequently reached the cargo. Assistance was sent for and by the use of another steamer, some tugs and lighters, her passengers and cargo were transferred and the leaks in her bottom having been stopped, she was pumped out and brought to New York, where she was placed in dry-dock and repaired. The cargo, which was badly damaged by water, was also brought to New York in lighters and upon recommendation of the surveyors was sold at auction. The matter was then placed in the hands of average adjusters and it was found that the total losses and expenses arising from the accident, amounted to \$157,207.07, of which \$32,780.14 was treated as particular average and \$125,426.93 as general average. The items of loss or expenses making up this aggregate are not criticised or questioned by the underwriters but merely the correctness of the division or apportionment into particular or general average, the underwriters contending that the damage resulting from the submerging of the cargo and main deck of the steamer should be charged as particular and not as general average. It is admitted by the underwriters that if the stranding were the proximate cause of the loss, that it should fall under general average and be contributed to by the vessel, but it is urged that the striking upon the rock, not the stranding, was the proximate cause, and the cargo for that reason should not be entitled to contribution.

The difficulty arises in the application of the maxim "*Causa proxima non remota spectatur*" to a case of general average. The primary or original cause of the disaster was obviously not the stranding and if the case is to be decided thereby, no room exists for discussion. The *G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234. The doctrine of general average, however, is a peculiar one and its applica-

tion does not seem to be concluded by the primary cause of the loss but is rather dependent upon what occurred in the effort to save property. All cases of general average arise originally from some maritime peril and the peril instead of destroying the doctrine is the foundation of it. The sacrificial act, which brings the doctrine into operation, and the success, which ensues in the saving of property, are the proximate bases for a contribution to the sacrifice. If the vessel here instead of striking a rock had upon reaching the Sound encountered a sudden and violent storm or got into collision, in which she was so injured that she necessarily turned back and sought the beach to avoid sinking in the harbor for the benefit of the associated interests, it could not be successfully contended that there could be no general average on the loss occasioned by the stranding because of the previous storm or collision peril (*Hobson v. Lord*, 92 U. S. 397, 403, 404, 23 L. Ed. 613; *Barnard v. Adams*, 10 How. 270, 302, 13 L. Ed. 417), and there is no practical difference in principle because the vessel struck a rock, except so far as the striking upon the rock admitted water into the vessel which is directly connected with the loss. It is urged that the striking upon the rock must be the proximate cause of the loss because if the vessel had not turned around she would have sunk in deep water and there could consequently be no other cause of loss than the accident, but, to my mind, the suggestion lends force to the argument that the original danger of loss was not necessarily the proximate cause of the loss that occurred but that the latter may have originated with the attempt to save. If a loss follows as a natural or inevitable result of the original and involuntary cause of danger, then such original cause should be regarded as the proximate cause (*Fowler v. Rathbones*, 12 Wall. 102, 120, 20 L. Ed. 281), but when a voluntary act intervenes, which in itself is a cause of loss, such act being substituted for the original danger of loss with a design of saving, then it would seem that the substituted act should be regarded as the proximate cause for general average purposes. Otherwise there can be no general average recovery in cases of sacrifice to avoid the effects of the original danger. It is too well established for discussion, for example, that damage caused by masts being cut away in the stress of a storm is part of a general average loss (14 Am. & Eng. Enc. Law [2d Ed.] 966, 967), which would not be the case if the storm and not the act of sacrifice were regarded as the proximate cause of the loss.

Assuming the correctness of the foregoing statement of general principles governing this class of cases, it remains to ascertain the particular facts of this case in order to determine the proper application of the law.

There is no conflict in the testimony as to what took place when it was determined to beach the vessel. Two alternatives then presented themselves to the master. One was to run the vessel upon the rocks in the vicinity of the accident and the other to adopt the course he pursued. It was recognized that the vessel was badly injured but investigation showed that she could probably be kept afloat long enough to reach the beach, as was found to be the case. The master, however, was under a misapprehension as to the nature of the beach. Above the water it was hard sand and he concluded



that the sand extended far enough under the water to afford a firm resting place for the vessel, so that her cargo would remain uninjured, but it turned out that below the part of the beach which was in sight, there was a bed of soft mud. When the beach was reached, the steamer was about a foot more by the head than she was before striking the rock, owing to the influx of water through the holes in the bottom, but the engineer had been able to close the gates in a bulkhead abaft the engine room, so that notwithstanding the injury she had received, there were several water tight compartments under the main deck of considerable dimensions intact and it is probable that she would have remained afloat if she had lifted or been sustained at the bow, instead of sinking into the mud. When she first went ashore, her main deck was several feet above the water, but her bow gradually settled in the mud so that in a few hours these compartments were filled by water flowing in over the main deck and she then sank. The water eventually reached a height of about five feet above her main deck. This was at high water. The rise of the tide was not however sufficient to cause the ultimate sinking. The rise of the tide from low water was only from two and a half to three feet and as the steamer went ashore between 12 and 1 o'clock A. M. and the tide was high at 3:18 A. M., the rise during the latter part of the run of the tide being less than the first part, the tide would not of itself have overcome the margin of safety from further immersion which would have existed if the bottom had been the unyielding sand the master expected to find. Instead of the vessel lifting forward, as the master expected, the bow ploughed in the mud and not only remained stuck there but sunk further and further into it, probably stopping some of the leakage through the holes in the bottom but holding the vessel and subjecting her to complete submersion to the extent stated. The result of the sinking was that the cargo was damaged to the extent of over \$100,000. There was also some additional damage to the hull by reason of the submersion. What would have occurred with respect to damage to cargo if the master instead of seeking the beach had grounded his vessel upon the rocks in the vicinity of Cormorant Rock can only be conjectured. It probably would have been more injurious to the hull and assuming the absence of any storm during salvage operations (which, owing to the exposed position the vessel in such event would have taken, might have frustrated the salvage enterprise and caused a greater, or perhaps total loss of the property) and the saving of cargo without injury, the cargo would certainly have been obliged to contribute to the loss on the hull. The other alternative having been adopted, in the exercise of the master's best judgment, why, in the application of the equitable principles governing general average, should not the cargo be entitled to recover for its resulting loss? It is immaterial that the master did not find the kind of bottom he expected. In endeavoring to find benefit for all the interests under his care, the effect is the same for general average purposes, notwithstanding the unexpected result of his effort. *Lown. Av.* 131, 132. In *Rea v. Cutler*, 1 Spr. 135, 20 Fed. Cas. 344 (No. 11,599), Judge

Sprague, referring to *Insurance Co. v. Ashby*, 13 Pet. (38 U. S.) 331, 10 L. Ed. 186, said:

"The principle of law laid down in that case appears to be, that where loss by shipwreck is inevitable, but may be met in more than one way, and with different degrees to peril of life or property,—where, in short, an election remains open to the master, and he acting for the interest of all concerned, exercises his volition, and adopts that one of the several courses which seems to him least perilous, and most conducive to the common benefit, and in so acting the ship is wrecked, the loss is a ground for general average, to which the property preserved must contribute. The volition and election of the master, is the essential inquiry, and the degree of injury sustained by the vessel is unimportant.

"In this case, there was a chance that the anchors might have caught a rock, and have held the vessel. There was an election on the part of the master to take this chance, or to slip the cables and run on shore; and in making this election, he exercised his volition."

The case of *Fowler v. Rathbones*, *supra*, is relied upon by the respondents to establish their contention. There the ship *Oneiza*, while at anchor in the harbor of New York, was found to be settling by the head from the effects of injury to her bows by floating ice. Attempts to free her from water by her pumps were ineffectual and the master caused her to be towed to shoal water on the Staten Island flats, where she was grounded. The owners of the ship brought action against the consignees and owners of the cargo to recover in general average for losses and expenses incurred in consequence of an alleged voluntary abandoning of the ship. The cause came to trial before the court and a jury and the court charged the jury, *inter alia*, as follows (page 107, 12 Wall., 20 L. Ed. 281):

"2d. That if they found that no water entered the ship which reached and damaged the cargo, except what came through the holes cut in the bows by the ice—then that the defendants were not entitled to be allowed anything for the damages to their cargo by water, by way of general average, or by way of reduction of the plaintiffs' claim, because such damages were not caused by or the result of the act of stranding the ship, but were caused by a peril of the sea which had overtaken the cargo before it was determined to strand the ship."

The case was reviewed by the Supreme Court and affirmed. It is an authority for the proposition that if as a matter of fact the water entering the ship were a direct and necessary result of the original injury from a sea peril, there could be no allowance to the cargo therefor in reduction of the ship owners' general average claim due to the stranding, and applying it to this case, that if the cargo here were directly damaged by water entering the ship through the holes in the bottom caused by the striking of the rock, and without loss in any respect from the subsequent stranding, it should not be entitled to recover its loss by way of general average, but it is not an authority to prevent recovery upon a different state of facts. Apart from an effort to save the property here, no doubt the holes in the bottom would eventually have caused a loss not recoverable in general average, but an attempt to save the property intervened and by such intervention the steamer was placed in a position from which, at least, a different degree, if not kind, of loss occurred. It was not the same loss. With the attempt to save the property, all involved in the

enterprise became subjected to danger from the beaching, which was a different hazard from that which would have existed without the attempt, and all the property interests were thus associated, with reciprocal relations, in the success of the enterprise. The result was that there was a general saving of property, though with the losses in question. Such losses can not be traced directly to the primary peril as in the Oneiza but should be connected, under the circumstances of the case, with the stranding and thus be brought into general average. The adjustment is sustained.

Decrees for libellant for the sums in controversy, after deducting payments made since the institution of the actions, with interest. Decrees to be settled on notice.

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In re JOHNSON.

(District Court, N. D. Iowa, E. D. November 8, 1902.)

1. HOMESTEAD—CHANGE FROM ONE PROPERTY TO ANOTHER—IOWA STATUTE.

The homestead statute of Iowa (Code, § 2981), as construed by its supreme court, permits a change of homesteads from one piece of property to another, and the new homestead, to the extent in value of the old, is exempt from all debts which could not have been enforced against the old, although contracted before the change was made.

2. BANKRUPTCY—HOMESTEAD EXEMPTION—PROCEEDS OF FORMER HOMESTEAD.

A bankrupt had sold together, for the nominal price of \$4,500, two pieces of realty, one of which was his homestead, which was valued in the sale at \$900. He took a note for a part of the purchase money, which he later contracted to sell at a discount; his trustee ratifying such contract by collecting the agreed price therefor. *Held*, that on the bankrupt's application to have the proceeds of his homestead set apart to him therefrom as exempt, to be invested in a new homestead, as permitted by the law of the state, a proportionate part of the discount should be deducted from the price nominally received for the homestead.

In Bankruptcy. On exceptions to ruling of referee on question of homestead rights.

Henderson, Hurd, Lenehan & Kiesel, for bankrupt.  
V. T. Price and J. E. Corlett, for creditor.

SHIRAS, District Judge. The question at issue in this case arises between the bankrupt and one Dan Wolf, a creditor, whose claim, in the sum of \$1,585.06, has been duly proved and allowed by the referee.

Upon the allowance of the claim, the creditor Wolf filed a petition before the referee, asking that the sum of \$900, in the hands of the trustee, and claimed by the bankrupt to be the proceeds of the sale of his homestead, should be appropriated by the trustee to the payment of his claim on the ground that the debt due him had been incurred by the bankrupt before the acquisition of the homestead right, and therefore, under the provisions of the Code of Iowa, the homestead and its proceeds were not exempt from liability for the claim of petitioner.

¶ 1. See Homestead, vol. 25, Cent. Dig. §§ 81, 112, 139.

From the evidence submitted on the hearing, the referee found the facts to be as follows:

"That bankrupt owned and occupied a farm homestead in Clayton county, Iowa, continuously from 1868 to 1900. That on March 29, 1900, he purchased a house and lot in the town of Elkader. That in the latter part of March, or first part of April, 1900, he abandoned the farm homestead, and made the house and lot in Elkader his homestead. That the new homestead was of no greater value than the old one. That the indebtedness of bankrupt to claimant, Wolf, was incurred March 6, 1900, and prior to the acquisition of the last homestead. That on February 4, 1902, bankrupt sold his farm in Clayton county and his home in Elkader. That the homestead sold for \$900, and the farm for \$3,600; both tracts being sold together. That bankrupt in said deal took a note and chattel mortgage of one E. F. Cords for \$1,750, and afterwards discounted said Cords note to White & Miller for \$1,400. That the trustee of said bankrupt's estate collected said \$1,400, less \$38, which comprised a bill said White & Miller had against bankrupt, and \$5 they had paid to him on account of the purchase of said \$1,750 note and mortgage. That the trustee has said money in his custody at the present time. That bankrupt and his wife, at the time of the sale of said Elkader homestead, intended to invest the proceeds of such sale in a new homestead, and that they still so intend if they can procure the money."

Upon these facts, the referee held that the bankrupt was entitled to the proceeds of the homestead as against the claim of the petitioner, but, as he had discounted the proceeds of the sale to the amount of \$350, such discount must be equitably divided and apportioned so as to impose upon the contract price of the homestead its share of the discount, to wit, the sum of \$70; the final order being that the trustee should pay over to the bankrupt the sum of \$830 as the amount realized from the sale of the homestead.

Exceptions were taken to the ruling of the referee, and the questions at issue were thereupon certified to the court for determination.

The provisions of section 2981 of the Code of Iowa, as construed by the supreme court of the state (*Benham v. Chamberlain*, 39 Iowa, 358; *State v. Geddis*, 44 Iowa, 537; *Schuttloffel v. Collins*, 98 Iowa, 576, 67 N. W. 397, 60 Am. St. Rep. 216), authorize the sale of the homestead and the reinvestment of the proceeds in another homestead, which will be exempt from liability for debts not enforceable against the first homestead. The referee found, as a question of fact, that when the Elkader home was sold it was the intent, and still is, of the bankrupt and his wife, to invest the proceeds realized from the sale of their home in the purchase of new homestead.

In the case of *Schuttloffel v. Collins*, supra, it was said:

"The question of fact in the case is, was it the intention of the husband and wife to use the proceeds of the sale for the acquisition of a new homestead? If so, the money was exempt from the claims of the creditors of the husband. \* \* \* It is not necessary that the old homestead be sold for cash, which is immediately invested in a new one. The sale may be on time, and if the intention is to invest the proceeds, when realized, in the new homestead, such proceeds will be exempt."

These decisions, as applied to the facts of this case, make it clear that the bankrupt is entitled to the proceeds of the Elkader property in the hands of the trustee as against his general creditors; but it is claimed by the petitioner that the debt due him was created before the Elkader home was acquired, and therefore it and the proceeds

thereof are liable to the payment of his claim, under the provisions of section 2976 of the Code of Iowa, which enacts that "the homestead may be sold on execution for debts contracted prior to its acquisition, but in such case it shall not be sold except to supply any deficiency remaining after exhausting the other property of the debtor liable to execution." As already stated, section 2981 of the Code authorizes a change of homestead, it being further therein declared that "the new homestead, to the extent in value of the old, is exempt from execution in all cases when the old or former one would have been." The supreme court of Iowa in the cases of *Pearson v. Minturn*, 18 Iowa, 38; *Sargent v. Chubbuck*, 19 Iowa, 37, and *Furman v. Dewell*, 35 Iowa, 170, has held that the change of homesteads contemplated by the statute includes cases wherein a person owning at the same time two pieces of property changes his residence from the one to the other. Thus in *Furman v. Dewell*, supra, the facts were that the defendant had, from 1865 to 1871, owned and occupied as a homestead a lot and a half in the town of Magnolia; that in 1867 he had bought 35 acres of unimproved land, and in April, 1871, having built a house on the 35-acre tract, he moved his family thereto, and claimed the same as his homestead. In 1869 a judgment was rendered in favor of the plaintiff, *Furman*, and in October, 1871, a sale on execution was had of the 35-acre tract. It was held by the supreme court that the sale was void; it being said that "the statute not only conferred on the defendant the right to change his homestead in the manner he did, but said to him that his new homestead, 'to the extent in value of the old,' should be 'exempt from execution in all cases where the old or former homestead would have been exempt.' Now, if after the change of homestead the new one remained liable absolutely to be sold on execution on the plaintiff's judgment, because it had been a lien thereon, and the former homestead also became subject to execution, as it undoubtedly did by being abandoned as such, then the statute would be a mockery. The owner of the homestead, under such a construction, would be practically deprived of the right to change his homestead, and the statute exempting the new homestead to the extent that the old one was exempt would be entirely defeated, for, upon appellant's theory, a change of homestead would render the former one liable to execution, while the new one would continue to be liable in the same manner as it had been before the change. By making the change, the old homestead would become liable, while the new one would not be exempt. This is contrary to the plain language and obvious purpose of the statute." The facts, as found by the referee, show that the new homestead acquired in the *Elkader* property did not exceed in value the former homestead, which, by abandonment, was made liable for the debts of the bankrupt, including that of the petitioner, *Wolf*; and the referee therefore rightly held that, under the construction placed upon the provisions of the Code of Iowa by the state supreme court, the bankrupt had the right to change his homestead from the farm property to the town property in *Elkader*, and that, as the former homestead was exempt from liability for the debt due the petitioner, the *Elkader* homestead would be equally exempt.

On behalf of the bankrupt, exception was taken to the ruling of the referee that the discount made to secure payment of the note of E. F. Cords, which was taken as part payment for the realty, should be equitably apportioned so as to deduct from the nominal price of each piece of realty its proportionate share of the discount made, which was the sum of \$350; and, on behalf of the creditor, exception is taken to such ruling upon the theory that the whole of this discount should be deducted from the proceeds of the homestead. As I understand the facts found by the referee, it appears that the two tracts of realty were sold together for the sum of \$4,500, the homestead at \$900 and the farm property at \$3,600. In fact the property was sold for the note of E. F. Cords of \$1,750, and the remainder in cash or its equivalent. Subsequently, the bankrupt agreed to take \$1,400 for the note of \$1,750, and this agreement was carried out by the trustee, who received the \$1,400 paid in discharge of the Cords note and mortgage. The sale of the two pieces of property did not, therefore, realize the nominal figures placed thereon of \$900 and \$3,600. The theory of the bankrupt that, as the homestead brought \$900 in the sale, that amount should be awarded him, is not well taken, because the real fact is that the homestead did not realize, out of the funds in the hands of the trustee, the sum of \$900. On the other hand, the claim of the creditor, that the amount representing the funds realized from the sale of the homestead property should be reduced by the whole amount of the discount made on the Cords note, is not equitable, and cannot be sustained. Suppose the note taken as part payment for both pieces of property had, through some misfortune overtaking the maker thereof, become valueless or noncollectible; would it be just to hold that the whole amount of such loss must be deducted from the purchase price of the homestead? But it is contended that this discount was the act of the bankrupt, and that it created a loss which ought to be borne by him. The trustee, as the representative of the creditors, did not repudiate the action of the bankrupt in this particular, but accepted payment of the sum due on the note less the discount agreed upon. The referee does not find, upon the evidence, that the action of the bankrupt in agreeing to the discount was fraudulent, or that he could surely have collected the whole amount of the note. The action of the bankrupt in this particular may have been hasty and ill-advised, but as the trustee has accepted, for the creditors, the fruits of his action, I do not see any good ground for holding that the discount made to secure prompt payment of the note should be charged up against the proceeds of the homestead, especially as such action would injuriously affect the rights of the wife, who has an equal interest in the homestead and its proceeds.

The action of the referee in charging the discount proportionately upon the proceeds of the homestead and farm property fairly meets the equities of the situation, and the exceptions thereto are overruled.

## YORK v. WASHBURN.

(Circuit Court, D. Minnesota, Fifth Division. November 11, 1902.)

## 1. VENDOR AND PURCHASER—CONTRACT WITHIN STATUTE OF FRAUDS—RECOVERY OF CONSIDERATION PAID.

An oral contract for the sale of an interest in real property, though unenforceable, is not void, and the purchaser cannot recover a partial payment made thereon as earnest money if the vendor is ready, willing, and able to perform on his part.

. At Law. Trial to the court by stipulation.

AMIDON, District Judge. The defendant and those associated with him acquired a right to a mining lease of three 40-acre tracts of land situated in the Mesaba iron range, in the northern part of Minnesota. The consideration given by them for this right was the exploration of the property, by core drills and otherwise, to discover and define the extent of the ore deposit contained in the property. They undertook this work at their own risk. If no ore was found, the expense of the exploration was their loss. If, however, a valuable body of ore was discovered, then the owners of the fee agreed to execute and deliver to them, or to others named by them, a lease of the property, conveying the right to extract ore therefrom, for the period of 50 years, upon the payment of a royalty of 25 cents per ton for all ores thus extracted and shipped. Acting under this arrangement, the defendant and his associates conducted extensive work upon the property, and thereby discovered a large body of iron ore. It was estimated that between 3,000,000 and 4,000,000 tons of the ore thus discovered was of a quality known as "Bessemer ore." In addition to this, there was a large body of ore of inferior grades. Thereupon the defendant, acting on behalf of himself and his associates, undertook to sell the right to the lease thus acquired. To that end, a brother of the plaintiff residing in New York (one James E. York) was employed as a broker. He was to sell the right to the lease for \$150,000, this sum being arrived at by estimating the value of the Bessemer ore at 5 cents per ton. Through the efforts of this broker the plaintiff became interested in the property. At first he simply undertook to bring about a sale on behalf of the broker, his brother, to aid him in earning his commissions. Later, however, he applied to become a purchaser. The negotiations which led to what was supposed by the parties to be a contract took place in the city of Washington, between the defendant, the plaintiff, and the broker. The result of the negotiations was that the defendant undertook to obtain a lease directly from the owners of the fee to the plaintiff, and the plaintiff undertook to pay the defendant and his associates the sum of \$150,000 for such lease; and thereupon, to bind the bargain, the plaintiff mailed to the defendant his check for \$10,000, and the defendant returned to him a receipt for the same, stating, in general, the purpose for which the payment was made, but not sufficiently identifying the property to make the receipt a memorandum, within the meaning of the statute of frauds. It will be noted that throughout all these negotiations no lease had in fact been prepared or executed. The plaintiff did not

have before him the instrument defining his rights and obligations, but the whole transaction rested entirely in parol. It was contemplated by the parties that some little time would have to intervene before the lease could be prepared, as there were certain minor heirs, who had a sixth interest in the property, and proceedings in the probate court were necessary to obtain authority to execute the lease on their behalf. After Mr. Washburn returned to Duluth, the place of his residence, he prepared a form of lease, and sent it to the plaintiff, in Ohio. This form provided for the payment of a royalty of 25 cents per ton upon all ores mined and shipped from the property. After some delay the plaintiff expressed his dissatisfaction with this feature of the lease, and declined to execute it on his part, claiming that it was his understanding that the royalty was to be paid only on Bessemer ore. After considerable correspondence, in which each of the parties insisted upon his understanding of the agreement, the plaintiff repudiated the entire transaction, refused to execute any lease, and demanded a return of the \$10,000. The defendant, on the other hand, offered to deliver a lease of the property, in accordance with his understanding of the oral agreement, and was ready and able to do so, and refused to return the earnest money.

This suit is brought to recover the \$10,000 and interest. It is an action at law, but was tried to the court without a jury, pursuant to stipulation of the parties. On behalf of the plaintiff the action is presented in two aspects: In the complaint he charges that the contract was for the execution of a lease providing for the payment of a royalty of 25 cents per ton on Bessemer ore only, that the defendant failed and refused to deliver such a lease, and that thereby the consideration for the payment of the \$10,000 had wholly failed. In his reply to defendant's answer, the plaintiff, while insisting upon his original position, also puts forward the claim that all the negotiations between the parties were oral, and the contract was therefore void under the statute of frauds of Minnesota.

The plaintiff came to the trial of this cause relying mainly upon this second contention, namely, that he was entitled to recover the \$10,000 because the contract between himself and the defendant was void under the statute of frauds. This was the burden of counsel's argument at the hearing. It is entirely plain, however, under the authorities, that the position thus taken is untenable. An oral contract for the sale of an interest in real property, though unenforceable, is not void. One who makes a partial payment of the consideration upon such a contract cannot recover it if the vendor is ready, willing, and able to perform on his part. No court has more firmly and clearly asserted this doctrine than the supreme court of Minnesota. *Sennett v. Shehan*, 27 Minn. 328, 7 N. W. 266; *McKinney v. Harvie*, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640. See, also, *Mitchell v. McNab*, 1 Ill. App. 297; *Collier v. Coates*, 17 Barb. 471. The whole subject is stated in a scholarly way by Prof. Keener in his work on *Quasi Contracts* (page 232 et seq.). The rule, at first thought, seems harsh, but consideration justifies its wisdom. The money is paid, to use the wise language of trade, "to bind the bargain,"—a bargain recognized as without binding force in itself, by reason of the statute of frauds. To



permit its recovery upon the mere plea of the statute would defeat the primary object of the parties. But the situation of the defendant is the best justification of the rule. His only remedy for the damages that he suffers by the plaintiff's repudiation of the oral agreement is to hold the earnest money. The statute forbids any recovery on the contract. To compel a restitution of the payment is to take from the defendant the very redress which he has wisely exacted, and which the plaintiff has voluntarily placed in his hands. It might be that equity would grant relief against such a forfeiture in a case of great hardship, but the law affords no redress.

The plaintiff is therefore left with only a single ground of recovery, namely, that the defendant in fact agreed in the oral negotiations to obtain and deliver to him a lease of the property providing a royalty of 25 cents per ton upon Bessemer ore only. If this was the actual agreement, the defendant is in default, and the plaintiff is entitled to recover. Upon this issue the plaintiff has the burden of proof. He is bound to show by a preponderance of the evidence that the agreement was in fact as he contends. This he has wholly failed to do. The only direct evidence in support of his contention is his own testimony, and that is exceedingly vague. It is as follows:

"I met Mr. Washburn in the city of Washington on the 28th of November, 1901. James E. York was present with me. He was there at my request. The talk about this property was that I should pay \$150,000 for it, and a royalty of 25 cents a ton on the Bessemer ore,—I understood it to be."

This qualified and vague statement is the only evidence which the plaintiff himself gives upon the subject. His brother, James E. York, on the contrary, testifies positively that the agreement was for a royalty of 25 cents a ton upon all ore mined and shipped from the property. He certainly cannot be regarded as an unfriendly witness to the plaintiff. The defendant also testifies with positiveness and particularity that the agreement between himself and the plaintiff plainly provided for a royalty of 25 cents a ton on all the ore mined and shipped. There is, however, other evidence in support of the defendant's contention that is still more cogent. The negotiations in Washington were held on the 28th day of November, 1901, being Thursday. On the preceding Saturday, November 23d, the plaintiff had a meeting with Mr. A. W. Thompson, president of the Republic Iron & Steel Company of Chicago, in which he undertook, on behalf of his brother, James E. York, to negotiate a sale of the lease to that corporation. At that meeting the whole character of the property, and of the ore therein, and of the royalty payable to the fee owners, was carefully discussed between the plaintiff and Mr. Thompson, who was himself familiar with the facts. Mr. Thompson has given his deposition in this case. I quote from it as follows:

"Q. I ask you whether or not, in the course of the conversation between you, the question of the quality and grade of the iron ore on the property came up? A. Oh, yes; that was discussed very fully. We had before us the chemical returns,—quite a large number of samples taken from the property. These returns showed the metallic iron and phosphorus in the different samples, and showed what proportion of the ore deposit was Bessemer, and what proportion non-Bessemer. Q. You did not purchase the lease for your company? A. No; I did not. Q. Did you state to Mr. York any reason why you

did not purchase it? A. I did. Q. What did you state to him? A. I told him the price he was asking for the lease was too high, in view of the fact that the royalties were 25 cents per ton, and that such a large proportion of the ore was of the poorer or non-Bessemer, variety, and 25 cents was a high royalty for non-Bessemer ore. Q. Did he, or did he not, say that there was not or would not be any royalties under the lease to be paid to the lessors on the non-Bessemer ore? A. No; he did not; and I told him my main objection was the high royalties on non-Bessemer ore, and also told him in that connection that the Republic Iron & Steel Company had just concluded a purchase of a lease on a large non-Bessemer property of two forty-acre tracts on the Mesaba range, which carried 18 cents royalty per ton, and a small minimum annual output besides."

This deposition leaves no doubt that only a few days previous to the transaction between the plaintiff and the defendant the whole subject of the royalties had been carefully considered by the plaintiff; that it was then understood that the royalty of 25 cents was to be paid under the lease upon non-Bessemer as well as Bessemer ore; and the plaintiff failed to negotiate a sale of the property for that very reason. It does not seem credible that, if the plaintiff had the understanding that the royalty applied only to Bessemer ore, he would not have presented that consideration to Mr. Thompson. Great force is added to Mr. Thompson's testimony by the fact that it is wholly uncontradicted. His deposition was taken on the 6th day of October, 1902. It was filed with the clerk of this court on the 7th day of October of the same year. The plaintiff's deposition was taken on the 24th day of October, 1902,—about two weeks after the deposition of Mr. Thompson had been taken and filed. It is not to be doubted that the testimony of Mr. Thompson was brought clearly to the attention of the plaintiff and his counsel. In fact, in his rebuttal evidence the mind of the plaintiff was expressly directed to the conversation between himself and Mr. Thompson, and yet he in no respect either denies or qualifies the testimony of Mr. Thompson on the subjects above referred to.

I am therefore satisfied that the preponderance of the evidence clearly shows, and I so find the fact to be, that the agreement and understanding between the plaintiff and the defendant was that the lease should provide for the payment of a royalty of 25 cents per ton on all ores mined and shipped from the property; that the defendant was ready, willing, and able to obtain and deliver to the plaintiff a lease in conformity with such agreement; and that the plaintiff, without any just cause, failed and refused to accept such lease and carry out the agreement. This finding is fatal to the plaintiff's right of recovery. It also defeats any right of recovery on the part of the defendant under the various counterclaims set up in the answer.

Judgment will therefore be entered dismissing the complaint upon the merits, with costs; also dismissing the counterclaims. It is so ordered.

## BEAVERS v. C. A. RICHARDSON &amp; CO. et al

(Circuit Court, W. D. Texas, W. D. October 7, 1902.)

No. 255.

## 1. EQUITY PLEADING—AMENDMENT OF BILL AFTER REPLICATION.

An application for leave to amend a bill, after replication filed, must conform to the requirements of equity rule 29, and such leave will not be granted upon a motion not supported by affidavit as required by such rule.

In Equity. On motion for leave to amend bill.

The bill in this cause was filed by the plaintiff to restrain C. A. Richardson & Co. and the Bradley Gin-Saw Filer Company from prosecuting a suit at law until the determination by this court of the question of the validity of certain letters patent. Original and amended answers have been filed by the defendants, as well as a replication by the plaintiff, and the testimony of a number of witnesses has been taken. The plaintiff, desiring to amend his bill, has filed the following motion, signed by counsel, but not verified by affidavit: "Now comes J. M. Beavers, complainant herein, and asks leave of the court to file the attached amendments to the bill of complaint; and he shows to the court that by reason of the amendment made to the original answer of the defendants, and the testimony of the defendants' witnesses, already taken in this cause, the complainant is justly entitled to amend his bill of complaint, as proposed in the attached amendments, and he prays the court that he be allowed to file the same." Leave has not been granted to file the amendments proposed, but the paper embodying the amendments bears the following file mark of the clerk: "Filed 7th day of October, 1902."

A. L. Jackson, for the motion.

J. W. Davis, opposed.

MAXEY, District Judge: The motion of the plaintiff is wholly insufficient to accomplish the purpose sought. By the twenty-ninth rule in equity it is provided:

"But after replication filed the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause."

It will be seen at a glance that the plaintiff has failed to observe the requirements of the rule, and it is needless to remark that the rules of practice prescribed by the supreme court should be respected and properly enforced. *Railroad Co. v. Bradleys*, 10 Wall. 299, 19 L. Ed. 894. Obedience to their mandates will save labor to counsel and avoid confusion and unnecessary delays in the prosecution of causes. In the present case the motion of the plaintiff, being unsupported by an affidavit embodying the essential requisites of rule 29, must be denied. And, it appearing that the amendment was improvidently filed, it will be stricken from the files, without prejudice, however, to the right of the plaintiff to submit a motion or petition in proper form if he be so advised.

Ordered accordingly.

## LAMSON et al. v. HUTCHINGS.\*

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 851.

**1. CORPORATIONS—STOCKHOLDERS—STATUTORY LIABILITY—FRAUDULENT TRANSFER OF SHARES—ACTION AT LAW—PROOF.**

Where, in an action at law to recover a statutory liability against stockholders of a corporation, who had transferred their shares, it was alleged that such transfer was fraudulent, and for the purpose of avoiding their liability, plaintiff was entitled to prove in that action that the assignment was fraudulent and void, and for that reason was no defense.

**2. SAME—LIMITATION OF ACTION—CONSTRUCTION.**

2 Starr & C. Ann. St. p. 2642, c. 83, par. 25, provides that in any of the "actions" specified in any of the sections of the act, if judgment shall be given for plaintiff, and shall be reversed by writ of error or on appeal, or if plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of the suit, plaintiff may commence a new action within a year after such judgment reversed or given against the plaintiff, and not after. *Held*, that the word "action" in such section was not limited to actions at law, but included suits in equity, and hence, where plaintiff was nonsuited in a chancery suit, and limitations ran against his claim during the pendency of such suit, he was entitled to commence an action at law on the claim within a year after the entry of the nonsuit.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This action is at law to enforce against the plaintiffs in error a statutory liability as stockholders in the Cherokee Brilliant Coal & Mining Company, a corporation of the state of Kansas. That corporation became indebted to George Fowler in the year 1884, the indebtedness maturing January, 1886. Prior to the maturity of that indebtedness the plaintiffs in error became large stockholders in the corporation, with knowledge of its indebtedness. In October, 1888, Fowler obtained judgment against the corporation in the circuit court of the United States for the district of Kansas, and execution issued thereupon was returned nulla bona in February, 1889. Subsequently Fowler obtained a judgment against the corporation in the state of Illinois, founded upon the judgment in the district of Kansas, and in October, 1890, instituted a creditor's proceeding in chancery in the superior court of Cook county to enforce the statutory liability of the plaintiffs in error, and decree was therein entered against them; but upon appeal to the supreme court of Illinois the decree was reversed upon the ground that the liability of the plaintiffs in error under the statute of Kansas could not be enforced in the courts of the state of Illinois, and that the chancery proceedings for that reason must be dismissed. *Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163. The bill was finally dismissed on the 4th day of February 1897. This action at law was commenced on the 24th day of August, 1897. The cause was tried to the court without a jury, resulting in judgment against the plaintiffs in error upon special findings of fact upon all the issues involved; one of which determines that on the 21st of May, 1886, the plaintiffs in error were the owners of 521 shares of the capital stock of the company, and on that date transferred 519 shares to one Whitner without consideration, and solely to defeat their personal liability thereon as charged in the declaration.

David M. Kirton and Wm. H. Barnum, for plaintiffs in error.  
E. F. Thompson, for defendant in error.

\* Rehearing denied November 15, 1902.

¶ 2. See Limitation of Actions, vol. 23, Cent. Dig. § 553.

Before JENKINS and BAKER, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge. The two propositions upon which the case here must turn are: First, whether the court below erred in admitting evidence of the alleged fraudulent transfer by the Lamsons of the 519 shares of the capital stock owned by them in the debtor company; second, whether the claim of the defendant in error is barred by the statute of limitations. When this cause was previously before us (*Hutchings v. Lamson*, 37 C. C. A. 564, 96 Fed. 720), we held, following our ruling in *Rhodes v. Bank*, 13 C. C. A. 612, 66 Fed. 512, 34 L. R. A. 742, that the action to enforce liability under the statute of one state may be maintained in a federal court sitting in another state. It is urged in behalf of the plaintiffs in error that evidence of the fraudulent transfer by plaintiffs in error is not admissible in an action at law. We think this contention cannot be upheld. A transfer of stock without consideration, and merely to avoid the statutory liability of the stockholder to creditors, is as to such creditors, void, and the stockholder may be treated as still a stockholder in the corporation. The inquiry was, were these plaintiffs in error stockholders of the corporation, and by reason thereof liable under the statute for the debt of the corporation? While this corporation was insolvent and owing the debt demanded, the plaintiffs in error, stockholders in that corporation, and under the statute of Kansas liable for this debt, transferred their stock to a dummy, without consideration, to avoid that liability. The question, therefore, was whether they absolved themselves of liability to the defendant in error by such fraudulent transfer. The proceeding was not to follow property fraudulently conveyed, but to enforce a statutory liability existing at the time of the transfer. It is claimed that such liability is defeated by reason of the fraudulent transfer. But since that could not result from the fraudulent act they are, as to the creditors and notwithstanding such transfer, members of the corporation. We perceive no reason why the inquiry as to the fraudulent nature of the transaction may not be inquired of in a court of law. *Dauchy v. Brown*, 24 Vt. 210; *Marcy v. Clark*, 17 Mass. 330; *McClaren v. Franciscus*, 43 Mo. 452; *Middletown Bank v. Magill*, 5 Conn. 30; *Paine v. Stewart*, 33 Conn. 516; *Rider v. Morrison*, 54 Md. 429. It seems to us not other or different from a case where a demand is sought to be enforced at law, and a receipt or release of the claim is interposed as a defense, which was obtained fraudulently. In such case a court of law is undoubtedly qualified to sweep away the fraudulent transaction which stands between the plaintiff and recovery upon his demand. Or the case may be likened to replevin for personal property fraudulently obtained, the title to which, because of the fraud, does not pass. In such case the fraud may be inquired into by a court of law, for the recovery does not proceed because of, nor is it dependent upon, the fraud.

A more difficult question is presented by the plea of the statute of limitations. We ruled, when the case was previously here, that the Illinois statute of limitations of five years should be applied. The right of action accrued not earlier than June 18, 1886, the date of the

dissolution of the corporation. In 1890 the chancery suit was brought in the state of Illinois, and was dismissed on February 4, 1897, and this suit was commenced within one year after such dismissal. By the act of July 1, 1873 (2 Starr & C. Ann. St. p. 2642, c. 83, par. 25), which amends the general statute of limitation of that state, it is provided:

"In any of the actions specified in any of the sections of said act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

Does this section include suits in chancery? The question has not been decided by the supreme court of Illinois, so far as we have been able to learn, and we are free to give it such construction as will best meet the intention of the law-making power. It would be profitless to review the history of the growth and interpretation of statutes of limitation. Formerly, they were construed strictly, the courts seeming to lean to the thought that they should only be applied to cases within the strict letter of the statute; treating the statute with disfavor, because, as was supposed, it was a weapon by which to defeat an honest debt. In modern times courts have looked favorably upon the statute as one of repose, to prevent the prosecution of stale claims when the witnesses to the transaction may be dead. The latter theory appeals to us as equitable, and that in the interest of peace such statutes should be given liberal interpretation; that one who lies by dormant and fails to present his claim to a court of justice at a time when the witnesses to the transaction are living, ought not to receive the assistance of a court of justice. By that same token we think that this statute of Illinois, which seeks to relieve the diligent but mistaken claimant from the consequences of his mistake, should receive a like liberal interpretation in the interests of justice and of fair play. The general statute of limitation of the state of Illinois would seem to cover, in some instances at least, not only legal, but equitable, claims. It would seem to comprehend all proceedings with reference to real estate, whether legal or equitable. It provides by paragraph 11 that no one shall commence an action to foreclose a mortgage or a deed of trust unless within the specified time. The action here referred to is undoubtedly the suit in equity to foreclose. Ordinarily, the terms "suit" and "action" are synonymous or convertible. In a general sense, civil actions include actions at law, suits in chancery, proceedings in admiralty, and other judicial controversies in which rights of property are involved. And so, also, the terms "judgment" and "decree," while, strictly speaking, applicable, the former to suits at law and the latter to suits in chancery, are usually employed as convertible terms. The statute of Illinois provides that "all general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the legislature may be fully carried out." 3 Starr & C. Ann. St. Ill. p. 3833, c. 131, par. 1. And so it is ruled that a thing within the intention is within the statute, though not within the letter;

and a thing within the letter is not within the statute unless within the intention. *People v. Gault*, 149 Ill. 39, 36 N. E. 576.

Turning now to the statute in question, we find that it employs the word "actions" with reference to any of the proceedings specified in the general act, which, as we have seen, may include a suit to foreclose a mortgage. It provides that, if the judgment in any such action shall be reversed by writ of error or upon appeal, and during the pendency of such suit the time limited for bringing an action shall have expired, the plaintiff may commence a new action within one year after such judgment reversed. The terms "action" and "suit" are here employed as convertible terms. It will also be seen that it speaks of a reversal by writ of error or upon appeal. In a common-law state, unless otherwise regulated by statute, judgments at law are not reviewed by appeal, but by writ of error only. We think this language must refer to all actions, legal or equitable, reviewable by writ of error or by appeal. The intent of the statute was that the time occupied in an unsuccessful litigation touching a demand—the statutory limitation expiring during the litigation—should not prove a bar, where the merits of the controversy had not been determined, but that a period of one year should be allowed after the expiration of the unsuccessful litigation to bring a proper action to enforce the demand; and this whether the unsuccessful litigation be at law or in equity. The legislature was not dealing with form merely, but with substance, to relieve from mistaken proceedings. We have been referred to several cases, notably *Dawes v. Railroad Co.*, 96 Va. 733, 32 S. E. 778; *Gray's Adm'x v. Berryman*, 4 Munf. 181; *Elam v. Bass' Ex'rs*, Id. 301; *Roland v. Logan*, 18 Ala. 307. It is sufficient to say, without approving or disapproving the reasoning of the court in those cases, that they are founded upon statutes unlike the one here. The reasoning of the courts in those cases is founded upon the precise terms of the statute, which sought to bar legal actions only, and extends the time only when the judgment, not going to the merits, is reversed by a writ of error, the language "or upon appeal" not being within the terms of the statute; while in the statute we are considering the words "suits" and "actions" are used as convertible terms, and the reversal provided for may be by writ of error or by appeal, indicating that the word "judgment," as used, comprehends the decree of a court of chancery as well as the judgment of a court of law. This construction is upheld in the decision of the circuit court of appeals for the Eighth circuit in *Alexander v. Gordon*, 41 C. C. A. 228, 101 Fed. 91, construing the statute of Arkansas, like to the one here. It is there held that a suit at law commenced within one year after the dismissal of a chancery suit was within the saving statute, and that the statute of limitations did not bar the action. The dismissal of the chancery suit here did not go to the merits of the cause. The judgment of the appellate tribunal instructed the claimant that he had mistaken his forum. The case, in our judgment, is clearly within the intent of the statute, and we think also within the letter.

The judgment is affirmed.

RICHARDSON & CO. v. CORNFORTH.\*

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 882.

1. SALES—STANDARD OF WEIGHT—APPLICATION.

Where oats were sold without any agreement as to the standard of weight governing the number of pounds to the bushel, the standard in force at the place where the oats were purchased governs the contract.

2. SAME—CONSTRUCTION—PAROL EVIDENCE.

Telegrams constituting a sale of a quantity of clipped oats purchased in Chicago for shipment to the buyer in Seattle recited that the oats would test from 36 to 37 pounds per bushel, and the telegram of acceptance accepted offer for white clipped oats, 36 pounds to bushel, Chicago Board grade. Defendant shipped a sufficient quantity of oats at 32 pounds per bushel to fulfill the contract, but plaintiff, claiming that the contract called for 36 pounds per bushel, sued for breach of contract, in which evidence was offered that, according to the customs of the Chicago market, 32 pounds was the standard bushel of oats, and that the "test 36 and 37 pounds per bushel" had reference solely to the quality of the oats. *Held*, that the contract did not show a meeting of minds on the standard by which the oats should be measured, and that the evidence of the Chicago custom was admissible.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Seymour Edgerton and George P. Merrick, for plaintiff in error.

H. K. Tenney, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion of the court.

Richardson and Company, a corporation organized under the laws of Illinois, plaintiff in error, was the defendant below, and Joseph T. Cornforth, defendant in error, a citizen of the State of Washington, was the plaintiff below.

The suit in the Circuit Court, was to recover seven thousand, eight hundred dollars, damages for failure to ship about eighteen thousand, three hundred and thirty-four bushels of number two white clipped oats, on a contract calling for one hundred and sixty thousand bushels, payment for one hundred and sixty thousand bushels having been made by the purchaser to the vendor. Defendant below pleaded that the full quantity of one hundred and sixty thousand bushels had been shipped.

It is admitted that five million, one hundred and twenty thousand pounds of oats were delivered and accepted under the contract. Defendant below insisted that this fulfilled the contract, taking thirty-two pounds as the standard of a bushel. Plaintiff below claimed that thirty-six pounds should have been taken as the standard of a bushel. The controversy turns solely upon the question whether thirty-two pounds or thirty-six pounds was, under the contract, the standard of the bushel.

\* Rehearing denied November 15, 1902.



The contract was by telegraphic correspondence. Plaintiff below desiring to bid upon a government contract calling for twenty five hundred tons (five million pounds of oats) to be delivered at Tacoma or Seattle, asked the agent of the Chicago, Milwaukee & St. Paul Railroad, at Portland, Oregon, to ascertain on what terms the oats necessary to the contract, could be purchased in Chicago. Thereupon the following telegrams passed:

E. S. Keeley,  
Chgo. "Seattle, Wash., 26 Sept., 1900.

Wire F. O. B. prices Chicago on 160,000 bushels clean white oats in new burlaps 100 pounds each also in bulk. Rate per ton required Chicago to St. Paul 125. Destination China. Answer here by Friday.

(Signed) C. J. Eddy."

C. J. Eddy,  
C. M. & St. P., Seattle, Wash. "Chgo. Sept. 23.

Can get quantity desired immediate shipment best quality Green Bay inspection white fanned oats in bulk 25 cents, burlaps 26½ cents with 7c. added for burlaps. Clipped oats test 36 to 37 pounds per bushel acceptance this week F. O. B. Green Bay. Can quote a delivered price Asiatic ports to Seattle on very low freight basis. Connection Canadian Pacific.

(Signed) H. E. Pierpont."

H. E. Pierpont,  
Chgo. "Portland, Sept. 29.

Your wire 28th quote price oats with lowest through rate to Seattle.  
(Signed) C. J. Eddy."

C. J. Eddy,  
Portland. "Chgo. Oct. 1, 1900.

On offer for 160000 bushels white clipped oats can get price of 25 cents per bushel F O B Chicago.

(Signed) H. E. Pierpont."

H. E. Pierpont,  
Chgo. "Seattle, Oct. 2.

Mr. Comings asks are oats white what weight per bushel for clipped how soon could they be shipped?

(Signed) R. M. Boyd."

R. M. Boyd,  
Seattle. "Chgo. Oct. 4.

We quoted Eddy price of white oats clipped, test, thirty-six to thirty-seven pounds. Is there any prospect of securing this contract?

(Signed) H. E. Pierpont."

H. E. Pierpont,  
Chgo. "Seattle, Oct. 5/00.

Your wire yesterday Comings claims to control lowest bids on oats awaiting award of contract will advise later.

(Signed) R. M. Boyd."

H. E. Pierpont,  
Chgo. "Seattle, Oct. 8.

Comings has contract how soon can all be loaded?

(Signed) R. M. Boyd."

H. E. Pierpont,  
Chgo. "Seattle, Oct. 8.

Arrived here today Comings advises he has the oats contract and finances arranged through bank how soon can they move after satisfactory settlement is arranged answer here.

(Signed) C. J. Eddy."

R. M. Boyd,  
Seattle.

"Chicago, Oct. 8, 1900.

Wire quick what basis accepted on the oats quantity and to whom invoiced and what inspection required.

(Signed) H. E. Pierpont."

H. E. Pierpont,  
Chgo.

"Seattle, Oct. 8.

Your message today Comings says basis white cleaned clipped oats 36 to 37 pounds to be bushel in bulk F O B Chgo amount one hundred and sixty thousand bushels price 25 cts will advise as to inspection tomorrow. How soon can they be loaded and forwarded?

(Signed) R. M. Boyd."

C. J. Eddy,  
Seattle.

"Chgo. Oct. 9.

Offer good for reply to reach us by 11 A. M. tomorrow one hundred sixty thousand bushels No. 2 clipped white oats 36 pounds to bushel 25 cents F O B Chicago prompt shipment really excellent quality pass any inspection but sold on basis Chgo. Board grade No number one grade.

(Signed) H. E. Pierpont."

H. E. Pierpont,  
Chgo.

"Seattle, Oct. 9.

I am advised that offer is accepted and that Bank of Seattle will telegraph parties you designate tomorrow morning making the necessary financial arrangement for payment of one hundred and sixty thousand bushels of oats in accordance with your telegram this date answer quick.

(Signed) C. J. Eddy."

H. E. Pierpont,  
Chgo.

"Seattle, Oct. 9/00.

Expect to be able to advise you today as to inspection and invoice to a certain bank wire quick as possible when oats can be loaded and forwarded.

(Signed) C. J. Eddy."

"C. J. Eddy,  
Seattle, Wh.

Have closed one hundred sixty thousand oats with Richardson & Co. Board of Trade, Chicago basis twenty-five cents F O B Chicago. Have bank wire them direct and give shipping instructions and advise quick. Our arrangements are with Canadian Pacific.

(Signed) H. E. Pierpont."

Eddy and Boyd were connected with the railroad company on the Pacific, and Pierpont and Keeley were connected with the road in Chicago. Plaintiff below having obtained the contract with the government, arranged with the Puget Sound National Bank of Seattle, to finance his contract, and thereupon the following telegram was sent:

Richardson & Co.,  
Board of Trade,  
Chicago, Ill.

"Oct. 11, 1900.

Drafts with bills of lading attached for one hundred sixty thousand bushels number two white clipped clean oats, thirty-six pounds to bushel, Chgo. board grade if shipped promptly, last shipment to leave Chicago before October 16th, will be paid on presentation if shipped from Chgo. to Seattle via Minnesota, transfer on C., M. & St. P. Railway and Northern Pacific Railway consigned to us here. This is the lot of oats about which P. E. Pierpont has been negotiating with you. Answer.

The Puget Sound National Bank of Seattle.

J. Furth, Pt."

to which defendant below replied as follows:

"Chicago, Ills. October 11th, 1900.

J. Furth,  
President Puget Sound Nat. Bank of Seattle,  
Seattle, Wn.

Message received; will ship fifty to seventy-five thousand immediately cars obtainable, balance within fourteen days; can't obtain cars sooner; will ship out fast as possible; sale made basis Chicago exchange; answer.

Richardson and Co."

This completed the arrangement, and accordingly, the oats were from time to time shipped by defendant below, and drafts made on the basis of thirty-two pounds to the bushel.

It is claimed by counsel for both parties, that the contract, embodied in these telegrams, is unambiguous. This would seem to exclude the necessity of extrinsic proof. But while the defendant in error insists that the contract, rightly read, clearly shows that thirty-two pounds to the bushel was to be taken as the standard of measurement, counsel for defendant in error insists, with equal emphasis, that it is clearly shown that thirty-six pounds was the standard agreed upon. Our own inspection of the telegrams leaves us with the belief that if the contract be unambiguous, it should be interpreted to mean thirty-two pounds to the bushel. That such upon its face is the meaning of the contract however, we do not decide.

Clipped oats are oats which have been put through a machine, by which the worthless ends of the husk are cut off. The result is, that the oats thus clipped, takes up a less space, and that a given cubic measure will weigh more than the same measure when filled with oats in their natural state.

A given cubic measure of clipped oats, however, has by no means a fixed weight. It varies according to quality, from thirty-two to forty-two pounds to the measured bushel. In the grading of clipped oats, therefore, weight to the measured bushel, is an essential element.

On the trial of the case, oral evidence was introduced by defendant below, tending to show that in transactions on the Board of Trade of Chicago, number two white clipped oats is sold upon the standard of thirty-two pounds to the bushel; but tested as to quality at not less than thirty-four pounds to the measured bushel. A regulation, to that effect, also, is among the printed rules of the Board. The Circuit Court, however, at the conclusion of the testimony of the defendant below, held that the contract embodied in the telegrams, called for delivery on the basis of thirty-six pounds to the bushel, from which it followed that the evidence extrinsic to the contract, was irrelevant. Upon this view, a verdict was rendered for the plaintiff below, upon the instruction of the court.

We cannot concur with the Circuit Court in the conclusion that the extrinsic evidence is irrelevant. The plaintiff below came into the Chicago market for his purchase. In that market, thirty-two pounds has been fixed by statute, as the standard for the measurement of a bushel of oats. This may not include, it is true, oats artificially treated; but it may be shown, by the custom of the market, to have been applied to clipped oats as well. The telegrams do not show that the minds of the parties came together on a different specific basis. There are repeated allusions to "thirty-six pounds," and to "thirty-seven

pounds" to the bushel; but upon the part of the seller, at least, this could easily, in view of the customs of the Chicago market, have been understood as reference to quality, and not to standard. An inspection of the telegrams leaves room for the view, either that the standard agreed upon was thirty-two pounds to the bushel, or that the parties came to no specific agreement upon that element of the contract.

In the absence of an agreed standard, the standard of the place where the commodity is purchased governs; and the evidence offered tended, at least, to show that such standard was thirty-two pounds to the bushel. In such a situation, the evidence ought not only to have been submitted to the jury, but the judgment of the jury taken, based upon the customs of the market where the oats were purchased.

The judgment of the Circuit Court will be reversed, and the case remanded, with instructions to grant a new trial.

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THE TRITON.

THE JOHN A. CURTIS.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1902.)

No. 441.

1. COLLISION—VESSELS CROSSING—STEAM TUG AND SCHOONER.

Conflicting evidence examined, and a tug held solely in fault for a collision in Hampton Roads in the night, with a schooner, on a crossing course.

2. SAME—NAVIGATION RULES.

Article 28 of the general navigation rules, which provides that, "when vessels are in sight of each other, a steam vessel under way, whose engines are going at full speed astern, shall indicate that fact by three short blasts on the whistle," is applicable, and obligatory, although the other is a sailing vessel.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

This is a case of collision between a steam tug and a schooner in Hampton Roads in that part that lies between the Ripraps and the wharf at Old Point Comfort. The collision happened at 9 o'clock in the evening. The night was clear, the wind blowing from the north and west. The collision occurred October 16, 1900. The libel on behalf of the schooner was filed October 19, 1900. The depositions of the three seamen on the schooner were taken October 22, 1900. The answer of the steam tug was filed December 20, 1900. The case was heard before the district judge May 8, 1901, when the master of the schooner testified in court, together with all the witnesses for the tug. The libel on behalf of the schooner states: That she was of 147 tons, with a cargo of 183 tons of fish scrap, bound from Fairport, Va., to Norfolk, with a crew consisting of a master and three colored men. The schooner was on a course about southwest by west through the Roads, well over to the Old Point Light side, making for the Norfolk Channel. The schooner's booms were on her port side, and the wind was blowing strong from the north and west. That the tug was seen by the master of the schooner anchoring her tow in the vicinity of the Ripraps, and afterwards was observed, without her

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¶ 2. Collision rules, see notes to *The Niagara*, 28 C. C. A. 532; *The Mount Hope*, 29 C. C. A. 368.

towing light, heading apparently in the direction of Old Point wharf, showing her green and white lights. That the schooner was kept on her course until the vessels were very close together, the tug heading directly across the bows of the schooner. That the master of the schooner, seeing that a collision was inevitable, tried to ease the blow by starboarding his wheel, but only succeeded in getting it partly over, changing his course less than a point, when the boom and bowsprit of the schooner struck the tug aft of the smokestack. The tug passed by, but the schooner was seriously injured, and it was necessary to beach her. That from the time the tug was seen to start towards Old Point wharf she appeared to be going at her ordinary full speed, and so continued, and blew one short whistle about the time of the collision. The case for the tug, stated in her answer, is that she is a large, powerful seagoing tug, engaged in seatowing along the Atlantic coast. That she had just come in from the sea, towing the barge Knickerbocker, and had anchored the barge about one mile westwardly from the Ripraps, and, after taking in her hawser, proceeded under one bell for Old Point wharf, to get orders. While so proceeding, at a slow speed, the red light of a schooner was observed almost half a mile distant off her starboard bow, apparently on a southwest course. The tug's wheel was then put to port, and her engines stopped, in order to give the schooner ample room to keep her course in safety; but when the schooner was about a quarter of a mile distant, sailing rapidly under the strong wind from the northwest, she was seen to change her course, and keep off, so as to head for the tug, finally shutting in her red light. The tug promptly put her engines full speed astern on observing the schooner's change of course, but, although the tug succeeded in getting sternway on, it was to no purpose, and the schooner came on at a rapid speed, striking the tug on the starboard side, carrying away a portion of the tug's after-house.

Floyd Hughes, for appellant.

H. H. Little (Robert M. Hughes, on brief), for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge (after stating the facts). There are conflicts in the testimony which we have not been able to reconcile, and, after careful consideration, we can but agree with the district judge who heard the case that the libelant's account of the movements which resulted in the collision is far the more reasonable and probable. The schooner's crew were not intelligent men, but seem to have had this virtue; that they did not attempt to testify to anything more than they actually saw and knew. Their testimony was taken only six days after the collision, and they obviously had not time to work up any theory of how the collision occurred, and to shape their testimony to support it. The wheelman is positive that the schooner's helm was not changed until the master ordered it hard up just before the collision; and he states that the collision came so quick that the schooner's course was not in fact changed. The schooner had a straight course, with a fair wind up the Roads past the Old Point wharf, and there was no reason why she should change. If they had mistaken the green light of the tug which they saw for the green light of a sailing vessel on their port bow, as has been suggested, the schooner's duty would have been just the same,—to keep her course. The tug's witnesses state (a fact not stated in her answer): That she was lying off in the channel between the Ripraps and the Old Point wharf for half an hour waiting for a steamer at the wharf to leave it. That they lay

about a mile from the wharf, heading about N. W. by N., directly for it. That when they saw the steamer leaving the wharf they started ahead under one bell, and in about a minute and a half the schooner's red light was reported about four points on the tug's starboard bow, about half a mile away. That the tug's engines were then stopped, and her wheel put to port, so as to pass under the schooner's stern. That when the schooner was about a quarter of a mile away those on the tug saw her swinging to port. This they say they made out by the appearance of the hull and sails, and not by a change of lights, for, although they had lost the schooner's red light, they never saw her green light. That, when they saw the schooner swinging to port, the tug's engines were reversed full speed astern, and the tug got under sternway; and that the collision happened very shortly after the schooner's red light was shut in. Christensen, a deck hand on the tug, who was standing abreast of the forward rigging, testifies that the tug's engines were reversed before the schooner was observed to change her course, and continued to go astern until the collision.

It is difficult to believe, against the positive testimony from the schooner, that her green light was not burning; and if it (her green light) was burning, and not seen from the tug, it is quite convincing proof that the schooner did not change her course, for, if she had done so at any distance from the tug, she would have exhibited her green light. It is also difficult of comprehension why, if the experienced master of this powerful tug saw the schooner nearly abeam changing her course towards his stern at a quarter of a mile off, he did not put his engines full speed ahead instead of astern. These difficulties and others are all explained, and the conflicts in the testimony disappear, if it be true that the tug's engines were stopped because she was waiting for a clear berth at the wharf, and not on account of the approaching schooner; and that the master of the tug was watching what was going on at the wharf directly ahead of him, and, confused by the lights of the steamer lying at the wharf and the electric lights at the wharf and the hotels, he did not observe the schooner until she was close upon him, sailing rapidly, and then reversed his engines as the best thing to do in the emergency. For 20 minutes before the tug started across the channel for the Old Point wharf, her witnesses say there was no one in the pilot house, both the master and the mate being aft on the tug superintending the taking in of a 200-fathom hawser, while the tug was drifting. When they went into the pilot house, they started for the wharf, and then they stopped the engines for half an hour while they watched the wharf for an opportunity to make a landing. It does not seem, therefore, improbable, that they neglected to continue to watch the red light of the schooner, and that the tug's engines were not stopped on her account; but that when she was close upon them, coming on at eight miles an hour, and her sails began to be visible, they erroneously supposed that her sails indicated a change of course. It has been frequently observed that as the sails of an approaching vessel are coming into view at night, they are liable to present the appearance of changing without really doing so. The witnesses from the tug testified in court about eight months after the

occurrence, when their opinions as to minute intervals of time and distance must have been in the nature of guesses.

It was suggested in argument that the tug could in no case be held in fault for not blowing a signal, as under no circumstances was such a signal required to be given to a sailing vessel. Article 28 of the act of June 7, 1897 [U. S. Comp. St. 1901, p. 2884], provides: "Art. 28. When vessels are in sight of one another, a steam vessel under way, whose engines are going at full speed astern, shall indicate that fact by three short blasts on the whistle." This article made it obligatory upon the tug, when she put her engines full speed astern, to give warning of that fact by three short blasts. Under the facts of the case as we find them, this omission was not, perhaps, of special consequence, but, if the vessels had been as far apart as contended on behalf of the tug, it would have been a very important warning to the schooner, as her master says he heard the jingle bell on the tug, which was rung for full speed astern, and he supposed it meant full speed ahead. The single blast heard by those on the schooner was probably from the steamer just leaving Old Point wharf.

Upon careful consideration of the testimony, although some of it is confusing, we see no reason to differ with the conclusion of the district court, and the decree is affirmed.

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#### CITY OF CENTERVILLE v. FIDELITY TRUST & GUARANTY CO.

(Circuit Court of Appeals, Eighth Circuit. September 29, 1902.)

No. 1,743.

1. MUNICIPAL CORPORATIONS—CONTRACTS WITH WATER COMPANIES—VALIDITY.

Under the Iowa statute (McClain's Code, § 639), which authorizes cities to contract with water companies for the construction of water-works, to grant franchises therefor, and to agree to pay rentals for fire hydrants, when a majority of the voters approve the same at an election, the power to make such contracts and grant the necessary rights and franchises is vested in the council, to be exercised after the general scheme shall have been approved by the voters; and an ordinance passed after an election, embodying the contract, is not invalidated by the fact that it differs in details from the one submitting the matter to a vote, where there is no wide departure, and the changes made do not appear to be detrimental to the interests of the city or indicate bad faith on the part of the council.

2. SAME—CONTRACT TO PAY HYDRANT RENTALS.

A city in Iowa, authorized by statute to contract for a supply of water from a water company and to levy a tax to pay for the same, made a contract by which it agreed to levy such tax, within the statutory limit, as was required each year to pay the rental for a certain number of fire hydrants to be maintained by the company for a term of years, and to pay such rentals directly to the trustee named in the mortgage which the company was authorized to execute to secure an issue of bonds, to be applied exclusively upon the interest and principal of such bonds. *Held*, that such contract was valid, and on the subsequent completion of the works and execution of the mortgage the rights of the parties thereunder became fixed, and the right of the mortgage trustee to enforce payment of the rentals for the benefit of the bondholders was not affected by an option reserved to the city by the contract to purchase

the works, whether such option could lawfully be exercised or not, nor by the subsequent exercise of such option, by which the city came into possession of and operated the works.

**8. SAME—CREATION OF INDEBTEDNESS—CONTRACT FOR CURRENT EXPENDITURES.**

A contract by a city to pay rentals for fire hydrants at stated times in the future is one for a current expenditure, and does not create an indebtedness of the kind contemplated by the provision of the Iowa constitution limiting municipal indebtedness.

**4. EQUITY JURISDICTION—ENFORCING LEGAL DEMANDS—DETERMINING ENTIRE CONTROVERSY.**

A city, which has purchased and taken possession of waterworks, subject to a mortgage placed thereon by the former owner, is a necessary party to a suit to foreclose such mortgage; and a court of equity, having acquired jurisdiction of the parties and of the subject-matter in such suit, will determine all matters connected with the controversy, and may enforce the rights of the complainant under a contract, made before the execution of the mortgage, by which the city agreed to pay hydrant rentals directly to the trustee for the benefit of the bondholders.

**Appeal from the Circuit Court of the United States for the Southern District of Iowa.**

The appellant, the city of Centerville, is a municipal corporation of the second class, organized and existing under the general laws of the state of Iowa. The appellee, the Fidelity Trust & Guaranty Company, is a New York corporation, and the Centerville Water Company is an Iowa corporation. On February 18, 1895, the city council of the city of Centerville passed Ordinance 207, which by its terms purported to authorize the Centerville Water Company to erect, operate, and maintain for the period of 25 years a system of waterworks in that city, to supply water to extinguish fires and for the use of the inhabitants, with the usual franchise as to the use of streets, alleys, roads, bridges, and public grounds. The water was to be pumped from an artesian well or wells, and many details respecting the construction and capacity of the waterworks were specified, and among them that there should be placed along the mains not less than 70 fire hydrants, located under direction of the council, and a steel water tower 60 feet high on a stone or brick foundation not less than 40 feet high, and a storage reservoir of a capacity of not less than 2,000,000 gallons; the work to be completed and ready to be tested by March 10, 1896. To enable the water company to obtain money to complete the works, the ordinance provided that the water company "may mortgage said entire waterworks plant, including the engine, pumphouse, and real estate connected therewith, all machinery, mains, and piping, and all other property forming said plant, including the rights, franchises, and rentals conferred by this ordinance, to secure a loan to said corporation not exceeding at any time the sum of forty-five thousand (\$45,000) dollars; but the company shall not alienate said plant otherwise (except to the city of Centerville) within one year from the date of completion of said works." The ordinance further provided that the city should rent from the water company for the term of 25 years not less than 70 fire hydrants at an annual rental of \$3,900, "to be paid by the city treasurer on or before the first day of June and December of each year, direct to the bondholders or their agents, if said bonds are issued, so that said rental fund shall at no time be under the control of said water company. Out of said fund the interest shall be first paid, and the balance remaining shall be applied to taking up and paying off some of the bonds, to the amount of such balance, or, if none then be due, said balance shall constitute a sinking fund for the extinguishment of said bonds. For all hydrants furnished in excess of seventy (70), said city shall pay a rental of fifty dollars (\$50) each, in manner and at a time hereinbefore specified."

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"Sec. 10. The city of Centerville shall annually during the term hereinbefore mentioned levy and collect a tax of five (5) mills on the assessed valuation, or so much thereof as shall be sufficient to pay the said hydrant



rental accruing during said year. The said tax, when collected, shall be kept and known as a 'Hydrant Fund,' and shall be held inviolate for, and is hereby irrevocably pledged and appropriated for, the payment of such hydrant rental in the manner herein provided. Provision to meet the requirements of this section shall be made in the annual appropriation bill.

"Sec. 11. The city of Centerville reserves the right to purchase the system of waterworks hereby authorized at any time within six months after their completion at the sum of fifty-five thousand (\$55,000) dollars, and, should the city elect to purchase and tender to the company the said sum, less the amount of principal of any incumbrance thereon, the company shall forthwith convey to the city by good and sufficient deed of conveyance the said waterworks system, and all real and personal property required in connection therewith, subject, however, to any existing mortgage indebtedness and interest thereon. Said city shall covenant in any such conveyance to it to keep such waterworks system in good repair and efficient operating condition. In event of the purchase being made as aforesaid, the company may, at its option, to be then expressed, accept payment in money or in twenty (20) year 5 per cent. bonds of the city at their par value."

The said ordinance further, and among other things, provided for the submission of the question of the erection of such waterworks to the voters of said city for their approval or disapproval, at a general election to be held March 4, 1895; the following propositions to be voted on: "Shall the Centerville Water Company be authorized to construct waterworks? Shall a tax of five (5) mills be annually levied and appropriated to the payment of hydrant rentals?" Due proclamation of said election was made, and said ordinance given wide publicity in said city; and at such election both of said propositions were approved and carried in the affirmative by a majority exceeding four-fifths of the voters.

Soon after said election said city council passed Ordinance 208, which amended and changed Ordinance 207 in many particulars. It provided that the water tower should consist of a steel reservoir 100 feet high and 12 feet in diameter, on a stone or brick foundation, not less than 4 feet in the ground; also, that the storage reservoir should be of not less than 250,000 gallons; also, that the mortgage authorized should not exceed \$50,000; also, that the city should pay the hydrant rentals directly to the trustee of the bondholders, if bonds should be issued; also, that the city's option to purchase the waterworks should be exercised within 30 days after their completion, and be for the sum of \$60,000. Said water company began the erection of said waterworks, and on August 1, 1895, issued and negotiated its bonds to the number of 100, in denomination of \$500 each, payable to bearer at the office of the Fidelity Trust & Guaranty Company, in Buffalo, New York, or at the Seaboard National Bank, in New York City, at the option of the holder, with interest at 6 per cent. as per semiannual coupons attached; and to secure the payment of such bonds said water company on the same day executed to the complainant, the Fidelity Trust & Guaranty Company, as trustee, its mortgage deed, covering said waterworks and all property connected therewith, and all the rights and franchises of said water company, which mortgage was duly recorded. Said water company completed said waterworks, and the same were duly tested and accepted by said city council February 12, 1896. On February 18, 1896, said city council by ordinance exercised its option to purchase said waterworks plant, and authorized and directed the mayor and city clerk to obtain from said water company a deed of conveyance to said city of said waterworks, and all property connected therewith, and rights and privileges appurtenant thereto, subject to said mortgage deed of trust to complainant, with covenant on the part of the city to operate and maintain said waterworks system; but the city should not be made liable to pay said bonds of said water company, and on delivery of such deed said mayor and clerk were authorized and directed to pay said water company \$10,000 in water bonds of said city, before authorized. Thereupon, on the same day, such deed from said water company to said city was executed and delivered in exchange for such water bonds, and said city then went into possession of said waterworks and property conveyed to it by said deed, and have since, until displaced by the receiver in

this suit, maintained and operated the same. Said city has ever since levied and collected said five-mill tax, and prior to February, 1901, had received from that tax \$17,577.39, and during the same time had paid over to the complainant as such trustee as hydrant rentals the sum of \$12,720, of which sum \$2,500 was applied by said trustee in paying the principal of 5 of the bonds secured by said trust mortgage, and \$10,220 in the payment of interest coupons of said bonds; and said city had of the moneys so collected, in February, 1901, the sum of \$4,800, and had expended incidentally the sum of \$53.39. None of the interest coupons which fell due February 1, 1900, or at any time since, on the outstanding 95 bonds secured by said trust mortgage, have been paid; nor has any of 7 of such bonds, the principal of which came due on or at dates before August 1, 1900, been paid.

In this suit, brought by said trustee against the Centerville Water Company and the city of Centerville for the foreclosure of said trust mortgage and other equitable relief, the defendant the Centerville Water Company answered, making no defense. The defendant city of Centerville by its answer claimed that the construction of the waterworks by the Centerville Water Company in accordance with the provisions of Ordinance 208 was never approved by the voters of said city at any election, and was unauthorized, and without any right or valid franchise; that the attempted purchase of the waterworks by the city, and its deed of conveyance from the water company, were unauthorized and void; that it incurred no legal obligation to pay hydrant rentals, and that the water company furnished no water for hydrants; and that it was under no obligation to pay over to complainant as hydrant rentals moneys which it had collected from said five-mill tax and still held. Upon final hearing decree was entered in favor of complainants substantially as prayed.

James C. Davis (Frank S. Payne and W. H. Sanders, on the brief), for appellant.

Horace S. Oakley (Theodore A. Craig and Charles B. Wood, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The contract entered into between the city of Centerville and the Centerville Water Company, authorizing the water company to construct the waterworks, and granting it the rights and franchises expressed in Ordinance 207, as amended by Ordinance 208, was valid; as was also the agreement therein of the city in respect to the payment of hydrant rentals. Municipal corporations were authorized to make such contracts when "a majority of the voters of the city or town at a general or special election, by vote, approve the same." McClain's Code Iowa, § 639. This approving vote of a majority of the voters of a city is necessary to empower the city council to authorize the erection of waterworks; but the power to make the necessary contract and grant the necessary rights and franchises is exercised by the city council after the approval of the voters, and not directly by the voters. The approval of the voters precedes the contract made by the council, though its terms may be formulated, more or less in detail, for the information of the voters before the election. Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070; Thompson-Houston Electric Co. v. City of Newton (C. C.) 42 Fed. 723. As it rested with the city council to make the contract for the erection of

waterworks after the vote approving the authorization of such erection, it follows that the city council could rightfully make such changes in respect to details as might seem to it wise or desirable, without departing widely and radically from the general scheme which was contemplated at the election. Changes in details might be unavoidable from hidden conditions in the ground, or appear very advantageous and desirable on further consideration and examination of other like works. The changes made by Ordinance 208 do not, so far as they relate to the construction of the works, appear to have been to the disadvantage of the city, nor indicate that the council acted in bad faith, or were misled or imposed upon by the water company or by any one.

The city council was authorized by statute to contract for supply of water for the municipality, the payment of hydrant rentals, and the application of the special tax to such payment. "If the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and such cities or towns shall contract with said individuals or companies for a supply of water for any purpose, such city or town shall levy each year and cause to be collected, a special tax as provided for above, sufficient to pay off such water rents so agreed to be paid to said individual or company constructing said works; provided, however, that said tax shall not exceed the sum of five mills on the dollar for any one year," etc. McClain's Code Iowa, § 643. The agreement on the part of the city for a supply of water and to pay hydrant rentals therefor was proper and lawful, and its further agreement that it would perform the duty imposed on it by the statute, and levy and collect the special tax for the payment of such rentals, was unobjectionable. So, also, was its agreement to pay the hydrant rentals direct to the trustee under the mortgage to be placed, and which was placed, on the property. The raising of the money to construct the works, by mortgage security upon the works and all rights and franchises connected therewith, was contemplated. It is the usual method by which money to construct such works is obtained. The agreement to pay the hydrant rentals direct to the trustee under the mortgage would add confidence to the security and cause no trouble to the city, which would be better assured that the interest on the bonds secured by the mortgage would be paid, and defaults, which might cause foreclosure proceedings, avoided. The mortgage, as contemplated in the contract set forth in the ordinances, was executed August 1, 1895, and the bonds negotiated; and when on February 12, 1896, the waterworks were completed, tested, and accepted by the city council as complying with the contract, the rights and obligations of the city, the water company, and the trustee under the mortgage became fixed under the then completed and fully executed contract, and it no longer mattered whether there had ever been any formal acceptance of either of the ordinances by the water company. *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, 284, 285, 34 L. R. A. 518.

The option to the city to purchase the waterworks, on specified terms, within 30 days after their completion and acceptance, was a provision separate from and independent of the other provisions and stipulations of the contract. It imposed no obligation on the city, and

did not increase its indebtedness a farthing. The option reserved was to exercise the discretion of the city council as to whether or not it should do an act which was neither illegal nor immoral, but merely, as it is claimed, beyond its legitimate power and authority under the circumstances then existing. If so, the option while not acted on was harmless, and the presumption would be that when the time should arrive for the city council to exercise its discretion in respect to the option, if it then found that it could not lawfully make the purchase, it would refrain from attempting to do so.

We agree with the learned judge who tried this cause that it is unnecessary to determine whether by the purchase of the waterworks the indebtedness of the city was increased beyond the constitutional limit. This suit is not to recover any indebtedness based upon or arising from such purchase. The rights which complainant here seeks to enforce as trustee under said mortgage are rights which were vested in complainant as such trustee before the attempted purchase of the waterworks by the city, and are not affected by that transaction to which the trustee was not a party. The mortgage by its terms conveyed to complainant as trustee all the real and personal property forming or connected with the waterworks plant, with every franchise, right, power, and privilege held by the water company, and all its claims and demands, during the existence of the mortgage, against the city of Centerville for the rental of fire hydrants, and all its rights to any special fund out of which the same should be payable, and appointed said trustee its agent, irrevocably, to receive and receipt for all sums of money accruing from said city as rentals for fire hydrants, to be applied on the mortgage debt so long as any of it should remain. The city, by its contract with the water company as set forth in Ordinance 208, agreed to rent from the water company, its successors and assigns, for the period of 25 years, not less than 70 hydrants, at an annual rental of \$3,900, and any hydrants in excess of 70 at \$50 each, the rentals to be paid on stated days by the city treasurer directly to the trustee of the bondholders, so that said rental fund shall at no time be under the control of the water company. This agreement on the part of the city was valid, and, being for a current expenditure, did not create an indebtedness of the kind contemplated by the Iowa constitution in its provision limiting indebtedness of municipalities. *Creston Waterworks Co. v. City of Creston*, 101 Iowa, 687, 70 N. W. 739; *Fidelity Trust & Guaranty Co. v. Fowler Water Co.* (C. C.) 113 Fed. 560.

The fund now in possession of the city, collected from the five-mill special tax authorized by section 643, McClain's Code Iowa, should have been applied to the payment of this water rent, and cannot lawfully be diverted to any other purpose. The complainant has the right to require that it shall be so applied.

As the city of Centerville has possession of the waterworks under a conveyance from the water company, it is a necessary party to this suit to foreclose the mortgage made by the last-named company; and a court of equity, having thus obtained jurisdiction of the parties and of the subject-matter, has jurisdiction to determine all matters connected with the controversy, and afford complete and effectual relief.

Taylor v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; Oil Co. v. Wilson, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025.

There is no merit in the contention that because the water company, after conveying the plant to the city, ceased to supply water to the hydrants, the obligation of the city to pay the hydrant rentals also ceased. The city, by the original contract under which the waterworks were constructed, had, as has been already stated, contracted that it would pay the hydrant rentals at specified dates, for a specified period, directly to the trustee of the mortgage, which that contract contemplated should be executed by the water company to obtain the money to build the waterworks. The mortgage vested in the trustee the right and power, irrevocably, to receive such rentals directly from the city. No contract afterwards entered into between the water company and the city could abrogate or lessen the vested rights of the trustee; and the conveyance of the plant by the water company to the city was evidently intended to continue the hydrant rentals and the right of the trustee to receive the same. The deed from the water company to the city was expressly made subject to the mortgage, in which that right to receive such hydrant rentals constituted an important and valuable part of the security. The ordinance of February 18, 1896, for the purchase of the waterworks, provided that as a condition of such purchase the city should maintain and operate the waterworks in compliance with the ordinance of February 18, 1895, and that the deed of conveyance to it from the water company should contain a covenant to that effect; and such covenant or condition was accordingly inserted in that deed. This condition was a substantial part of the consideration, by means of which the water company still caused the waterworks to be operated and the hydrants supplied. It was clearly the purpose and intention of both parties to this conveyance that the hydrant rentals should not cease, but should continue to be paid to the trustee; and the city continued to so pay them for some time thereafter.

The case of Fidelity Trust & Guaranty Co. v. Fowler Water Co. (C. C.) 113 Fed. 560, is analagous to the present case; and the well-considered opinion in that case is in accord with the conclusions we have reached in this case.

The decree appealed from is affirmed, with costs.

## JENNINGS et al. v. ROGERS SILVER PLATE CO.

(Circuit Court, D. Connecticut. November 3, 1902.)

No. 882.

## 1. PATENTS—DAMAGES FOR INFRINGEMENT—LACHES.

Complainants notified defendant of their claim of infringement before their patent was issued, and promised to notify it of the issuance, but did not do so; and defendant continued to make and sell the infringing article thereafter until suit was brought. *Held*, that complainants were entitled to recover only such damages as were clearly and strictly proven.

## 2. SAME—LOSS OF PROFITS.

Where the demand for an article made after a patented design, which was, to a great extent, due to its novelty, had largely fallen off by the time the patent was issued, in consequence of its having then been on the market for a year and a half, it cannot be held that sales thereafter made by an infringer at a price so low as to leave scarcely any profit deprived the patentee of an equal number of sales at the higher price demanded by him, so as to entitle him to recover the profits he would have made on such sales as damages for the infringement.

In Equity. Suit for infringement of patent. On exceptions to master's report on re-reference.

J. C. Chamberlain, for complainants.

J. G. Calhoun, for defendant.

PLATT, District Judge. In the opinion of Judge Townsend sustaining the patent in this case, reported in 96 Fed. 340-342, there appear these significant paragraphs at the very end:

"It is not necessary to comment upon the broken promise of complainant, or the negligence of respondent in manufacturing and selling the infringing goods for more than a year and a half after the issuance of the patent without learning whether such a patent had been issued, and without making any further effort to learn about it, simply because counsel told him, as he says, that 'I could await a reply from Jennings Bros., who promised to send me a copy of their patent when issued.' The patent has expired, and the only question herein raised was whether or not complainant was entitled to an accounting. This should be allowed.

"The questions as to the effect of the alleged laches of complainant, and as to the interference by defendant with complainant's rights, can safely be reserved until the coming in of the master's report. Let an order be entered for an accounting, with costs."

The report came in; was duly excepted to by defendant, and sent back to the master, "to enable him to correct any errors of computation or transcription which he may find therein, and with leave to complainants to introduce further evidence as to damages, if they desire to do so." 105 Fed. 968.

So it appears that the questions arising out of the actions of both parties, which were before the court at the hearing on the merits,

¶ 1. Laches as a defense in suits for infringement of patents, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.

¶ 2. Accounting by infringer of patent for profits, see note to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.

revert to the present incumbent. It is hoped that their treatment will be such as to redound to the credit of his predecessor, and show that the judge acted wisely in leaving them open for a later consideration.

Aside from those interesting disputes, it will be well to consider what has been settled and what has been left open by the former rulings. It was intimated that: (1) The master had made a mistake in computation, which affected the whole report. (2) It was not clear whether his 25 per cent. allowance on cost for expenses covered selling as well as shop expenses. (3) He ought not to have included the "new design." (4) It could not be assumed that complainants would have made the \$1,174.44 profits if the defendant had kept out of the way. Non constat that he could have sold the higher-priced frames to the people who bought the cheaper-priced ones from defendant. True, defendant had practically driven the complainants from the market by putting so low a price on the infringing frame, and his low price had been so low as almost to eliminate his own profit.

However, back the report should go, and complainant could try to clear up the question of damages by further evidence, if he wished. And so back went the report, and at his work went the master again. Some of the things Judge Townsend told him, he understood; one thing which he thought that the judge had decided can only be found by inference; and then he argued a little as to whether the judge was right on the damage question. It is, to say the least, unwise to argue with a judge. The master is asked for facts, not for arguments. But argue he did, to some extent; and then, too, he referred, in language more or less emphatic, to the wanton and high-handed proceedings which he thought the defendant had indulged in, and suggested punishment dire and summary therefor. That was a suggestion which might very properly have been offered by counsel at the fitting time, if such a time should ever have occurred. It is the duty of the master to confine himself strictly to the facts by him found; and, if to such facts wantonness can be properly imputed, the prior ought to be, and, it is hoped, can be, relied upon to do his duty as he sees it. Hereafter it is expected that in certain respects the methods adopted in this report may be reasonably modified.

The master thinks that Judge Townsend decided that the profit on the mirrors should not be counted. Judge Townsend does not refer to the matter at all, but, as the master had made a recommendation to that effect in his first report, it is perhaps fair to assume that the judge agreed with him, and for that reason held his peace. At any rate, I am of that opinion from my own examination of the case, and shall so hold. The association between the frame and mirror is not so intimate—the two are not so amalgamated and connected in their necessary uses and functions—that one cannot stand without the other; and one does not, by any means, sell the other.

The 25 per cent. addition seems to have satisfied the judge, because he refers to it as something which had been done, and does not criticise it. It is also a practice too well established in this jurisdiction to be lightly set aside. The defendant argues that, if the

master can adopt his own experience, it is useless to introduce proof. But he argues in a circle. The master does not act on his own experience. When no satisfactory proof of actual expense is offered, the master avails himself of the best weapons within his reach to obtain a satisfactory solution. He did not believe the defendant's evidence. In cases of deception or uncertainty or evasion, or intentional suppression of evidence, one must come at a result based, if possible, upon something reasonable and tangible. It is not strange that the master was surprised to hear that expense which in the first year was practically 25 per cent. should go soaring up in the air in the following years, without any very satisfactory reason therefor. The 25 per cent. plan is accepted.

On the general question of whether the complainants can recover their supposed loss of profits as damages, it is well to outline the position which the court takes. The plain fact which he who runs may read is that the fad, so called, respecting complainants' frames, which in every such case is a short-lived one, at best, had really run its course, or, at any rate, the better part of its course, in the years prior to the accounting. The frame was on the market for almost the entire period which under our patent law deprives the inventor of his monopoly. Large sales had been made by both complainants and defendant for about a year and one-half before the issuance of the patent. Of the defendant's sales during this period, surely, the complainants cannot object. The patent was issued September 25, 1894, and the defendant continued to sell for about a year and one-half longer. Complainants notified him to stop before they actually obtained their patent. He responded politely, saying he could find no patent on record, and would they kindly give him number and date. They admitted that the patent up to that time really consisted of the commissioner's promise to give them one, and they would send word as soon as it came. The defendant was not "notified of the issue of the patent," as the master several times insists that he was. The patent came, but they did not send word, and defendant kept on selling until at last suit was brought. These facts all tend to lead the mind of the trier into a rather tense condition, when he is asked to resolve any doubtful questions in favor of the complainants on the broad principles of equity. It is altogether too much of a case of the pot calling the kettle black. The complainants shall have whatever, under the strictest rules, they are entitled to, but they must be content with precisely and exactly their pound of flesh,—no more, no less.

One of the complainants admits that a year, and even less, is long enough to take the edge off the demand in the market for new designs of no extraordinary value. It is manifest that the additional testimony does not show that the sales made by the defendant invaded to any appreciable extent the former trade of the complainants. The market had lost its keen appetite for this special design, and it was only induced to accept those sold by the defendant through the attractiveness of the price. Certain customers to whom the frame was offered by the complainants excused themselves from buying by calling attention to the fact that it could be purchased more



cheaply from the defendant. Such answers may have been excuses or evasions of the subject. The design is not so alluring as to make the frame an indispensable part of the stock of the retailer or jobber, especially after its novelty had vanished.

The defendant contends that, upon all the facts in the case, it is clear that he made no profit, and asks that only nominal damages be given. It is not possible to follow him to that point. Upon the report as I read it, in the first period the frames cost \$552.02, and brought in to the defendant \$617.13. In the second period they cost \$1,569.35, and he received \$1,599.61. His clear profit was in both periods \$95.37, and for that he should be held accountable. It will be seen that this opinion covers the issue as to whether the profits on the unpatented mirrors should be included, and also, incidentally, that it would be useless to ask for an increase of damages under the statute.

Let a decree be entered for the complainants to recover the sum mentioned above, with costs.

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PERSON v. ILLINOIS CENT. R. CO. et al.

(Circuit Court, N. D. Iowa, W. D. November 1, 1902.)

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—IMPROPER JOINDER OF PARTIES.

The joinder of the lessor with the lessee of a railroad as defendants in an action for the death of an employé of the lessee, alleged to have been due to its negligence in operating the road, where the question of the lessor's liability for such negligence is an open one, under the statutes and decisions of the state, cannot be held to have been solely for the purpose of defeating the lessee's right of removal on the ground of diversity of citizenship.

2. SAME—SEPARABLE CONTROVERSY.

An action against the lessor and lessee of a railroad, to recover for the death of an employé of the lessee alleged to have been due to its negligence in operating the road, does not involve a separable controversy which entitles the lessee to remove the cause on the ground of diversity of citizenship, where the plaintiff and lessor are citizens of the same state.

On Motion to Remand to State Court for Want of Jurisdiction.

J. D. F. Smith, for plaintiff.

W. S. Kenyon and Henderson & Frebourg, for defendants.

SHIRAS, District Judge. This action was commenced in the district court of Cherokee county, Iowa, it being averred in the petition therein filed that the plaintiff is the administrator of the estate of Magnus Person, deceased; that the Dubuque & Sioux City Railroad Company is a corporation created under the laws of the state of Iowa, and is the owner of a line of railway running from Dubuque, Iowa, to Sioux City, Iowa; that the Illinois Central Railroad Company is a

¶2. Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.

corporation created under the laws of the state of Illinois, and is the lessee of the line of railway owned by the Dubuque & Sioux City Company, and is and was, at the times named in the petition, engaged in running its trains over and upon said leased line; that in the month of January, 1902, Magnus Person was in the employ of the Illinois Central Company as a laborer, and on the 20th day of January he, with others, was engaged in gathering up rails along the railway line, and placing them on cars furnished for that purpose by the Illinois Central Company, and by direction of the foreman in charge of the work he was required to go upon one of the cars to aid in placing the rails thereon; that, through the negligence of the company, the body of the car was not properly or securely fastened to the trucks, so that it fell from the trucks upon the said Magnus Person, causing his death, and for the damages thus caused to his estate judgment in the sum of \$15,000 is prayed against both the named railroad companies. In due time the Illinois Central Company filed in the state court its petition, asking an order of removal into the federal court, which order was granted, and upon the filing of the transcript in this court the plaintiff filed a motion to remand the case to the state court, thus bringing up the question whether upon the facts shown on the face of the record, including the petition for removal, it appears that the case was properly removed into this court upon the petition of the Illinois Central Company only. In the petition for removal it is averred that the plaintiff was, when the suit was brought, and continues to be, a citizen of the state of Iowa; that the Dubuque & Sioux City Company is a corporation created under the laws of Iowa; that the Illinois Central Company is a corporation created under the laws of Illinois; that under the provisions of the laws of Iowa the Dubuque & Sioux City has leased its line of railway to the Illinois Central; that, at the time the accident happened causing the death of Magnus Person, the Illinois Central Company had the exclusive possession and management of the leased railway line, and provided and operated all the trains, engines, and cars, including the one in use when the accident happened, which were used in the operation of the line of railway leased to it; that the Dubuque & Sioux City had no control in fact, or right of control, over the operatives employed upon the line, there being no joint use or occupancy of the line, and therefore the said Dubuque & Sioux City Company could in no way be held liable for the injury complained of; that the Dubuque & Sioux City Company is therefore but a nominal party to the controversy, and in fact was made a party defendant for the purpose only of thereby defeating the right of the Illinois Central Company to remove the case for trial into the federal court; and, furthermore, that the case presents a separable controversy between the plaintiff and the Illinois Central Company which entitles the latter company to remove the case.

It thus appears that the plaintiff in the suit and one of the defendants, to wit, the Dubuque & Sioux City Railroad Company, are, and were when the suit was begun, citizens of the same state, and this fact, of necessity, defeats the right of removal, unless upon the facts shown it can be held that the Dubuque & Sioux City Company is a nominal or sham defendant, and made a party to the suit for the purpose of

defeating the right of removal, which, in the absence of that company, would exist in favor of the Illinois Central, or that the suit involves a separable controversy, in which the Dubuque & Sioux City Company has no interest.

In the case of *Arapahoe Co. v. Kansas Pac. Ry. Co.*, 4 Dill. 277, Fed. Cas. No. 502, it was said by Justice Miller:

"The supreme court has decided that where there are merely formal parties, without the requisite citizenship, that does not oust the jurisdiction. But in this case they are hardly formal parties, and it is hard to see why they were put into the bill at all; for it charges that they protested against the wrong while it was being done. It would be a very dangerous doctrine, one utterly destructive of the rights which a man has to go into the federal courts on account of his citizenship, if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, and with the express declaration that he asks no relief from them, join persons who have not the requisite citizenship, and thereby destroy the rights of the parties in federal courts. We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

This general question is dealt with, under varying circumstances, in the cases of *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69; *Dow v. Bradstreet Co.* (C. C.) 46 Fed. 824; *Durkee v. Railroad Co.* (C. C.) 81 Fed. 1; and *Deere Wells & Co. v. Chicago, M. & St. P. R. Co.* (C. C.) 85 Fed. 876; and the rule deducible from these and other cases is that where it appears that, with respect to the controversy declared on by the plaintiff, any one of the parties named in the petition has no real interest therein, and no liability attaches to him or is sought to be enforced against him, such person will be deemed to be merely a nominal party, whose presence in the case will not confer or defeat the right to removal as between the real parties interested in the cause of action set forth in the plaintiff's petition; and, furthermore, if it is made to appear that a person has been joined as a party upon the record under circumstances which clearly demonstrate that such joinder was not made in the honest belief that such person was a proper or necessary party to the controversy sought to be litigated, and if the presence of such party is relied on as a ground for defeating the otherwise existing right of removal, such a state of facts will justify the holding that the joinder of such a party is but a sham, intended to wrongfully defeat the right of removal, and the presence of such a party will be disregarded in determining the question whether the right of removal exists in favor of the real defendant to the controversy.

The motion to remand does not take issue upon any of the material matters of fact alleged in the petition for removal, and therefore, as was held in *Dow v. Bradstreet Co.*, supra, the questions to be considered are those arising upon the averments of fact contained in the petition for removal, assuming the same to be true.

The cause of action declared on in plaintiff's petition is the injury to the person of Magnus Person, resulting in his death, caused by the negligence of the Illinois Central Company in furnishing for the use of its employes a car not properly and safely equipped for the use made of it, liability for the results of such negligence being charged against the Illinois Central Company, because it was the company

actually engaged as lessee in operating the line of railway and the train of cars upon which the accident happened; and as against the Dubuque & Sioux City Company liability is charged on the ground that it is the owner of the line of railway upon which the accident happened, and is therefore responsible for injuries resulting from negligence in the operation of the line of railway, even though it has leased its line to another company, and exercises no control over the actual operation of the trains or cars thereon. Briefly stated, liability is charged against the Illinois Central Company, because it negligently furnished to its employes for use in the operation of the railway line an unsafe and dangerous car. Liability against the Dubuque & Sioux City Company is charged on the ground that, being the owner of the line, and having, as such, once assumed the duties and obligations imposed by law upon it as such owner, it cannot escape the same by committing the actual management and operation of its line to a lessee.

On behalf of the Illinois Central Company it is contended that the court must hold that such charge of liability against the Dubuque & Sioux City Company is so lacking in any possible foundation that it will be deemed to be a sham or a fraud, made for the sole purpose of endeavoring to defeat the right of removal existing on behalf of the Illinois Central Company. If the statutes of Iowa, in providing for the leasing of a line of railway, had in express terms declared that the lessor company should not be liable for injuries resulting from the negligence of the lessee in operating the leased line, or if the supreme court of the state, in determining the construction to be placed upon the terms of the statute authorizing the leasing of railway lines, had held that the lessor could not be held liable for the negligence of its lessee in the operation of the line, so that it was the settled law of the state that the lessor company could not be lawfully charged with liability for the negligence of the lessee in the operation of the leased railway, then the act of joining in the one case the lessor and the lessee as defendants would justify the court in holding that such joinder was not in good faith, but must have been made with the intent of thereby defeating, if possible, the right of removal existing in behalf of the real defendant to the cause of action declared on by plaintiff. On the other hand, if, under the law of the state, the lessor and the lessee are each liable to any one injured through negligence in the operation of the railway line, then, of course, it could not be held that either of these parties was either a nominal or sham defendant to a suit brought against them jointly, based upon negligence in the operation of the leased railway line. If, however, the question of liability on part of the lessor company for the results of the negligence of its lessee in the operation of the line has not been settled, either by express legislative declaration, or by the decision of the supreme court of the state, then it cannot be justly said that a plaintiff, who seeks to obtain a judgment against both the lessor and the lessee for injuries caused him in the negligent operation of the cars or trains on the leased line, is open to the charge of endeavoring to fraudulently defeat the right of removal by joining a nominal or sham party as a defendant in the suit.

In the consideration of the questions arising on the motion to remand in this case, the court is confined to the inquiry whether it is the settled law of the state of Iowa that a lessor of a railway line within the state is not liable for the negligence of its lessee in the operation of the leased line of railway. If this question has not been finally determined, either by legislative declaration or judicial decision, but exists and is presented in the case, as a question to be solved in the further progress of the suit upon the consideration of the rules of law applicable thereto, then this issue of the liability of the lessor company cannot be said to be a sham or fraudulent issue wrongfully injected into the case, for the sole purpose of defeating the right of removal.

It is not claimed on behalf of the railway company that there is to be found in the statute law of the state any declaration expressly providing that a lessor railway company is not liable for negligence of its lessee in the operation of the leased line, and counsel have not called to the attention of the court any decision of the supreme court of the state wherein it is ruled that such liability does not exist.

In *Brockert v. Railway Co.*, 82 Iowa, 369, 47 N. W. 1026, it is ruled that a judgment cannot be rendered against a railway company for damages resulting from the negligent operation of the line of railway by a receiver who has been placed in charge of the property of the company by order of a court, but this ruling is placed upon the ground that the possession of the receiver is not the possession of the company nor by its procurement, but is antagonistic thereto; and the same ruling is made in *Schurr v. Railway Co.* (Iowa) 67 N. W. 280,—it being further stated in the former case that it is not held that the railway company was not properly joined in the action, in view of the fact that the judgment rendered might become a lien upon the railway property.

These decisions do not settle the point of the liability of a railway company which voluntarily places the control of its property in the hands of a lessee, and continues to reap a benefit, in the form of rental paid, from the operation of the railway line, and therefore the question of such liability is one of the issues of law arising upon the facts of this case, which must be determined by the court in which the suit is heard upon its merits; and therefore upon the face of the record it appears that there is presented for determination a question of the liability of the Dubuque & Sioux City Company, a question or controversy between citizens of the same state, a question which is an open one, which the plaintiff has the right to present, and which the court cannot say is asserted without foundation, and as a mere sham or device intended solely to defeat the right of removal on behalf of the lessee company.

Do the facts set forth in the plaintiff's petition show that there is involved in the suit a separable controversy between the plaintiff and the Illinois Central Company, in which the Dubuque & Sioux City Railroad Company has no interest, and which can be wholly determined without affecting the rights of the Dubuque & Sioux City Company? The ground of liability charged against the Illinois

Central Company is negligence in furnishing a badly constructed and unsafe car for the use of its employes. The grounds of liability charged against the Dubuque & Sioux City Company are that the company is the owner of the line of railway between Dubuque & Sioux City; that it committed the management and operation of the line to the Illinois Central Company as its lessee; that the lessee was negligent in operating the line, and for the results of such negligence the lessor is responsible.

The Dubuque & Sioux City Company is clearly interested in the issue of negligence in the operation of its leased line by its lessee, and on the trial of the case will be entitled to be heard on this issue. That company has a vital interest in that question, and, as the case stands, it cannot be decided that the Illinois Central was guilty of negligence in the particular charged without affecting the interest of the Dubuque & Sioux City Company; and, on the other hand, if it should be decided that the Illinois Central was not guilty of the negligence charged against it, then the case would also fail as to the Dubuque & Sioux City Company, for the issue tendered by the plaintiff in his petition as against the latter company is that the Illinois Central was guilty of negligence causing the injury complained of, and that the Dubuque & Sioux City, as the owner and lessor of the line of railway, is liable for the negligence of its lessee in the operation of the road. In no view that can be taken of the case can it be held that the Dubuque & Sioux City Company has no interest in the question of the negligence charged against the Illinois Central, and, this being so, then it cannot be held that the suit presents a controversy solely between the plaintiff and the Illinois Central, but, on the contrary, it appears that the Dubuque & Sioux City Company has a direct and vital interest in the question or controversy existing between plaintiff and the Illinois Central, and the case does not, therefore, involve a separable controversy, within the meaning of the removal statute. Furthermore, as the plaintiff has elected to sue the defendants jointly for the consequences of the alleged negligence, it is not open to either defendant to claim that the suit embraces a separable controversy within the meaning of the removal statute. *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Railway Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121.

There being no separable controversy in the suit, and as the facts shown on the record do not justify the holding that the Dubuque & Sioux City Company is either a nominal or sham defendant, made so for the purpose of defeating the right of removal on part of the Illinois Central Company, and as the record shows that the plaintiff and one of the defendants, the Dubuque & Sioux City Company, are and were, when the suit was begun, citizens of the same state, to wit, of Iowa, it follows that the case was not removable to this court, and the motion to remand the same to the state court is well taken, and is granted.

## In re SWIFT et al.

(District Court, D. Massachusetts. October 31, 1902.)

No. 2,745.

1. **BANKRUPTCY—PROCEDURE—REVIEW OF DECISION OF REFEREE.**

In the district of Massachusetts the district court requires no particular formalities to obtain a review by the judge of the orders or other proceedings of a referee in bankruptcy. No formal exceptions need be taken to the referee's findings or rulings, but it is sufficient if the matter in dispute is substantially set out. Nor has the court assigned any precise quantitative weight to findings of fact made by the referee, but that matter is left to be determined in each case, and is dependent upon the character of the evidence on which such findings are based.

2. **PARTNERSHIP—MARSHALING ASSETS—JOINT OR SEPARATE ESTATE.**

Property originally owned by one partner, and used in the business of the partnership, may be joint or separate estate, as the partners agree, either in writing or by parol; and a parol agreement, if not express, may be shown by a course of conduct, as by entries on the partnership books. In the absence of agreement, it becomes a matter of intention; and, where there is no evidence showing either an agreement or a definite intention on the subject, the court must hold the property to be joint or separate estate as best accords with the general intention of the parties.

3. **SAME.**

In a contest between the creditors of a bankrupt firm of brokers and the creditors of one of the partners, seats in exchanges, formerly owned by such partner, and still standing in his name, but used in the partnership business, without any definite agreement or intention being shown as to whether they should become property of the firm, *held*, under the facts shown, to have become a part of the joint estate.

In Bankruptcy. On review of decision of referee in marshaling assets between partnership and individual creditors.

See 105 Fed. 493, 108 Fed. 212, 111 Fed. 503, and 114 Fed. 947.

Freedom Hutchinson, pro se.

Albert S. Hutchinson, for trustee.

Elder & Whitman, for individual creditor.

Bancroft G. Davis, for firm creditor.

LOWELL, District Judge. The question in this case concerns the marshaling of assets between joint and separate creditors. Certain seats in the Boston and New York Stock Exchanges and the Chicago Board of Trade stood in the name of Hodges. Originally they belonged to him. Before 1899 Hodges had done business as Hodges & Co., one Lowry being a nominal or salaried partner. By the rules of the stock exchanges, the seats could not stand in the name of the firm, and the fact that they stood throughout in the name of Hodges throws no light upon their real ownership. In 1899 Hodges entered into an agreement for a partnership, to last six months, subsequently renewed for six months more, with Frederick Swift; Lowry remaining a partner, though he did not sign the written agreement. This was informal, and provided that "the New York and Boston seats standing in the name of Hodges shall draw interest up to the amount of \$50,000, which shall be charged to the general expense account."

Counsel for the joint creditors raised certain formal objections, based upon the state of the record. It is sufficient to say that this court has not hitherto required, and does not intend to require hereafter, any particular formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee. If the matter in dispute is substantially set out, that is enough. No formal exceptions to the referee's findings or rulings need be filed. If this practice shall seem lax to some, the answer is that it has hitherto been found convenient in this district, both for the judge and for the parties, and it has not been abused. A stricter practice has been adopted in some other districts, doubtless because it has been deemed convenient there.

Again, no precise quantitative weight is in this district assigned to the findings of fact made by a referee. If those findings are based largely upon the good or bad faith of witnesses seen and heard by the referee, this court will always bear in mind that the referee's means of judgment are, in an important respect, better than its own. If, on the other hand, the findings depend upon inferences to be drawn from admitted facts, this court's means of judgment are nearly as good as the referee's. The weight to be assigned to the referee's findings in the two cases supposed is by no means the same. No labor-saving formula will determine the weight of the finding, or show just how strongly the court must incline against it in order to reverse it. To say that the finding should not be set aside unless it is "clearly erroneous," "manifestly erroneous," "so manifestly erroneous as to invoke the sense of justice of the court," or "unless it discloses prejudicial errors by the referee, some of which may, without exaggeration, be denominated gross," is to darken counsel, if more is meant than that the court will not set aside the finding unless it is deemed erroneous, after due allowance for the circumstances under which it was made. Artificial and quantitative presumptions of fact are foreign to the spirit of the common law, and the introduction of these presumptions has been rare and unfortunate.

We come next to the merits of the case. Property originally owned by one or more partners, and used in the business of the partnership, may be joint or separate estate, as the partners agree. Originally separate estate, it may be converted into joint estate without formal conveyance, even without any writing, by a parol agreement made between the partners, without any other act. The oral agreement need not be express. It may be proved by a course of conduct; e. g., by entries upon the partnership books. These written entries do not change the title to the goods in question by converting them from separate into joint estate. The entries are rather evidence of an understanding or agreement between the parties, which understanding or agreement operates the conversion. It follows that in the absence of express agreement, written or oral, the separation of joint and separate estate must often depend on circumstantial proof of a state of mind or intention. But it happens not infrequently that the difference between joint and separate estate was not brought to the attention of the partners, and so in fact they had no definite intention in the matter. The court must then determine which



of the possible alternatives—joint or separate estate—better, accords with the general intention of the parties. This is the question presented by the case at bar. The intentions of both parties, Hodges and Swift, were vague. The original partnership between Hodges and Lowry was of an uncertain character. Lowry was called by Hodges a "nominal partner,"—a term unknown to the law of partnership. Hodges added that Lowry had no interest in the assets of the business; that he had the right to sign the firm's name, was the "Co." of Hodges & Co. and continued in the firm after Swift entered it. Lowry called himself a "partner," and later a "salaried partner." There is some evidence that his salary was contingent on profits. By the written agreement for the new partnership, he was to share the guaranteed profits up to and not exceeding \$750 for the term of the partnership. Doubtless Hodges and Lowry supposed and intended the seats to be in the control of Hodges during their first partnership, but, on the other hand, it is likely that they also supposed the firm business in general to be in Hodges' control, and the seats to be liable for the payment of Hodges & Co.'s debts, without preference to Hodges' separate creditors. When the new partnership was formed, consisting of Hodges, Swift, and Lowry, the intention was but little more definite. The written partnership agreement and the bookkeeping entries are inconclusive. The direct statements of understanding or intention made by the parties are contradictory. I do not believe that, at any time before the partnership was dissolved, either Hodges or Swift had a definite intention or understanding that the seats should be either joint or separate estate. Hodges testified that the seats were never transferred to the partnership, and that there had been no change in their ownership; but his evidence, so far as it states facts, and not conclusions of law, amounts only to this: That there was no express transfer (which is admitted), and that Hodges did not intend a transfer. The testimony of a man regarding his past intentions, especially when these were indefinite, is far from conclusive. For some reason, Hodges was testifying with a manifest bias, and the weight of his testimony is fairly balanced by his statement to the opposite effect made to Foreman and Leopold. It is true that these last statements may have meant no more than that the seats were in some sense liable for the firm's debts. The statements are by no means conclusive evidence in favor of the joint creditors. Indeed, but little weight can be attached to any of Hodges' statements in the matter. The referee heard him testify, and has found against him. Without any reflection upon Mr. F. Swift's good faith, it is plain that he understood so little the difference between joint and separate estate as to contradict himself repeatedly. Taken as a whole, his testimony rather leans to the side of the joint creditors, but it is practically worthless.

As has been said, the book entries are ambiguous. The seats were valued at \$50,000, and either they were contributed to the firm, as the joint creditors contend, or in some sense their use was contributed, as the separate creditors contend. As interest on his contribution to capital, or as rent for their use, Hodges was to receive \$1,500 each

six months. The agreement designated the payment as interest, which fact makes for the contention of the joint creditors, though it is not conclusive. F. Swift procured a loan of \$50,000 from E. C. Swift. As between the firm and E. C. Swift, this was treated as the debt of the firm, guarantied by Hodges, but, as between the partners, it seems to have been treated differently. In some sense, it was deemed that F. Swift contributed \$50,000 to the firm. The original entries credited Hodges with \$1,500 interest on the seats, while \$1,500 interest on the note was charged to the firm. The theory of these entries appears to have been that the debt to E. C. Swift was the debt of the firm, and not of one partner more than the other. The original entries were changed by charging Frederick Swift with the interest on E. C. Swift's debt. This made the other entry unfair, though F. Swift was so ignorant of bookkeeping that he did not recognize the unfairness when he testified about the entries. If F. Swift individually paid the interest on the E. C. Swift note, then either Hodges ought to get nothing for his seats, or F. Swift ought to be credited with interest on the \$50,000 which, under this supposition, he had contributed to the firm. The former alternative was adopted. Hodges got nothing for his seats, and F. Swift nothing for his contribution, whatever it was. In fact, Hodges received no actual money for his seats, either under the old entry or under the new. If it be said that the entries are unimportant, in view of the written agreement of partnership, it may be answered: First, that a written partnership agreement may be altered by the dealing between the partners (*Pilling v. Pilling*, 3 De Gex, J. & S. 162); and, second, an ambiguous agreement, like that in the case at bar, will be interpreted by subsequent conduct. On the whole, while the entries are not by any means conclusive, they seem to indicate that the seats were finally treated like the \$50,000 cash, and so went into the joint estate. The partnership agreement looks the same way. And this is said to be the presumption in the absence of evidence to the contrary. *Story, Partn. § 27*. In *Kidd v. Johnson*, 100 U. S. 617, 25 L. Ed. 769, the controversy arose between the partners and their assigns, not between creditors. No one supposes that the partnership agreement gave F. Swift half or a third of the beneficial interest in the seats. On the dissolution of the firm, in the absence of evidence that they had changed in value, Hodges would have been entitled to them as against F. Swift and Lowry. The seats were practically necessary to the business, and must be either owned or hired. Doubtless firms of brokers can and do exist without seats at the brokers' board, but the facilities of the firm for doing business are thereby much lessened. Originally, the seats were the property of Hodges, but they had been used in the old and going firm of Hodges & Co. when that firm was composed of Hodges and Lowry, and I believe every one supposed them primarily liable for the old partnership debts. Where, as here, a going firm is enlarged, it is to be supposed that joint assets of the old firm become joint assets of the new, rather than the separate estate of one or more of the old partners. *Commercial Co. v. Francis*, 41 C. C. A. 167, 101 Fed. 16. The Chicago seat was not mentioned in the partnership agreement, and little attention was paid to the matter in briefs or arguments. I think that

its disposition should follow that of the other seats. With some doubt, I have therefore come to the conclusion that the judgment of the referee should be affirmed as to the seats.

As to the Wheelman notes, many of the same considerations apply. They seem to have been property used in the firm's business. The ledger page which contains the account of them contains also, and without distinction, an account of dealings between the Wheelman Company and the new firm. Some of the later Wheelman notes admittedly were joint assets, and I think no sufficient difference is shown between the older notes and the later. As to these, also, the referee's judgment is affirmed.

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BISHOP et al. v. YORK et al.

(Circuit Court, M. D. Pennsylvania. October 15, 1902.)

1. SUFFICIENCY OF BILL—RIGHT OF HEIRS TO MAINTAIN SUIT.

In a bill to recover bonds in possession of defendant, and claimed as a gift from the plaintiffs' stepmother a few days prior to her death, the plaintiffs do not sufficiently state a case when they simply allege that they are heirs at law of the decedent (which they apparently are not under the laws of Ohio, where the case arose), and that, as a compromise to a suit to contest her will, the executors agreed to turn over to them one-half of her estate. Their exact relationship and the full terms of the compromise agreement should be set out.

In Equity. On demurrer to bill.

The bill, after jurisdictional allegations, proceeds as follows:

Complainants say that the defendant the Union Savings Bank & Trust Company is a corporation under the laws of Ohio, domiciled at Cincinnati, and is likewise the executor of the last will and testament and trustee under the will of Elizabeth P. Patterson, deceased, who died in the city of Cincinnati January 25, 1899, testate, she at the time of her death being a citizen and resident of the city of Cincinnati, Ohio, and her said will being duly admitted to probate in the probate court of Hamilton county, Ohio, letters testamentary having thereupon issued to the said Union Savings Bank & Trust Company, defendant herein, which said company duly qualified and is now such executor. That under the said will of Elizabeth P. Patterson, the said defendant the Union Savings Bank & Trust Company became, and was and is, the trustee of certain beneficiaries under the said will. Complainants say that on the 18th day of November, 1899, the complainants herein brought a suit in the court of common pleas of Hamilton county, Ohio, which court had jurisdiction of said cause, contesting the validity of the will of the said Elizabeth P. Patterson, the testatrix as aforesaid, they being heirs-at-law of the said decedent, and the said cause was determined and compromised by the said defendant the Union Savings Bank & Trust Company, individually and as executor and as such trustee, and the other beneficiaries under the said will agreeing to turn over and convey and deliver to plaintiffs, in kind or otherwise, one-half of the said property belonging to the estate of the said decedent, Elizabeth P. Patterson, which said agreement was in writing, and was and is in full force and effect, and binding upon all the parties. That said agreement of settlement was approved and ordered by the said probate court of Hamilton county, Ohio, and thereupon a decree was taken, after the verdict of a jury confirming and establishing the said will and the codicils thereto. Complainants say that the said agreement of compromise and settlement has been partially executed and carried out. Complainants further say that for a long period of time prior to her decease the said Elizabeth P. Patterson was

in failing health; that her mental faculties had become impaired; that she was of unsound mind and incapable of transacting business, and easily influenced. That the defendant Luella York for many years had been an inmate of the home of Elizabeth P. Patterson, was a trained nurse who had cared for her and nursed her, and by reason of her close relationship with the said Elizabeth P. Patterson exercised great influence and control over her, and was likewise a companion to the said Elizabeth P. Patterson during all these years, and while the said Elizabeth P. Patterson was in the aforesaid mental condition, sick and in bed, and unable to transact business, or to enter into agreements or contracts of any kind, the said defendant Luella York by such influence, by importunity, argument, and entreaty, and while the said decedent, Elizabeth P. Patterson, was so infirm and sick in body and mind, solicited and procured the said Elizabeth P. Patterson, as the said Luella York pretends, to give to her certain bonds, five in number, Nos. 1298, 2377, 2378, 2379 and 2380, of \$1,000 each, being first mortgage 5 per cent. bonds due in 1922, of the Cincinnati, Newport & Covington Street Railway Company, although these complainants charge and show to this honorable court that the said Elizabeth P. Patterson never in fact gave said bonds to the said defendant, and was in no mental condition to legally make a valid gift to the said defendant, and was sick, ill, and infirm in mind and body, and unable to resist the importunities and entreaties and arguments of the said Luella York directed to her, by means of which said Luella York obtained possession of the said bonds so as above described, on or about January 19, 1899, which was just six days before the said Elizabeth P. Patterson died. Complainants say that the said Luella York is now in possession of the said bonds of the said the Cincinnati, Newport & Covington Street Railway Company, as complainants are advised, and that she has not disposed of the same, and that she is still receiving the interest when it is due upon the same, and keeps and retains the same in her possession, all by reason of the foregoing. Complainants say that they have applied to and requested in writing of the said Union Savings Bank & Trust Company, individually and as executor and trustee, to begin an action against the said Luella York to bring this action and to recover and secure the possession of the said bonds as aforesaid, and the said the Union Savings Bank & Trust Company, in writing, has declined so to do, the said bank, however, not objecting to the bringing of this action by the complainants herein, who bring it, not merely for the benefit of themselves, but for the benefit of the estate of the said Elizabeth P. Patterson and her other beneficiaries under her said will.

To the end, therefore, that the said defendant Luella York may, if she can, show why your complainants should not have the relief hereby prayed, and may upon her oath and according to the best and utmost of her knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the several interrogatories hereinafter numbered and set forth, she is required to answer, that is to say: Interrogatory 1. Whether it is not a fact that about January 19, 1899, the said Luella York obtained from Elizabeth P. Patterson, now deceased, five bonds of \$1,000 each, issued by the Cincinnati, Newport & Covington Street Railway Company, numbered 1298, 2377, 2378, 2379, and 2380, respectively, being first mortgage 5 per cent. bonds due in 1922? Interrogatory 2. Whether it is not a fact that the said Luella York obtained said bonds at the house of Elizabeth P. Patterson in Avondale, Cincinnati, on or about the sixth day before the said Elizabeth P. Patterson died? Interrogatory 3. Whether it is not a fact that the said Luella York since that time has had the possession of said bonds, and has clipped therefrom the interest coupons on the same, and collected the proceeds of such coupons?

Complainants say that they are advised and believe that the said Luella York, at the time she came into possession of the said five bonds as aforesaid, had no other property, real or personal, subject to execution, and was insolvent, and that she now has no other property, real or personal, other than the aforesaid bonds, which this action seeks to sequester and secure to the estate of the said Elizabeth P. Patterson, deceased. That these complainants have no other remedy that they may invoke, other than this action in injunction, to prevent the said Luella York from disposing of said bonds or

putting them out of her possession or beyond the reach of this court, and that the only way the said bonds can be secured to abide the decree of this court upon a final hearing is by a temporary restraining order restraining her from disposing of the same or putting them out of her possession, and by having a receiver take possession of and hold said bonds until the final adjudication in this court. And that unless these complainants have such temporary order, and the appointment of a receiver, the object of this action may be defeated, to the great and irreparable loss of the complainants and by the loss of said property. Complainants say that the granting of a temporary restraining order and the appointment of a receiver, and the placing of the said bonds in the hands of a receiver to hold the same and collect the interest accruing on said bonds, evidenced by the coupons thereon, will work no harm and no injury to the said defendant, Luella York. Complainants say that Luella York neither in law nor in fact had any title to said bonds, and had no right to the same nor the proceeds of the interest from the coupons thereon. Wherefore the complainants pray that, upon a hearing of the aforesaid matters and things so set forth herein, this court may find and decree that the said bonds belonged to the said Elizabeth P. Patterson in her lifetime, and that she never parted title to the same to the said Luella York. That neither in law nor in fact has she any title to said bonds, or the right to collect and receive the interest from the coupons upon the same. That the said defendant may be enjoined from further collecting and receiving the interest from the coupons upon said five bonds so in her possession as aforesaid, and that she may likewise be enjoined from disposing or attempting to dispose of said five bonds of the Cincinnati, Newport & Covington Street Railway Company, so as aforesaid in her possession, or from pledging the same for the security of any loan or debt, or in any other way placing said bonds out of her possession or control. Complainants pray that a receiver may be appointed by this court, during the pendency of this action, to take charge of and collect the interest coupons upon said bonds as they become due until final hearing of this cause, and likewise to take charge of and possession of the said five bonds as aforesaid, and hold the same until a final determination of this action, under the orders of this court. That upon final hearing this court may decree that said bonds are not the property of the said defendant Luella York, but are the property of the estate of the said Elizabeth P. Patterson, and belong to said estate, and that the said Luella York has no title or interest in and to the same, and that said bonds may be surrendered to said estate, and said estate given the possession and control of the same.

The defendants demurred, assigning, among other things, the following:

That complainants acquired their right to sue, not as heirs at law of Elizabeth P. Patterson, but by virtue of a compromise agreement made with the beneficiaries, legatees, and devisees under the will of Elizabeth P. Patterson, by which it is agreed that the complainants are to have paid and conveyed to them one-half of all the sums and property devised unto said beneficiaries named in said will, and that, complainants having thus acquired their right to the one-half of the sums and property given and devised upon certain beneficiaries named in the will, and as the bonds in dispute were not in possession of the executor and trustee of the estate when the agreement of compromise was made, the said complainants are but assignees of a mere litigious right to recover the bonds, and cannot file a bill in equity on the ground of fraud practiced on the testatrix, as that would be contrary to public policy and savoring of maintenance. That the bill does not aver that the beneficiaries, executor, and trustee held the whole estate of Elizabeth P. Patterson at the time said agreement of compromise was made to convey one-half of the same to complainants, nor does the bill aver that the beneficiaries, for whom the Union Savings Bank & Trust Company is trustee, took the whole estate of Elizabeth P. Patterson, or were the sole residuary devisees of the estate, and hence title to one-half interest in the bonds given Luella York is not shown to be in complainants.

E. N. Willard, for complainants.

J. A. Beeber, for defendants.

ARCHBALD, District Judge. This suit is considerably out of the ordinary course, and the right of the plaintiffs to maintain it should clearly appear on the face of the bill before it is allowed to go on. This right depends in the first instance on the title or quasi title which they are able to show to the bonds in controversy, with regard to which it is averred that the plaintiffs are heirs-at-law of Elizabeth P. Patterson, deceased, from whom the defendant obtained the bonds as a gift a few days prior to her death, and that, as a compromise to a suit which they had instituted in the courts of Ohio to contest Mrs. Patterson's will, it was agreed that the will should be confirmed, the executors to turn over to them one-half of the estate in kind or otherwise. This is a very meager statement on which to rest the right to sue, and it does not in some respects correspond with the facts as disclosed by the oral argument. The plaintiffs, as I understand it, are the step-children of Mrs. Patterson, being the children of her late husband, Nicholas Patterson, by his first wife. If this be so, they are not the heirs-at-law of their step-mother, but are simply entitled, under the laws of Ohio, in case of her intestacy, to such property as came to her from her husband, their father. As heirs-at-law of Mrs. Patterson, such as they aver themselves to be, it is possible they would have a standing to contest for the bonds in suit in behalf of the estate, the executors declining to act. But as heirs of their father they would have no such standing, unless the bonds were a part of the property which came to Mrs. Patterson from her husband, or were representative of it, with regard to which we have no showing. Moreover, whether they claim in one capacity or the other, it is important to know the terms of the compromise agreement by which the contest over Mrs. Patterson's will was settled. It was in writing, and, while its legal effect may be correctly pleaded in the bill, I am not content to pass the matter over by any such brief reference to it as is there found. If the plaintiffs' title is dependent upon it, it is a question whether they have a standing to sue for any special part of the estate, and are not compelled to look to the executors themselves, if it has not been fulfilled, and of this we can only judge by having so much of it quoted as will disclose its real scope. Considering the bill defective in these particulars, the plaintiffs must cure it by amendment, or the suit be dismissed.

The demurrer is sustained, with leave to plaintiffs to amend within twenty (20) days; the preliminary injunction heretofore granted to remain until further ordered.

## In re SIMS.

(District Court, W. D. Georgia, S. D. October 21, 1902.)

1. **BANKRUPTCY—TAXATION OF FUNDS IN HANDS OF TRUSTEE.**

The funds of a bankrupt estate in the hands of the trustee are subject to state and local taxation in that taxing district where the values might have been assessed for taxation if the bankruptcy had not supervened, and on proper application the court will order the payment of such taxes by the trustee as coming within the spirit, if not the letter, of Bankr. Act, § 64a.

In Bankruptcy. On review of decision of trustee denying an application for an order requiring the trustee to pay taxes.

W. G. Smith, for Albert Jones, tax collector of Bibb county.

Walter J. Grace, for trustee in bankruptcy.

**SPEER**, District Judge. This is an application on the part of the tax collector of Bibb county for an order directing the trustee appointed in the above-stated case to pay the taxes due for the year 1901 on a fund of \$3,000 in cash belonging to said bankrupt estate, and placed by the trustee, under order of the court, in the designated depository. The referee denying the application, a petition for review of that officer's decision has been filed. This presents the question, are the funds in the hands of a trustee in bankruptcy liable to state and county taxation in that taxing district where the values in question might have been assessed for taxation had not bankruptcy supervened? The importance of the inquiry will be readily perceived. No case where the question has been distinctly decided under the existing bankruptcy legislation has been called to the attention of the court. Upon principle, however, it seems that the application of the tax collector must be granted. Section 64a of the act provides:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt, to the United States, state, county, district or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such taxes the same shall be heard and determined by the court."

It is manifest from this provision of the act that congress had no purpose to deny to the taxing power any valid claim for taxation upon the values in the hands of officials of a court of bankruptcy. On the contrary, it was the purpose of congress to make it obligatory that all the current taxes legally due should be paid. It is true that the act does not expressly provide that funds held by officers of court pending the litigation shall be liable to taxation. Under the general principle, however, that taxation should be uniform upon all values, it is difficult to perceive why the primary right of the taxing authority, whether national, state, or municipal, should be denied. A tax is a debt due to government. The levying and collection of such tax is, within the relative scope of existing authority, an exercise of sovereignty, and nothing will be presumed against such sovereign right. It would have been easily competent for congress, in enacting a uni-

form system of bankruptcy, to have declared that funds held in process of litigation and for the purpose of distribution should not be taxed; but it has not done this. Much light is thrown upon this important inquiry by the decision of the supreme court of the United States in *U. S. v. Herron*, 20 Wall. 251-264, 22 L. Ed. 275. The precise question was not involved, but Justice Clifford, for the court, quotes with approval the language of Chitty to the effect that:

"Acts of parliament which would divest or abridge the king of his prerogatives, his interest, or his remedies in the slightest degree do not, in general, extend to or bind the king, unless there be express words to that effect."

In the same opinion we are advised that the framework of the bankruptcy legislation of this country is largely taken from various acts of parliament, and "such acts," said the learned justice, "have never, in terms, included debts due to the sovereign of the country; and the decisions of the courts of Westminster Hall for more than a century have held without exception that such acts, or the proceedings under the same, do not discharge debts due to the crown." The learned justice continued:

"Nor does the bankruptcy act impair or supersede the laws for the collection of taxes, and that rule also is founded upon the same canon of construction, to wit, that the crown is not bound by the bankruptcy laws; and therefore, says Shellford, on page 303, the appointment of assignees does not relate to the act of bankruptcy as against the crown process, but the bankrupt's personal property is bound under an extent even when tested subsequently to the appointment of the assignees."

Here, of course, the taxing power stands in the place of the sovereign, and the trustee in the place of the assignees.

We are strengthened in the conclusion here announced by the views of a text writer so well known and so reliable as Mr. Robert Desty. In his valuable work on *Taxation* (volume I, p. 301) we find the following:

"Money of litigants in the hands of the county treasurer, though placed there by order of the court, is liable to taxation. So the owners of money deposited in court are liable to be assessed and taxed therefor. Funds in the hands of receivers, when taxable, should be assessed to the receiver in the place where the court sits which appointed the receiver,"—citing *People v. Lardner*, 30 Cal. 242; *In re Kellinger*, 9 Paige, 62; *Commissioners v. Clarke*, 36 Md. 206.

It does not follow, of course, that all moneys deposited in the registry of the court or designated depository of the courts are subject to taxation. Much of it belongs to nonresidents, and would not be subject to state taxes merely because impounded in litigation. Much of it is deposited under the admiralty jurisdiction, where the values belong to foreigners likewise exempt from the taxing power of the state or county. But when a fund is held by a trustee in bankruptcy or other fiduciary agent of the court, which, but for the litigation, would have been liable for taxation in a particular taxing district, we see no reason why the court should not, on proper application, direct the payment of current assessments of valid taxes thereon to the appropriate tax collector.



In re CLARK.

(District Court, M. D. Pennsylvania. November 5, 1902.)

No. 45.

1 VENDOR OF LAND UNDER ARTICLES IN PENNSYLVANIA—LIENS.

Under the law of Pennsylvania, a vendor of land, by contract to convey, on payment of the purchase price, has no lien on the land distinct from his legal estate in it.

2. BANKRUPTCY OF VENDEE—SALE OF REMOVABLE STRUCTURES—LIENS.

Where, therefore, the vendee becomes bankrupt, the proceeds obtained by his trustee from the sale for removal of structures, such as greenhouses placed on the land by the vendee, belong to the general creditors, and not to the vendor, whether such structures be removable fixtures or part of the realty.

In Bankruptcy. On exceptions to report of referee disallowing claim of Charles J. Church to proceeds of sale of greenhouses.

A. D. Dean, for claimant.

A. V. Bower, for trustee.

ARCHBALD, District Judge. The bankrupts were florists, and were the owners, among other things, of certain green and hot houses constructed in the usual fashion, with sashes of glass set in wooden frames, and supplied with steam pipes for heating. When the trustee took possession he found these houses in a very dilapidated condition, and on application to the court he was permitted to make private sale of the glass and piping, which were in danger of being destroyed by a collapse of the buildings. From this sale he realized \$850, and this is the sum in controversy.

The land on which the green and hot houses stood was purchased by the bankrupts from Jos. and Chas. J. Church by articles of agreement, September 15, 1886, for \$2,675, which was payable in certain installments, and was entirely due and unpaid at the time the proceedings in bankruptcy were instituted. In case of a default the contract provided that an action of ejectment might be entered for the land, and judgment confessed therein, with leave to issue a writ of hab. fa. to take possession, and on the strength of this such a judgment was confessed in the common pleas of Lackawanna county, Pa., where the land was situated; but, as this was not done until after an adjudication had been made against the bankrupts, no further steps were taken.

The present fund is claimed by Church on the ground that the green and hot houses were a part of the realty; but the referee held that they were removable fixtures, and therefore rejected the claim. Without passing upon that question, I am of the opinion that the fund belongs to the general creditors. A vendee under articles in Pennsylvania has an equitable interest in the land, and is regarded as the real owner of it, subject only to the payment of the purchase money to the vendor. While the land is answerable at all times therefor, the vendor has no lien upon it in the sense that he has any direct claim, aside from his legal estate or the remedy which he has by reason of this against it (Appeal of Vierheller, 24 Pa. 105, 62

Am. Dec. 365), although the mistake is sometimes made of supposing that he has, and the distinction is not always kept clear. Several remedies, however, are open to him to enforce his claim. He may bring an action on his legal title, and obtain a conditional verdict by which the equities of the vendee will be cut off unless the condition is complied with; or he may sue and recover a money judgment (or enter up one by confession, if he has it), and sell out the property on execution. In the latter case it will be assumed that he intends to have the whole estate, legal as well as equitable, pass to the sheriff's vendee, and, in consideration of parting with the legal estate in this way, the purchase money will be first paid out of the proceeds. *Love v. Jones*, 4 Watts, 471; *Horbach v. Reilly*, 7 Pa. 81; *Appeal of Vierheller*, 24 Pa. 105, 62 Am. Dec. 365. But as is well said by Gilmore, P. J., in *Canon v. Campbell*, 34 Pa. 309: "The vendor is not paid the proceeds of his judgment because it is a lien, but because he is the owner of the paramount title." The estate of the vendor and that of the vendee are in fact distinct, each having its own characteristics and incidents, and being subject to its own liens and ownership. *Auwerter v. Mathiot*, 9 Serg. & R. 397; *McMullen v. Werner*, 16 Serg. & R. 20, 16 Am. Dec. 543; *Kerr v. Stiffey*, 2 Pen. & W. 174; *Catlin v. Robinson*, 2 Watts, 373; *Appeal of Vierheller*, 24 Pa. 105, 62 Am. Dec. 365. In the present instance the sashes and piping which the trustee sold, whether removable fixtures or permanent improvements, belonged to the bankrupt vendees as part of their equitable estate, and were subject to their disposition as such. They were owners of these structures the same as they were of the land on which they had been set up, and, subject only to the possible right of the vendor to restrain them on the ground of waste, they could sever and sell them at their pleasure. In the same way, if the land was covered with growing timber (*Lillibridge v. Sartwell*, 8 Pa. 523) or underlaid with minerals, or had a quarry, or a sand, clay, or peat bed, upon it, as owners they could cut, mine, or dig either of these products, or permit others to do so, without responsibility or question. If their whole interest in the land was sold (other than at the instance of the vendor), while the purchaser would undoubtedly take subject to the ultimate payment of the purchase money, the vendor, according to the authorities cited, would have no lien or claim upon the proceeds, but would be remitted to his remedies against the land in the hands of the purchaser. Much less, then, would he have any such claim on what was realized from a sale of something less than the whole, even though it were an integral part of it, and its removal constituted a stripping or dismantling of the property.

Nor is this affected in the case in hand by the fact that the vendor entered up a judgment in ejectment with a view to the possession of the property. This was subsequent to the adjudication, and therefore subject to it; but, aside from this, it was a general, and not a conditional, judgment, and did not, therefore, cut off the equities of the bankrupts or divest their ownership.

The exceptions are dismissed, and the report of the referee is confirmed.

## In re MILLER.

(District Court, E. D. Georgia, S. D. November 22, 1901.)

**1. BANKRUPTCY—POWER OF COURT—ENJOINING SALE UNDER USURIOUS CONVEYANCE.**

Under Code Ga. § 2878, which provides that "a creditor has no right to collect usurious interest from an insolvent debtor to the prejudice of other creditors," petitioning creditors in bankruptcy may attack the validity of a deed by which the alleged bankrupt has conveyed to another creditor a valuable part of his estate, which deed, while it conveys title, is in equity a mortgage, on the ground that it is usurious, and the court of bankruptcy has power to enjoin a sale of the property by the grantee pending an adjudication of the question.

**2. USURY—RIGHT OF CREDITORS TO PLEAD—CONDITIONS PRECEDENT.**

Creditors who are given the right by statute to attack the validity of a mortgage given by their debtor to another creditor on the ground of usury are under no equity which requires them to pay the debt of such other creditor as a condition precedent to the exercise of such right.

## In Bankruptcy.

John R. L. Smith and W. C. Snodgrass, for petitioning creditors.  
Joseph Hansell Merrill and Washington Dessau, for bankrupt.

SPEER, District Judge (orally). This is an attempt on the part of creditors of William Miller to administer his estate in bankruptcy. It appears that an important part of the estate is about to be sold by the Thomasville Loan & Improvement Company by virtue of a deed made by the debtor, in which under the law of Georgia he conveyed title to that company. This nevertheless, in equitable contemplation, is security only for debt. It is said that the holder of that lien, who is proceeding to sell a portion of the real estate, has the right to sell it, and that this court, exercising the functions of the bankruptcy court, has no authority to enjoin that sale. This the plaintiffs now insist should be done because the deed is usurious in character. It is objected by the holder of the deed that that point cannot be raised in this court for several reasons. One is that usury is a personal plea, and another is that a creditor coming and making an equitable defense against usury, or what is claimed to be an equitable defense against an usurious deed, must himself do equity and pay off the principal and interest due on the debt secured by the deed before the court will hear him. It is further insisted that this court has no right to consider the question at all, but that it must be determined by the courts of the state.

With regard to the first contention, it is sufficient to say that the statute of Georgia is a definite and conclusive answer. The bankrupt is an insolvent as far as we are now advised. The Code of Georgia (section 2878) provides: "The plea of usury is personal, and a creditor has no right to collect usurious interest from an insolvent debtor to the prejudice of other creditors." It is here made to appear to the court from the pleading that a creditor is seeking to collect usurious interest; and he is doing more,—he is using what is alleged to be the usurious deed of an insolvent, not only to collect the usurious interest, but to defeat a sovereign and uniform remedy of other creditors

which is accorded by the constitution and laws of the United States. Well, is it true that the creditor who makes this objection to this deed, and insists it is void, must pay the principal and interest due on the debt before he can be heard to attack the character of the instrument itself, which not only conveys away from the representative of the bankruptcy court the title of the insolvent's property, which is used also to defeat his remedy in the bankruptcy court? It does not seem so to me. The decision in 62 Ga. (Campbell v. Murray, 62 Ga. 96), relied on by defendants, is one which is applicable only to those persons who are attempting to seek equity without doing equity. What equity is there upon one creditor to pay off the debt of another creditor, before he can insist that the security instrument which the other creditor has taken to secure his debt is contrary to the law of Georgia, and thereafter null and void? He is a privy with his debtor, and is therefore entitled to be heard, and he has the right to object to a usurious deed which will defeat his claim, just as he has the right to object to any other void instrument which would have the same effect. It is not clearly perceived why it can be insisted that the courts of the state shall pass upon a question of usury, and the courts of the United States have not that power. It is difficult to understand any reason for that contention.

That being true, in the opinion of the court the objections to the amendment must be overruled, and the amendment must be allowed.

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BRANDON et al. v. MILLER et al.

(Circuit Court, E. D. Georgia, S. D. August 19, 1902.)

1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—BUILDING ASSOCIATION LAW OF GEORGIA.

The statute of Georgia relating to building and loan associations is not so clearly in violation of the constitutional provision prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws, because of its permitting such associations to take interest which would render other contracts usurious, as to authorize a federal court to declare it invalid after it has been sustained by the supreme court of the state.

In Bankruptcy.

John R. L. Smith and W. C. Snodgrass, for creditors.

J. H. Merrill and Washington Dessau, for Thomasville Real Estate & Improvement Co.

SPEER, District Judge. This is a matter largely within state control. The state may or may not permit its people to be subjected to usurious charges. This being true, it is, as stated, a question of state polity, and, if no general question of commercial law is involved, the ruling of the supreme appellate court of the state must control. Since the state courts uphold this act, their conclusions are apparently binding on the United States courts. It is further said that the building and loan association laws of Georgia are obnoxious to the last clause of section 1 of the fourteenth amendment to the constitution of the

United States, which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws." It is difficult to perceive, however, how an act creating institutions of this general character, and authorizing them to make usurious charges upon citizens of the state who voluntarily enter into the contracts contemplated, is such a violation of this clause of the constitution as will justify a judgment of the national courts annulling such legislation. Certainly it may be said that there is at least fair doubt about the constitutionality of these enactments, and cases of doubt on such topics should always be resolved in favor of the constitutionality of the law. Besides, in this case, Brandon, a principal complainant assailing this law, has been from the beginning, and is now, a director and one of the principal stockholders in the building and loan association involved. Since he has for years taken benefits under this legislation, the court will not give a ready acquiescence to his complaint that the law itself is null and void, when the arguments advanced in his behalf to show unconstitutionality are at least of doubtful validity.

The legislation is not injurious. The classification of persons with whom these building and loan associations can deal are not indicated in a capricious or arbitrary manner. The law itself is intended to enable citizens of urban and suburban communities to build and own their homes. Surely, this is a meritorious purpose; one which the state may and ought to promote. The citizen who owns his home is usually a conservator of the best interests of the state and of the municipality. It is, indeed, difficult to perceive how this legislation is prejudicial to any one in view of any clause of the constitution of the United States. No penalty is imposed on the unwilling and no unequal operation of the law inflicted, as in *Connolly's Case*, cited in 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. The debtor voluntarily assumed his attitude toward the building and loan association. As to whether the enactment under consideration is class legislation as denounced by the state constitution, it seems that we are also concluded by the decisions of the supreme appellate court of the state.

Upon the whole, while the court has been much impressed with the ability and learning of the argument presented by the complainants' counsel, the correctness of their propositions that the building and loan association law of the state is in violation of the constitution of the United States is unsatisfactory, and, the doubt remaining, under the familiar rule, must be resolved in favor of the state law.

For these reasons the court feels obliged to deny the relief sought. We will, however, accept the voluntary proposition of defendants' counsel, made in *judicio*, that the sale of the property in question shall not be valid unless confirmed by order of the court.

## EDDY v. CASAS.

(Circuit Court, W. D. Texas, El Paso Division. November 6, 1902.)

No. 335.

## 1. REMOVAL OF CAUSES—ALIENAGE OF DEFENDANT—NECESSITY OF NONRESIDENCE.

A suit by a citizen of the United States against a citizen of a foreign country residing in the state in which the suit is brought is not removable by the defendant, on the ground of his alienage, under the second clause of section 2 of the judiciary act of 1887 (24 Stat. 552), corrected in 1888 (25 Stat. 434), nonresidence being a prerequisite to the right of removal thereunder.

At Law. On motion to remand to state court.

The plaintiff, J. A. Eddy, a citizen of Texas, acting for himself and as trustee for others, originally instituted a suit of trespass to try title in the district court of El Paso county, Tex., against the defendant, a citizen of Mexico, to recover certain real estate in the city of El Paso of the estimated value of \$12,000. The defendant seasonably filed in the state court a petition and bond to remove the cause to this court. In the petition for removal it is alleged that the defendant is a citizen and subject of the republic of Mexico, but there is no allegation in respect of his residence. His counsel, however, admitted in open court that he was at the time of filing the original petition, and still remains, a resident of this state. The record was duly filed in this court, and plaintiff has submitted a motion to remand the cause, on the ground, among others, that the defendant is not entitled to remove the same to this court because he is a resident of Texas.

Edwards & Edwards, Beall & Kemp, and Patterson & Buckler, for plaintiff.

Jay Goode and Thurmond & Russell, for defendant.

MAXEY, District Judge. Several questions are suggested by the motion to remand, but the court deems it unnecessary to consider any save the following: Is a suit of this nature, instituted in the state court by a citizen of Texas against a citizen of Mexico residing in this state, removable by the resident defendant into the circuit court of the United States? The controversy here involves no federal question, and hence it is not claimed that the suit is removable under the first clause of the second section of the act of March 3, 1887 (24 Stat. 552), as corrected by the act of August 13, 1888 (25 Stat. 434). But the contention is that the defendant is entitled to remove it under the second clause of section 2, which reads as follows:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, being non-residents of that state." 25 Stat. 434.

That, under the act of March 3, 1875, a like cause was removable, there is no doubt; as that act, in "a controversy between citizens of a state and foreign states, citizens or subjects," permitted either party to remove the suit. 18 Stat. 470, 471. And either plaintiff or defendant was entitled to remove, without reference to the question of residence, and notwithstanding the suit was one of which the circuit

courts might not have had original jurisdiction. "But the second section of the act of 1887 (as corrected in 1888)," said the supreme court in *Railroad Co. v. Davidson*, 157 U. S. 208, 15 Sup. Ct. 565, 39 L. Ed. 672, "contained a radical difference from section 12 of the act of 1789 (1 Stat. 78) and section 2 of the act of 1875, in confining the suits which might be removed to those of which the circuit courts of the United States are given original jurisdiction by the preceding section." On the same page it was further said:

"We must hold, therefore, as has indeed already been ruled (*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 461, 14 Sup. Ct. 654, 38 L. Ed. 511), that the jurisdiction of the circuit courts, on removal by the defendant, under this section, is limited to such suits as might have been brought in this court by the plaintiff under the first section."

From an examination of the second clause of section 2 of the act above quoted, it will be seen that two restrictions or limitations are thereby attached to the right of removal: (1) The suits are limited to those of which the circuit courts are given original jurisdiction by the first section of the act; and (2) the right is expressly restricted to the nonresident defendant. Without reproducing the first section of the act, it is only necessary to say that a suit between a citizen of a state and an alien is one of which the circuit courts have, by virtue of that section, original jurisdiction. Employing the language of the supreme court:

"Such a person or corporation (referring to aliens) may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant."

In *re Hohorst*, 150 U. S. 662, 14 Sup. Ct. 225, 37 L. Ed. 1211; *Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Railroad Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248. As to the second limitation, it has been uniformly held, so far as the court is advised, that the nonresidence of the defendant is a prerequisite to the right of removal. *Bank v. Smith*, 19 C. C. A. 42, 72 Fed. 568; *Thurber v. Miller*, 14 C. C. A. 432, 67 Fed. 371; *Walker v. O'Neill* (C. C.) 38 Fed. 374; *Cudahy v. McGeoch* (C. C.) 37 Fed. 2; *Gavin v. Vance* (C. C.) 33 Fed. 87; *Freeman v. Butler* (C. C.) 39 Fed. 1. Other authorities might be cited, but it is deemed useless to multiply them, in view of the plain and unambiguous language of the statute. The defendant, being a resident of this state, although a citizen of the republic of Mexico, is precluded from removing the suit under the second clause of section 2 of the act of August 13, 1888. And as the remaining provisions of that section are inapplicable to the present record, it follows that the motion to remand should be sustained, and it is so ordered.

**NOTE BY THE COURT.** In the case of *Scott v. Cattle Co.*, 41 Fed. 225, a ruling was made by this court similar to the one above announced. The decision in that case, however, was erroneous to the extent of holding that the defendant, which was a corporation chartered by the laws of Great Britain, was a resident of Texas. In cases which arose subsequent to the decision of *Scott's Case*, it was held by the supreme court that "the domicile, the home, the habitat, the residence,

the citizenship of a corporation, could only be in the state by which it was created, although it might do business in other states whose laws permitted it." *Railroad Co. v. Gonzales*, 151 U. S. 501, 502, 14 Sup. Ct. 403, 38 L. Ed. 248; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 377.

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In re LANSAW.

(District Court, D. Missouri, S. W. D. October 30, 1902.)

No. 5.

1. BANKRUPTCY—PROOF OF CLAIM—VARIANCE FROM STATEMENT.

The general rule of law that a party can only recover on the cause of action alleged in his pleading applies to claims presented against a bankrupt's estate, and a claimant who has filed a statement of his claim under oath, as required by the bankruptcy act, cannot sustain it by evidence of an indebtedness arising in a different manner from that stated.

2. SAME—PROVABLE DEBT—MONEY PAID IN PURSUANCE OF SCHEME TO DEFRAUD CREDITORS.

Money paid to an insolvent in a purchase of his property under circumstances showing a scheme to hinder and defraud his creditors cannot be made the basis of a claim against his estate in bankruptcy after the property has been taken possession of and sold by his trustee under order of the court.

In Bankruptcy. On review of referee's decision.

John S. Farrington, for trustee.

Grayston & Taylor, for claimant.

PHILIPS, District Judge. The claimant, William Lansaw, has filed a motion herein to set aside the order of the court heretofore made affirming the action of the referee respecting the claim of said William Lansaw, presented for allowance against the bankrupt estate. The court withdraws its former opinion filed herein, and proceeds to the consideration of the case on its whole merits. The ground of the motion for rehearing is based upon the principal contention that the referee erred in rejecting the \$700 claim on the assumption that it was based upon a gift made by the claimant's mother of a debt of \$800 in her favor against the bankrupt. The contention now made is that this sum of \$700 is based upon a compromise agreement between the claimant and the bankrupt, supported by the consideration that the claimant threatened to sue his brother, John Lansaw, for \$800, claimed to have been given him by his mother, and that to avoid litigation John promised to pay in full satisfaction the sum of \$700. The court has re-examined the groundwork of the claimant's claim presented against the estate, and finds that the claim presented and sworn to by him to the referee for allowance alleges that the said John Lansaw "is justly and truly indebted to said deponent in the sum of \$1,660; that the consideration of said debt is as follows: that he, the said William Lansaw, advanced \$1,200 of said money to said bankrupt from time to time to go into his business as a general merchant in the town of Erie, in McDonald county, state of Missouri; that at the time said sum of



\$1,200 was advanced by him, the said claimant, the said John Lansaw was not indebted to any one, and said sum of \$1,200 paid for the stock of goods at Erie, in the county of McDonald and state of Missouri; that the said sum of \$1,200 antedates any other debt against the said John Lansaw, bankrupt; that on the 8th day of January, 1902, the said bankrupt, John Lansaw, sold, transferred, and delivered to him, the said William Lansaw, the stock of goods at Erie, in McDonald county, state of Missouri, for and in consideration of \$1,660; that at the date he (William Lansaw) purchased the stock of goods as aforesaid he paid the said John Lansaw, bankrupt, the sum of \$460 in cash; that by order of the referee in bankruptcy of said estate the trustee of said estate took charge of said stock of goods and sold the same; that no part of the said debt of \$1,660 has been paid," etc. From this sworn statement of his claim the cause of action is predicated of \$1,200 in money, advanced by him from time to time to said bankrupt, which went into his business as a general merchant; and that in payment for this indebtedness so contracted the bankrupt turned over to him his stock of goods, amounting to \$1,660, and the claimant paid the bankrupt the difference of \$460 in money. To support this claim he made proof of moneys loaned by him to the bankrupt of \$480, which the referee allowed him, and about which no controversy is made in this motion for a rehearing. To support the residue of the \$1,200 debt he introduced evidence tending to show that his brother, the bankrupt, had borrowed \$1,600 from their mother in her lifetime, and that on her deathbed she told him, in the presence of his said brother, she wanted him to have one-half of this debt John owed her; that after her death he demanded the same of his brother, who refused to recognize or pay it; and that, after threatening him with suit for its recovery, they got together, and in compromise thereof his brother, John, agreed to pay him \$700. This is not the claim presented in the sworn statement of the claimant before the referee. It is a clear departure from the cause of action stated in his petition. The rule of law obtains everywhere, under every system of pleading, that the party must establish "by evidence the case made in his pleading; and he is not entitled to recover on evidence which shows a different right of recovery." *Duncan's Adm'r v. Fisher*, 18 Mo. 404. In *Irwin v. Chiles*, 28 Mo. 576-578, the court said: "A party is not entitled to a judgment on a finding of facts different from any theory of the case set up in the petition." So Judge Wagner, in *Harris v. Railroad Co.*, 37 Mo. 307, said:

"The statute permits a party to amend his petition after his evidence has been given, to make it conform to the proofs; but no such thing was attempted in this case. It then presents the singular spectacle of declaring for one cause of action, and obtaining judgment for another and different cause. Such a course of procedure is destructive of all certainty in pleading, and can neither be tolerated nor encouraged."

This rule is universal. See *Newhan v. Kenton*, 79 Mo. 382, and citations. In 22 Am. & Eng. Enc. Pl. & Prac. p. 527, it is said in respect of this rule:

"In order to enable a plaintiff to recover, what is proved, or that of which proof is offered by the party on whom lies the onus probandi, must not vary

from what he has previously alleged in his pleading; and this is not a mere arbitrary rule, but is one founded on good sense as well as good law."

And again, on page 539, it is said:

"Where the statutes require the verification of pleadings, the necessity of a correspondence between the proof and the allegations is even more important than in a case where the pleading is not sworn to."

The bankrupt law, which proceeds much upon principles of equity jurisprudence and practice, requires that the claimant, in presenting his claim to the referee for allowance against the bankrupt estate, must make a statement of what his claim is, and he must purge himself by presenting his claim under oath. He cannot present for allowance a claim for \$700, alleged to have been advanced by him to the bankrupt, and which was put into the business of the mercantile store of the bankrupt, and undertake to sustain it by proof that his mother requested the bankrupt to pay the claimant \$800 on a debt he owed her, and which was afterwards compromised at \$700. The claim should have been rejected by the referee on this ground, without more; and, no matter what the ground of his rejection, if the judgment was right, the court will not disturb it on a review. I am satisfied from an examination of the whole testimony bearing upon the relationship between these brothers, and the transaction by which this claimant sought to cover up the goods of his brother's store by a simulated sale and purchase in fraud of the bankrupt act, that this \$700 claim was an afterthought, and was not even in the mind of this claimant when he presented his claim for allowance. It is furthermore apparent to the court from the language of the referee in passing on the question of fact respecting this \$700 claim that he meant no more than to say, conceding the fact to exist, the law, as he understood it, prevented its allowance. But, as already stated, no matter what reasons were assigned by the referee for his judgment, it was for the right party, and the finding will not be disturbed.

The remaining item of \$463, which was claimed on account of the purchase money advanced by the claimant to the bankrupt on the alleged sale and transfer of the goods, was properly rejected by the referee on his finding that John Lansaw was at the time insolvent, and that fact was known to William Lansaw, the purchaser, under circumstances tending to show that it was a scheme to hinder and defraud the creditors of the bankrupt. It needs no citation of authorities to support the proposition that, where a party makes a purchase of property from an insolvent debtor with the intent to hinder and delay his creditors, or where he takes from such debtor a larger amount of property than is necessary to satisfy his just debt against the insolvent, and this is done under circumstances indicating a conspiracy to cover up such excess of property from the other creditors of the insolvent, it is a fraudulent conspiracy; and, both parties being in *pari delicto*, the court will afford neither any relief, either by a restitution of the property conveyed or for a recovery of money paid in furtherance of such scheme.

The order of the court heretofore made overruling the exceptions to the referee's report and his action in the premises, affirming the same, will not be disturbed.

**In re MALINO.****(District Court, S. D. New York. June 5, 1902.)****1. BANKRUPTCY—PROCEEDINGS FOR APPOINTMENT OF TRUSTEE—OBJECTIONS TO PROOF OF CLAIMS.**

The proceedings for the appointment of a trustee in bankruptcy should not be so summary as to exclude consideration of all objections to the proof of claims for the purpose of qualifying the creditors to vote, but the referee should at least hear the objections sufficiently to determine whether they are made in good faith; and if so, and they appear to be well founded, the claims should not be allowed for voting purposes.

In Bankruptcy.

Weil, Wolf & Kramer, for certain creditors.

James, Schell & Elkus, for trustee.

Hays & Hershfield, for bankrupt.

ADAMS, District Judge. My opinion is asked with respect to certain proceedings before the Referee which resulted in the election of a trustee. The Referee refused therein to entertain objections to certain claims proffered on the ground that the claimants were preferred creditors and not entitled to have their claims allowed until the preferences were surrendered. The Referee overruled the objections, offering to consider them later, and accepted the proofs of claims objected to as presented and a trustee was elected thereupon. I think the proceedings were erroneous. The right of creditors to select a trustee is a substantial one (*In re Henschel*, 7 Am. Bankr. R. 662, 113 Fed. 443) and it does not rest in the discretion of the Referee to allow claims as voting bases when objections are made, which are apparently genuine. While the selection of a trustee can not be tied up indefinitely by obstructive tactics, which are obviously for the purpose of delay (*In re Sumner*, 4 Am. Bankr. R. 123, 101 Fed. 224), and in proper cases provisional allowances or disallowances may be made in order that a trustee may be expeditiously selected nevertheless the proceeding should not be so summary as to exclude the consideration of all objections. Objecting creditors, and the bankrupt are entitled to a hearing upon the objections for the purpose of determining, at least, whether they are honestly made and there is reasonable ground for their consideration. These facts being established, the claims should not be allowed for the purpose of voting.

The election of the trustee Wendt is set aside and the matter remitted to the Referee for further proceedings in conformity herewith.

SOUTHERN BUILDING & LOAN ASS'N OF KNOX COUNTY, TENN.,  
et al. v. MILLER.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1902.)

No. 444.

**1 BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY PROCEEDINGS—DISTRIBUTION OF ASSETS.**

Where the affairs of an insolvent building and loan association, having shareholders and assets in many different states, are being wound up by a court of equity of the state of its domicile, by whose laws its contracts and the rights of its shareholders are governed, such court should be regarded as the court of primary jurisdiction; and courts in other states, whether state or federal, which have collected assets of the association by their receivers either in ancillary or original proceedings, in the exercise of a sound judicial discretion should remit the net amount of such collections remaining for distribution among the shareholders to the domiciliary court, that the distribution may be equitably made between all the shareholders.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

See 49 C. C. A. 21, 110 Fed. 35.

R. M. Page and Jerome Templeton, for appellants.

I. H. Larew, for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and WADDILL, District Judges.

MORRIS, District Judge. This is an appeal by the Southern Building & Loan Association of Knox County, Tenn., by George Young, by a great number of others, who are stockholders in said association, and by D. A. Carpenter, receiver of said association, appointed by the chancery court at Knoxville, in the state of Tennessee. The appeal is from an order of the circuit court of the United States for the Western district of Virginia, entered July 3, 1901, which dismissed the petition of the said appellants, filed by direction of the chancery court at Knoxville, praying for an order directing that the funds in the hands of J. R. Miller, the receiver appointed by the circuit court for the Western district of Virginia, be transmitted to the chancery court of Knox county, Tenn., or its receiver, for general distribution among all stockholders of the association, and from the order of said United States circuit court for the Western district of Virginia, directing its receiver, Miller, to retain all funds coming to his hands for distribution by and under the orders of the circuit court of the United States for the Western district of Virginia, wheresoever the claimants might be or reside.

The first bill in order of time for the winding up and distribution of the assets of the Southern Building & Loan Association of Knox County, Tenn., a corporation of Tennessee, having its home office and domicile at Knoxville, in that state, was filed by Linda H. Johnson, a citizen of Indiana, in behalf of all stockholders and creditors, on January 20, 1897, in the United States circuit court for the Northern division of the Eastern district of Tennessee, at Knoxville, and imme-

diately thereafter the same complainants, on January 27, 1897, filed the bill in the present case in the circuit court of the United States for the Western district of Virginia as a dependent and ancillary bill in and of the complainant's bill filed in Tennessee, and prayed the appointment of a receiver, and all proper orders and decrees necessary to convert the assets of said association in the Western district of Virginia into money, and transmit the same to the Tennessee court for distribution. It so happened that upon further consideration of the bill filed in the circuit court of the United States at Knoxville, Tenn., the judge of that court, upon report of its special master, was of opinion that the association could successfully continue business, and on March 19, 1897, he dismissed that bill, and discharged the temporary receiver. Thereupon another bill was filed on April 16, 1897, by J. T. Barrow and others, against the association, in the chancery court at Knoxville, Tenn., and such proceedings were had that D. A. Carpenter became the receiver of the assets of the association. The association had many mortgage investments and borrowing stockholders in 17 different states, and proceedings were instituted and receivers appointed in those states to collect its assets, and it is stated that all those courts except the court in which the present case is pending in the Western district of Virginia are remitting the funds for distribution to the chancery court of Knox county, Tenn., and have remitted collections amounting to over \$700,000, recognizing it as the principal or domiciliary court of primary jurisdiction at the domicile of the association, which should be permitted to distribute the funds of the association. It appears that there are over 7,000 stockholders, residing in a great number of states, entitled to share in these funds, the aggregate amount of whose free outstanding stock was \$2,026,347.63. It further appears that nearly all the stockholders of the association, including a large portion of those whose residence is in the Western district of Virginia, have filed their claims as stockholders in the Tennessee court, and have received the dividends which have been there declared. Only about \$15,000 of stockholders' claims have been filed in the circuit court for the Western district of Virginia. Those who have filed their claims in that court have been paid, by order of that court, the same dividend which was declared by the Tennessee court. The amount due to the association from loans in the Western district of Virginia was about \$180,000. On May 6, 1897, by decree of the chancery court of Knox county, the association made a deed of all its assets to Receiver Carpenter, and especially of all the notes and mortgages of borrowing stockholders and other debtors. At the time of the appointment of the receiver by the chancery court of Knox county and the making of said deed to its receiver there were in the company's office at Knoxville, Tenn., notes and mortgages belonging to the association, due from residents of the Western district of Virginia, amounting to \$179,628, and these were delivered to Receiver Carpenter, and were by him, under order of said Knox county court, all delivered into the custody of the United States circuit court for the Western district of Virginia, and for some four years it has been Receiver Miller's duty to reduce them into money. There is no sug-

gestion that the chancery court at Knoxville and its receiver is not faithfully administering the affairs of said association, with full protection to all claimants, and distributing the funds as collected by declaring dividends to all shareholders from time to time.

It is obvious that if each of the courts in the 16 different states in which it has been necessary to have receivers appointed to collect the mortgage debts due by borrowing members of said association is to proceed to call in all the installment shareholders, and independently to consider their claims, and to adjudicate their rights and make distribution among them of the amounts collected by each of said courts, intolerable expense, delay, and confusion is sure to result; while, on the contrary, if the funds are transmitted to the Tennessee court, which is the court of the domicile of the association, where already very nearly all the stockholders have filed their claims, the distribution can continue to be made in an orderly and proper way with the least delay and cost. The one method is so sensible, equitable, and practical, and the other so wasteful and impractical, that it is hardly to be supposed, there being no creditors in the Western district of Virginia, that the petition asking for the transmission of the funds, after making proper provision for expenses, costs, and allowances, would have been refused, except for a consideration now about to be mentioned. The bill in the present case, filed by Linda H. Johnson, was originally filed as a professedly ancillary and dependent bill in aid of the bill filed by her in the United States circuit court at Knoxville, Tenn. That original bill in the circuit court was dismissed, and there followed the bill, seeking substantially the same relief filed by J. T. Barrow and others, in the chancery court of Knox county, against the association, in which the association was adjudicated insolvent, and the appellant Carpenter was appointed receiver. Thereupon Linda H. Johnson filed her supplemental bill in the present case in the Western district of Virginia, reciting the foregoing facts, and representing to the court that since the temporary receiver had been appointed in that court suits had been begun against the association in various state courts of Virginia, and that, if the cause should be dismissed, and said suits allowed to mature, and numerous and conflicting receiverships be thereby allowed to take the assets of the association, there would be loss to the stockholders, and she prayed the court to retain the cause as an original proceeding for the benefit and protection of the stockholders and creditors of the defendant association. The defendant association answered the amended bill, admitting its averments, and that the receivers appointed by the chancery court of Knox county were winding up its affairs as an insolvent corporation, and that it would be necessary for the court to appoint receivers to take charge of its assets in the Western district of Virginia, and collect the same, and under proper directions of the court to transmit the same to the chancery court of Knox county, there to be distributed to the association's stockholders. Thereupon, on July 5, 1897, J. R. Miller was appointed permanent receiver, and directed to file a bond in the penalty of \$10,000, and to take charge of all the property and assets of the association within the jurisdiction of the court, and directing that all causes

of action and claims against the association within the Western district of Virginia should be settled in that suit.

It is contended by the receiver, J. R. Miller, the appellee, that the filing of the amended bill changed the character of the proceeding, so that it became an original bill, devolving upon the court the right and duty to proceed to the end with it as an original bill, without reference to any other court or proceeding, or, at any rate, putting it entirely within the judge's discretion whether the court should do so or not. This view overlooks the essential character, object, and intention of the resort to courts of equity in this class of cases. Such bills are quite different from simple creditors' bills in cases in which the complainants and interveners have no contractual relations with each other. In the present case all creditors, if there were any, have been settled with, and the only claimants of the funds now in the circuit court for the Western district of Virginia are the stockholders of the association, who are under either an express or an implied contract with each other, arising out of the mutual character of the association, that its funds shall be ratably divided among all its members according to their respective contributions as shareholders; and it also appears that their subscriptions to stock were made with especial reference to the laws of Tennessee, and to be governed by the laws of that state. The supplemental and amended bill filed by Linda H. Johnson exhibited to the court the decree which had been passed by the chancery court at Knoxville instructing its receiver to take into his possession the assets of the association, not only in Tennessee, but in all other states. The chancery court at Knoxville and its receiver came into possession of all the promissory notes, deeds, mortgages, evidences of debt, and books of account of the association, which were all kept at its home office in Knoxville, Tenn.; and its receiver having possession of them, and having title to them also, by the deed to him from the association, made to him by the court's order, delivered them, by order of the Knoxville court, to the receiver appointed by the circuit court of the United States for the Western district of Virginia for the purpose of being converted into money, in order that the net fund should be distributed by the court of primary jurisdiction, being the only court which has before it the material to enable it to determine without conflicting adjudications the questions arising among the stockholders, according to the law of Tennessee, by which law the stockholders are bound. Great confirmation of this view of the law is found in the fact that all of the courts in the 16 different states, with the exception of the one now appealed from, and perhaps one other, have recognized the necessity and propriety of transmitting the funds collected by them to the court of the domicile of the association, which is actively engaged in making appropriate distribution.

The principle underlying this rule has been stated and enforced in numerous cases. *Smith v. Taggart*, 30 C. C. A. 563, 87 Fed. 94; *Parsons v. Insurance Co. (C. C.)* 31 Fed. 305; *Failey v. Talbee (C. C.)* 55 Fed. 892; *Buswell v. Supreme Sitting (1894)* 161 Mass. 224, 229, 234, 235, 36 N. E. 1065, 23 L. R. A. 846. This last is a carefully considered opinion, covering most of the questions which arise in

the present appeal. We do not mean to rule that there can be no discretion exercised in dealing with the question of transmitting funds in cases similar to this; but it is a legal, and not an arbitrary, discretion, somewhat similar to the discretion exercised in determining whether a receiver should be appointed or an injunction issue, and upon what terms, and the court is charged with the duty of considering whether, under all the circumstances, it best subserves the interest of all the shareholders. In the present case every circumstance pointed to the wisdom and economy of transmitting the funds to the Tennessee court, and no fact or circumstance was urged against it at the time the application was made except the assertion by Receiver Miller of a naked legal right to hold on to the funds upon the ground that by the dismissal of the first suit in Tennessee, to which this suit was professedly ancillary, the Virginia court became by the amended bill filed therein the court of primary jurisdiction, entitled to the exclusive right to wind up the affairs of this Tennessee corporation. He claimed that to transmit the funds would be in derogation of Virginia stockholders, and he prayed the court to order that all the books, papers, notes, and evidences of debt pertaining to the business of the association be delivered to him, and that Receiver Carpenter be ordered to bring into that court all the money and assets of the association remaining in his hands undistributed, in order that the Virginia court might do justice to all parties in interest. The Tennessee court and its receiver had then been engaged for four years in collecting and distributing the funds of the association among the shareholders, without complaint, so far as appears, and there was, so far as appears, nothing urged against transmitting the funds to that court, except the opposition of the receiver.

It is proper to notice that in the transcript of record sent up with this appeal there are a number of papers having reference to a difference between counsel as to what the court below had really intended by its decision, and whether the decree fairly embodied the rulings orally announced by the judge. Much of this occurred when Judge Paul was seriously ill of the sickness which resulted in his lamented death, and when he may not have had in mind, and possibly was not well enough to have called to his attention by counsel, the inconvenience and difficulties likely to result from the order he signed.

The order and decree entered July 3, 1901, dismissing the petition of the appellants praying for an order directing that the funds of its receiver be transmitted to the Tennessee court, was a final decree on that subject-matter, and was, we think, error, and should be reversed, and also the decree adjudging that Receiver Miller retain all funds coming to his hands to be distributed by him under orders of the court to all claimants wheresoever the said claimants might be or reside, should be set aside, and the court should pass such orders as may be appropriate to carry this opinion into effect, securing to those shareholders who have filed their claims in the circuit court for the Western district of Virginia equality with those who have filed their claims in the Tennessee court.

Reversed.



## CLARKE et al. v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1902.)

No. 410.

## 1. LIFE INSURANCE POLICY—EXCEPTED RISKS—SELF-DESTRUCTION, SANE OR INSANE.

A provision of a life insurance policy that "self-destruction, sane or insane," is a risk not assumed, must be given effect in accordance with its plain meaning, and there can be no recovery under such policy where the insured took his own life other than accidentally, whatever may have been his mental condition.

In Error to the Circuit Court of the United States for the District of Maryland.

The point presented for review on this writ of error arises out of the following facts and proceedings: The Equitable Life Assurance Society of the United States, on March 25, 1899, issued to William E. Clarke two policies of insurance, each conditioned for payment of \$10,000 upon the death of said William E. Clarke to his wife, Sallie F. Clarke, and, on certain contingencies, to the other plaintiffs in error. Among other provisions, each of these policies contains the provision that "self-destruction, sane or insane, within one year from the date of the issuance of the policies, is a risk not assumed by the society in this contract." On December 14, 1899, said William E. Clarke died from the effects of a pistol shot wound, which was inflicted on his head while the pistol was in his own hands. Due proofs of loss were furnished to the defendant company, and payment of said policies was demanded, and upon the refusal of said company to recognize this liability plaintiffs in error filed in the superior court of Baltimore city a declaration in the usual form against the defendant. The defendant appeared in that court, and had the case removed to the circuit court of the United States for the district of Maryland, in which latter court it filed four pleas, the first two of which were general issue pleas, on which issue was joined by the plaintiff. The third and fourth pleas were as follows: For a third plea it says that "said policies were made subject to a proviso that the defendant did not assume the risk of self-destruction, sane or insane, of the said William E. Clarke, within one year from the date of the issuance of the said policies, and that the said William E. Clarke committed self-destruction on or about the 14th day of December, 1899, by shooting himself through the head with a pistol, by reason of which self-destruction of said William E. Clarke said policies became null and void;" and for a fourth plea it says that it was "a condition of said policies that the said defendant should be liable to pay said insurance only on the receipt of satisfactory proofs of the death of the insured, and that proofs have been furnished to said defendant by said plaintiffs, which proofs show the death of said William E. Clarke on or about the 14th day of December, 1899, and states the cause of his death as follows: Grippe, during the last month of his life, together with grief over the loss of his daughter four years ago, and overwork in business, combined to bring on mental derangement. Pistol shot ended his life during a temporary aberration"; and also as follows: "He had grippe about a month previously, and was weak and depressed, and during an attack of despondency shot himself in the head, and died in a few minutes." And the said policies were subject to a proviso that the said defendant did not assume the risk of self-destruction, sane or insane, of the said William E. Clarke within one year from the date of the issuance of the said policies. Thereupon the plaintiffs filed special replications to each of the said third and fourth pleas, which replications were as follows: "As to the defendant's third plea, the plaintiffs say that

¶1. Suicide as defense to action on insurance policy, see notes to Insurance Co. v. Florida, 16 C. C. A. 623; Casualty Co. v. Egbert, 28 C. C. A. 284. See Insurance, vol. 28, Cent. Dig. §§ 1159, 1160.

they admit that said policies were made subject to the proviso mentioned in said plea, and they further admit said William E. Clarke on said 14th day of December, 1899, shot himself in the head with a pistol, in consequence of which he died on said day; but said plaintiffs deny that said act by said William E. Clarke constituted the self-destruction of said William E. Clarke within the meaning of said proviso in said policies; and said plaintiffs further say that at the time said William E. Clarke so shot himself in the head his mind was so affected and impaired by insanity that he, the said William E. Clarke, was then and there not conscious of the physical nature and consequence of the act he then committed, and did not intend by it to cause his death, but was moved and impelled to commit said act by an irresistible, insane impulse." "As to the defendant's fourth plea, the plaintiffs say that they admit that said policies contained the condition in reference to self-destruction mentioned in said plea, and that they submitted to said defendant proof showing the death of the said William E. Clarke on the 14th day of December, 1899, and that said proof of death contained the statements set out in said plea; but said plaintiffs say that at the time said William E. Clarke so shot himself in the head his mind was so impaired and affected by insanity that he, the said William E. Clarke, was then and there not conscious of the physical nature and consequences of the act he then committed, and did not intend by it to cause his death, but was moved and impelled to commit said act by irresistible impulse." To each of these replications the defendant demurred, and, these demurrers being sustained by the circuit court, the plaintiffs filed notice that they declined to amend said replications, and elected to stand thereupon, whereupon the circuit court entered final judgment for the defendant, and, writ of error having been granted, the case is here upon assignments of error, which present but one question, and that is whether the court below erred in sustaining the demurrer interposed by the defendant to the replications filed by the plaintiffs to the third and fourth pleas of the defendant.

Gans & Haman, for plaintiffs in error.

W. Irvine Cross, for defendant in error.

Before SIMONTON, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

BRAWLEY, District Judge (after stating the case as above). If it was an open question, there is much to be said as to the injustice of contracts of this nature, for a person ought no more to be held responsible for the loss of his life when taken by himself under the ravings of delirium, or impelled by the hallucinations of melancholy, than if he dies from an ordinary disease, or from an accident; but that question is not before us, and it seems to be well settled that insurance companies may avoid altogether this class of risks, and that, being at liberty to stipulate against hazardous occupations, unhealthy climates, or deaths from consumption or other excepted diseases, they may also contract not to assume a risk of a certain mode of death, and presumably the premiums are calculated on the elimination of that risk. If the assured is informed in apt words of the extent of the limitation, it is not perceived that there is any good reason why such contract should not be governed by the same rules of interpretation which control courts in all other cases of contract, and why plain and unambiguous words should be frittered away by casuistry and refinement. Something of the cloud which seems to obscure the natural interpretation of contracts like this arises from certain expressions in the opinions of courts of the highest authority in cases arising prior to the time when the insurance companies embodied

in their contracts of insurance what Mr. Justice Gray calls "the significant and decisive words" employed here. It may not be unprofitable to refer to some of these decisions construing the effect of provisions against liability for suicide in life insurance policies. The case of *Borradaile v. Hunter*, 5 Man. & G. 639, is the leading English authority. In that case the words of the proviso were "died by his own hand," and the decision was that the insurer would be exempt from liability if the act of self-destruction was the voluntary and willful act of a man having at the time sufficient powers of mind or reasoning to understand the physical nature and consequences of such an act, having at the time the purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding the moral nature and quality of his purpose was not relevant to the inquiry further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself. The leading case in the supreme court of the United States in construing a similar proviso is *Insurance Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236, where the American doctrine, differing from the English, is established. The court in that case holds.

"If the assured, being in the ordinary possession of his reasoning faculties, from anger, pride, jealousy, or desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

This case, which has been repeatedly reaffirmed, held that the proviso against death by suicide did not embrace a case of self-killing which was not intentional, and when the deceased did not realize the physical nature and consequences of his act, and took his own life, being moved by an irresistible, insane impulse, it was not his act, and no more than a mere accident.

To meet this condition, which practically nullified all provisos against death by suicide, the insurance companies have sought to avoid altogether this class of risks, and the policy under consideration evidently was intended as a contract where the insurer did not assume the risk of a certain mode of death. The first case that came up for decision in the supreme court of the United States upon a policy containing a proviso that the insurance company did not assume the risk of self-destruction, sane or insane, was *Bigelow v. Insurance Co.*, 93 U. S. 286, 23 L. Ed. 918, where Mr. Justice Davis uses this language:

"As the line between sanity and insanity is often shadowy and difficult to define, this company thought proper to take the subject from the domain of controversy, and by express stipulation preclude all liability by reason of the death of the insured by his own act, whether he was at the time a responsible moral agent or not. Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was

of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one could be misled by them. Nor could expansion of this language more clearly express the intention of the parties. In the popular, as well as the legal, sense, suicide means, as we have seen, the death of the party by his own voluntary act; and this condition, based on the construction of this language, informed the holder of the policy that, if he purposely destroyed his own life, the company would be relieved from liability."

And the court sustained the ruling of the court below in holding that a replication setting up that "at the time when he inflicted said wound he was of unsound mind, and wholly unconscious of his act," was bad; and adds:

"Bigelow knew that he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences."

Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308, was an action upon an accident policy of insurance which contained a proviso that no claim should be made when a death or injury may have been caused "by suicide (felonious or otherwise, sane or insane)." The petition, which set out the plaintiff's cause of action, alleged that the insured was accidentally shot through the heart by a pistol or gun by a person or persons unknown to plaintiff. The answer alleged that the death was caused by suicide. The court says:

"Upon the whole case the court is of opinion that by the terms of the contract the burden of proof was upon the plaintiff, under the limitations we have stated, to show from all the evidence that the death of the insured was caused by external violence and accidental means. Also that no valid claim can be made under the policy if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death."

In Insurance Co. v. Crandal, 120 U. S. 531, 7 Sup. Ct. 687, 30 L. Ed. 740, the suit was upon a policy which provided that the insurance should not extend to death by suicide or self-inflicted injuries, and Justice Gray says:

"This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words 'sane or insane,' does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him from foreseeing and premeditating its physical consequences and understanding its moral nature and aspect."

And in Insurance Co. v. Akens, 150 U. S. 475, 14 Sup. Ct. 157, 37 L. Ed. 1148, which was upon a like policy, the same justice says:

"The clause contains no such significant and decisive words as 'die by suicide, sane or insane,' as in *Bigelow v. Insurance Co.*, or by 'suicide (felonious or otherwise, sane or insane),' as in *Insurance Co. v. McConkey*."

It will be observed that the proviso under consideration contains no words limiting its operation to intentional suicide. The company contracted that it would not assume the risk of self-destruction, sane or insane. The contention of the appellant is that self-destruction avoids the policy if the insured lacked intelligence to know that his

act was wrong, but that it is not avoided if he did not understand the physical nature of his act. To sustain such contention would require us to believe that the deceased shot himself through the head because he did not know that it would kill him. Instead of giving to the words of the proviso the plain meaning for which they were manifestly intended,—that the insurer intended to guard itself from liability if the insured came to his death from any physical movement of his own, whether sane or insane,—we would lose ourselves in consideration of the different phases of insanity, be compelled to split it into degrees, and to hold that, if he was so entirely insane as not to understand the physical consequences of his act, the proviso would be avoided, while a lesser degree of insanity would make the company liable.

It is also contended that the replication here may be differentiated from that which was held "bad" in *Bigelow v. Insurance Co.* The replication there set up was that "at the time when he inflicted said wound he was of unsound mind, and wholly unconscious of his act." The replication here is that he was "not conscious of the physical nature and consequences of the act he then committed, and did not intend by it to cause his death, but was moved and impelled to commit said act by an irresistible insane impulse." This seems to us a distinction without a difference, and may be best answered by citation from the opinion of the court in *De Gogorza v. Insurance Co.*, 65 N. Y. 232:

"But the question seems to involve more the refinement of language than the application of practical sense, and we are of opinion that in the common judgment of mankind it would be considered that, when a totally insane man blows his brains out with a pistol, that he would be said to have died by his own hand within the meaning of the policy, such as we have under consideration."

It will be observed that the proviso is not limited to willful or intentional suicide, but includes any self-destruction, sane or insane. If the assured caused his own death while sane or insane, that is the end of any right to recover, and there can be no looking into the condition of the mind of the deceased when he committed the fatal act. The case might be different if the replication had stated that his death was due to an accidental cause,—if, for example, he had taken a poisonous draught, mistaking it for water; or walked through a window, mistaking it for a door. Then it would fall within the rule established by a number of cases which hold that accidental or unintentional self-destruction is not within a condition forfeiting a policy for suicide. If the deceased had died by reason of any such accidental killing, the replication would have traversed the plea; but the replication admits that he took his own life, "moved by an irresistible insane impulse." In plain words, it confesses the cause of death, and seeks to avoid the bar by setting up a state of insanity. It does not seem to be denied that an insurance company may contract to avoid liability if death results from any disease of the mind, just as it may guard itself from liability from any specified bodily disease if the contract is embodied in apt language. The words "self-destruction, sane or insane," would mean nothing if the appellant's contention is sus-

tained, for we would have to conclude that the deceased did not die by his own hand if death resulted from irresistible insane impulse. We are of opinion that by the plain rules of interpretation the defendant, under this contract, is exempt from liability, and we do not know in what more precise words the plain intention of the parties could have been more accurately expressed.

The judgment of the court below is affirmed.

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CITY OF ABILENE v. CORNELL UNIVERSITY.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1902.)

No. 1,662.

1. **SUFFICIENCY OF PLEADING—EFFECT OF WAIVER OF OBJECTION.**

Where an objection to an answer pleading the defense of *res judicial* was waived by plaintiff by failing to demur, and the only objection made to the evidence introduced in support of such defense was the general one that it was "incompetent, immaterial, and irrelevant," it was error for the court, after the cause had been finally submitted and taken under advisement, to reject such evidence, and to determine the cause without passing upon such defense, on the ground that it was not sufficiently pleaded.

2. **RES JUDICATA—SUFFICIENCY OF PLEA.**

The answer, in an action on municipal bonds, set up in bar a former judgment rendered in an action brought on coupons from the same bonds, which adjudged the bonds to be illegal and void. It alleged that the bonds and coupons were owned at that time by the present plaintiff, which delivered them to an agent, with instructions to collect the same; that they were assigned by such agent without consideration, and for the sole purpose of having suit brought thereon to a third person, in whose name the litigation was conducted; but that plaintiff remained at all times the actual owner thereof. *Held*, that such plea was sufficient notwithstanding the failure to expressly allege that the assignment was by the authority or with the consent of plaintiff, such fact being fairly inferable from the other facts pleaded.

3. **PROCEEDINGS IN ERROR—REMAND ON REVERSAL—ISSUES NOT DETERMINED BELOW.**

Where an issue was not determined by the trial court, which erroneously ruled that it was not within the pleadings, it will not be determined by the appellate court on a writ of error, but the cause will be remanded for a new trial.

In Error to the Circuit Court of the United States for the District of Kansas.

C. F. Mead and J. R. Young, for plaintiff in error.

Charles B. Wood and Horace S. Oakley, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This action was instituted by Cornell University, the defendant in error, against the city of Abilene, Kan., the plaintiff in error, on certain bonds, 10 in number, which were executed and delivered by the defendant city on July 2, 1888, and became due and payable 10 years thereafter. The plaintiff claimed to be an innocent purchaser of the bonds, for value and before maturity, from

H. C. Speer, to whom "or bearer" the bonds were originally made payable. The answer which was interposed by the defendant city contained a denial of certain allegations of the complaint and certain special defenses, among others a plea that the matter in issue was *res judicata*.

The latter plea averred, in substance, that in the year 1895 one John W. Edminson brought an action against the defendant city in the district court of Dickinson county, Kan., founded upon 60 coupons attached to the very bonds now in suit; that to said action, so brought in the state court, the defendant city appeared and pleaded the invalidity of the bonds for the same reasons that are assigned in other special defenses to the present action; that said former action was duly tried and determined in the state court, and resulted in an adjudication that the bonds in suit were null and void, and that such judgment remained in full force and effect and had become final prior to the commencement of the present action. The plea further averred that at the time Edminson brought said former action the present plaintiff, Cornell University, was the real and true owner of the coupons sued upon and of the bonds to which they were attached; that said bonds and the coupons so sued upon by said Edminson were delivered by Cornell University to N. W. Harris or N. W. Harris & Company, with instructions to collect the same; that they were assigned by said Harris to the said Edminson, without consideration, for the sole purpose of bringing a suit thereon in the name of Edminson; and that Cornell University remained the actual owner and holder thereof during all the time said former action was pending and at the time the judgment therein was rendered, and that by reason of such facts the right of the plaintiff to maintain the present action had become *res judicata*.

The reply to this plea was a general denial, no demurrer thereto having at any time been interposed. A stipulation was subsequently filed waiving a jury, and a further stipulation admitting that the coupons described in the suit of Edminson against the city of Abilene were coupons belonging to the 10 bonds sued upon in the present action. When the case was reached for trial the defendant city offered in evidence the "case made" in Edminson against the city of Abilene, the same being a complete record of all the pleadings and evidence in that case as made up for the purpose of obtaining a review in the supreme court of Kansas of the judgment at *nisi prius* in that case. When this offer was made the record now before this court recites that it was "agreed in open court by the plaintiff and the defendant that all the evidence and testimony contained in said 'case made' shall be treated and regarded as having been offered in evidence in this trial to the same extent as if the witnesses had been sworn and testified therein, and each and all of the written instruments had been specially introduced in evidence herein, all objection to the same being copies and not originals being hereby expressly waived; objection being made by the plaintiff only that the same, if so properly offered and presented, would be incompetent, immaterial, and irrelevant."

The case having been submitted on the aforesaid evidence, and on certain depositions which were offered for the purpose of showing the

relations that existed between Edminson and Cornell University when the former action was brought, the court took the case under advisement for some days. It afterwards rendered a judgment in favor of the plaintiff and against the city of Abilene on the sole ground, as appears from the opinion of the trial court which has been incorporated into the record, "that the answer of the city in this case does not sufficiently allege a defense of *res adjudicata*." The trial court held, as it seems, that the plea of *res judicata* did not sufficiently aver that Harris had authority to assign the bonds and coupons to Edminson; that it did not appear that Edminson, in bringing the former suit, was the agent or representative of Cornell University, but that it did appear that in bringing such action he was a mere interloper, and that his action in bringing the suit was neither authorized nor ratified by the plaintiff. On this ground, that no privity was alleged to exist between the university and Edminson, it was ruled that the judgment in the former case was not binding upon the university, and would not estop it from maintaining the present action.

Such action on the part of the trial court was clearly erroneous, operating, as it did, as a surprise to counsel for the defendant city, who obviously had no reason to anticipate such action. The sufficiency of the plea had not been challenged by demurrer, nor was it challenged when the record in the former suit was offered in evidence, in any such way as to advise any one that the objection to the evidence was grounded on any formal defect in the plea; such, for example, as the defect suggested by the trial judge, that the plea did not, in express terms, allege that Harris acted with the sanction and approval of the university in turning the bonds and coupons over to Edminson to be sued upon in his own name. Counsel for the plaintiff below do not seem to have urged this defect at any time during the progress of the trial, but it was pointed out for the first time by the trial judge in rendering judgment, and at a time when the defendant had no opportunity to remedy the supposed defect by an amendment of its plea. The plaintiff in fact waived any such imperfections in the plea by failing to demur to it, and such waiver was not recalled by the general objection to the "case made" on the ground of incompetency, immateriality, and irrelevancy, since it has been repeatedly held that a general objection of this sort, which does not point out the particular defect which renders the evidence incompetent, immaterial, or irrelevant, will not avail in an appellate tribunal. *Insurance Co. v. Miller*, 8 C. C. A. 612, 60 Fed. 254, and cases there cited. The present case is one where the rule in question should be rigidly enforced, since it is apparent that the alleged defect in the plea was not in the mind of counsel by whom the general objection aforesaid was made.

Moreover, we are of opinion that the plea was good and sufficient notwithstanding the failure of the pleader to expressly aver that the bonds and coupons were assigned to Edminson with the knowledge and consent of the university. Such knowledge and consent, we think, is clearly implied in the allegation that the bonds and coupons were delivered to Harris with general instructions to proceed and collect the same, and that they remained the property of the university during all the time the former action was pending. In view of these



allegations, it may be inferred fairly that the direction to Harris to collect the securities meant that he should proceed with the collection in such manner as he deemed most conducive to the interest of his client, and that he advised his client, as it was his duty to do, of the action that had been taken in that behalf, and that his action was duly ratified.

Inasmuch as the trial court ruled that the question, whether the former action operated as a bar to the present action, was not within the issues raised by the pleadings, because the plea was defective, it held, as a matter of course, that all the evidence which was offered to sustain the plea, consisting, as it did, of the record in the former case and certain depositions that were offered to establish the relations existing between Edminson and the university, was inadmissible; and all of such testimony was in fact rejected, as appears from the opinion of the trial court. It follows, therefore, that the issue arising on the plea was not considered by the trial court, and was neither tried nor determined. In view of that fact, we think that the proper course to pursue is to reverse the case for the reasons already stated and remand it for a new trial. We might possibly look into the rejected record and the rejected depositions and determine the issue arising on the plea, but by so doing we would be trying on appeal an issue that was not tried below, and one which the trial court declined to determine on the erroneous theory that it was not within the pleadings.

It is accordingly ordered that the judgment be reversed, and the cause remanded for a new trial.

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MUSKOGEE NAT. TEL. CO. v. HALL et al.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1902.)

No. 1,688.

**1. APPEAL—QUESTIONS REVIEWABLE—FAILURE OF INTERVENER TO JOIN IN APPEAL.**

An appellate court, on affirmance of the decree appealed from as between the original parties, has no power to reverse it so far as it denied the relief prayed for by an intervener in his own right, where such intervener did not join in the appeal.

**2. TELEPHONES—POWER TO GRANT EXCLUSIVE FRANCHISE.**

Telephone companies, like telegraph companies, are important agencies in the transaction of interstate commerce, and neither a state nor an Indian nation has power to grant to one company an exclusive right to maintain telephone lines within its territory. Such a grant, being void ab initio, cannot be invoked to prevent the construction and maintenance of lines by other companies or persons, although they are not interstate, but merely local.

**3. SAME—INDIAN TERRITORY—EFFECT OF REGULATION BY CONGRESS.**

Congress having provided, by Act March 3, 1901 (31 Stat. 1083), for the granting of franchises for telephone lines in the Indian Territory, in the exercise of its power to regulate commerce among the states and with the Indian tribes, such legislation necessarily annulled any grants previously made by one of the Indian nations which conflict therewith.

Appeal from the United States Court of Appeals in the Indian Territory.

On July 17, 1899, the Muskogee National Telephone Company, the appellant, filed its bill of complaint against R. F. Hall and G. W. Pitman, two of the appellees, in which the complainant alleged, in substance, that it had an exclusive franchise which had been granted to it by the Creek Nation on December 7, 1897, authorizing it to erect, construct, operate, and maintain a system of telephone lines within the Muskogee or Creek Nation, in pursuance of which it was operating a large number of telephone lines in the Creek Nation, and was engaged in extending such lines throughout the nation; that R. F. Hall and G. W. Pitman, in violation of its alleged exclusive franchise, were proposing to erect and conduct a telephone line in the town of Tulsa, within the limits of the Creek Nation; and that in the prosecution of said purpose they were then engaged in setting their poles and stringing their wires within said town, to the great and irreparable injury of the complainant. It accordingly prayed for an injunction restraining the defendants from further erecting telephone poles and stringing wires in the town of Tulsa, or in any other portion of the Creek Nation, and from operating telephone lines in said town, or elsewhere in the nation. The defendants filed a demurrer to the bill in the United States courts in the Indian Territory for the Northern district, where said suit was instituted, and upon the hearing thereof the demurrer was sustained, and an injunction, such as was prayed for, was refused. Thereupon, on August 3, 1899, the Creek Nation intervened in said cause by filing a complaint in which it alleged, in substance, that it was interested in the controversy, in that it was entitled to a royalty of 5 per cent. upon the net earnings of the Muskogee National Telephone Company, to whom it had granted an exclusive franchise for the transaction of a telephone business. It further alleged that it was the owner in fee of the land upon which the defendants were erecting their telephone poles, and that by erecting the same they were trespassing upon the lands of the Creek Nation. In view of the premises, the Creek Nation prayed that the defendants, Hall and Pitman, be restrained from erecting telephone poles and stringing wires in the town of Tulsa, or in any other part of the Creek Nation. The defendants, Hall and Pitman, filed an answer to the intervening complaint of the Creek Nation, wherein they asserted a right to erect a telephone line in the town of Tulsa, which was an incorporated town of the Creek Nation, under and by virtue of a resolution of the council of the town of Tulsa that had been duly adopted on June 5, 1899. They further asserted a right to erect the telephone line in question under and by virtue of a permit granted to them for the erection of the line on October 10, 1899, by the acting commissioner of Indian affairs. The case afterwards came on to be heard in the lower court upon the pleadings aforesaid, and upon such hearing it was ordered and adjudged by the court that the complainants take nothing by their suit, and that the injunction prayed for, both by the telephone company and the Creek Nation, be denied. The telephone company excepted to the decree and prosecuted an appeal to the United States court of appeals in the Indian Territory; but the Creek Nation did not join in the appeal and, so far as appears, took no part in the litigation in the appellate court. On the hearing of the case in the appellate court, that court affirmed the decree "in so far as it [related] to the plaintiff, the Muskogee National Telephone Company," but reversed the decree as to the Creek Nation, and remanded the cause to the lower court, with directions, "at the suit of the Creek Nation, \* \* \* to enjoin the defendants from further proceeding in the erection and operation of its system of telephones in the town of Tulsa until the said Hall and Pitman shall be fully authorized and empowered to do so by the secretary of the interior under the act of March 3, 1901." Thereupon the Muskogee National Telephone Company appealed from that decree to this court, naming R. F. Hall, G. W. Pitman, and the Creek Nation as appellees. It assigned as error that the court of appeals in the Indian Territory erred in not reversing the judgment of the lower court, which had overruled its prayer for an injunction.

C. B. Stuart and J. H. Gordon, for appellant.

Z. T. Walrond, for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The judgment of the United States court of appeals in the Indian Territory, in so far as it undertook to reverse the decree of the lower court and to grant an injunction in favor of the Creek Nation, was erroneous, for the reason that the nation had not appealed from the decree of the lower court, so far as the record now before us discloses. The Creek Nation intervened in the cause for the protection of its own interest, namely, for the protection of the revenue which it expected to derive from the exercise by the telephone company of the exclusive franchise which the nation had attempted to grant, and to prevent the erection of telephone poles on land of which it claimed to be the owner in fee. The case was fully heard on the bill and the defendants' answer thereto, and the nation's right to any relief was denied. It failed to take an appeal from the decree, and the adjudication of the lower court, so far as it was concerned, accordingly became final. We fail to see any ground, therefore, upon which the decree of the United States court of appeals in the Indian Territory, reversing the judgment of the lower court "as to the Creek Nation," can be sustained. The nation was not before it seeking any relief, but was apparently satisfied with the ruling of the lower court, since it did not appeal.

The decision of the lower court as respects the Muskogee National Telephone Company was clearly right, unless the exclusive franchise which it asserted to erect and maintain lines of telephone within the Creek Nation can be sustained as a valid grant. If it did not have an exclusive franchise, it goes without saying that it had no right to complain because the defendants were erecting a line of telephone in the town of Tulsa, although they were doing so without lawful authority. No right of the complaining company was violated by their so doing, unless its franchise was exclusive and was being invaded; and that the Creek Nation had no power to grant an exclusive franchise such as it attempted to confer is settled, we think, by the decision in *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, 8, 24 L. Ed. 708, where precisely such a franchise, granted by the state of Florida as respects only two counties of that state, was adjudged to be invalid. It is true that in the latter case the franchise that was held to be invalid had been granted to a telegraph company; but telephone companies are equally agencies of interstate commerce, and every reason which was or that may be assigned against the grant of a monopoly to maintain telegraph lines applies with equal force against the grant of such a monopoly to a telephone company. Telephone companies, like telegraph companies, are common carriers of information, and their lines are daily employed in the transaction of interstate commerce. Some courts have held that a telephone company is included by the words "telegraph company." *Southern Bell Telephone & Telegraph Co. v. City of Richmond* (C. C.) 78 Fed. 858, 860, and cases there cited. But, be this as it may, telephone companies, like telegraph companies,

are important agencies in the transaction of interstate commerce, and no state can grant to one telephone company the exclusive right to operate telephone lines within its borders; and what a state cannot do, because it operates as an obstruction to the free flow of interstate commerce, the Creek Nation (which is said to embrace as much territory as some of the states) cannot do. It is well settled that, in the exercise of its power to regulate commerce among the several states and with the Indian tribes, congress has full authority to grant rights of way through the land occupied by the five Indian tribes domiciled in the Indian Territory for the construction of railroads (*Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; *Stephens v. Cherokee Nation*, 174 U. S. 445, 485, 19 Sup. Ct. 722, 43 L. Ed. 1041); and in the exercise of this power it has recently authorized the secretary of the interior to grant rights of way through the Indian Territory for the construction, operation, and maintenance of telephone and telegraph lines. 31 Stat. 1083, c. 832, § 3. It follows, of course, that none of these tribes had the power to declare that any one telephone company should have the sole right to construct and operate telephone lines within its borders, since the existence of such a monopoly would have a necessary tendency to prevent free communication between those who reside outside of, and those who reside within, the territory. To this extent the grant of such a franchise as the one in question operates to obstruct interstate commerce.

It is argued in behalf of the appellant, and that view seems to have been adopted by the United States court of appeals in the *Indian Territory (Telephone Co. v. Hall*, 64 S. W. 600), that because the defendants below were engaged in erecting a telephone line simply within the town of Tulsa, and had not, so far as shown, made a connection with lines outside of the nation, the exclusive franchise in question did not interfere in any way with interstate commerce, and may be upheld against it as a valid grant. The fault with this reasoning is that the exclusive feature of the grant was void ab initio. It did not remain in force until the defendants had extended their line of telephone to the borders of the nation, and cease to be operative when they had made a connection with some exterior line of telephone; but it was invalid from the time the grant was made, being an attempt on the part of the nation to exercise a power vitally affecting interstate commerce, which did not belong to it. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, 11, 24 L. Ed. 708. Even if this were not so, and even if it should be conceded that until congress legislated on the subject the exclusive feature of the franchise might be upheld, yet, when congress, on March 3, 1901 (31 Stat. 1083), in the exercise of its constitutional power to regulate commerce, saw fit to provide how franchises for the construction and maintenance of telephone lines within the Indian Territory must be obtained, such action on its part necessarily prevailed over all local regulations on the subject, and operated to extinguish such exclusive rights to construct and maintain lines of telephone or telegraph within the territory as had theretofore been granted. No act of the Creek Nation on a subject within the lawful jurisdiction of the federal government can be given the effect of

nullifying or interfering to any extent with legislation by the congress of the United States, when it sees fit to pass laws on the subject. *Pensacola Tel. Co. v. W. U. Tel. Co.*, supra; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 566, 567, 7 Sup. Ct. 4, 30 L. Ed. 244; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 163, 24 L. Ed. 94; *Munn v. Illinois*, 94 U. S. 113, 135, 24 L. Ed. 77.

From any point of view, therefore, when this case was decided by the United States court of appeals in the Indian Territory on October 4, 1901, the Muskogee National Telephone Company, in view of the then recent act of congress of March 3, 1901, supra, had no right to complain that any of its charter privileges were being invaded, as it had not up to that time established any lines of telegraph in the town of Tulsa, and the decree of that court, affirming the decree below in so far as the telephone company was concerned, was clearly right. The decree as respects the Creek Nation was erroneous, for the reasons already stated. The result is that the decree of the United States court of appeals in the Indian Territory should be reversed, and the decree of the United States court in the Indian Territory, Northern division, which was rendered on April 10, 1900, being for the right party, should be affirmed. It is so ordered.

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**GLENCOVE GRANITE CO. v. CITY TRUST, SAFE DEPOSIT & SURETY CO.**

(Circuit Court of Appeals, Third Circuit. November 14, 1902.)

No. 15.

**1. FEDERAL COURTS—JUDGMENT OF STATE COURT—EFFECT.**

In an action in a federal court sitting in another state the same effect will be given to a judgment in a suit in a state court as would be given to it by the courts of the state in which it was rendered.

**2. SAME—DISMISSAL OF COMPLAINT—EFFECT.**

Code Civ. Proc. N. Y. § 1209, provides that a final judgment dismissing the complaint before or after trial does not prevent a new action for the same cause, unless it expressly declares or it appears by the judgment roll that it is rendered on the merits. *Held*, that where a complaint in an action by plaintiff, a foreign corporation, in a state court of New York, was dismissed, for failure of plaintiff to prove that it had received a certificate from the secretary of state authorizing it to do business in the state, such judgment was not on the merits, and was therefore no bar to a subsequent action by plaintiff in a federal court sitting in another state on the same cause of action.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Horace L. Cheyney and La Roy D. Gove, for plaintiff in error.  
Lincoln L. Eyre, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The former writ of error in this litigation was to a judgment entered against the defendant below for

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1507.

want of a sufficient affidavit of defense. The only question then presented to this court for determination was whether the original and supplemental affidavits of defense which the defendant had filed in answer to the plaintiff's statement of claim were sufficient to prevent a summary judgment. The majority of this court being of opinion that the affidavits of defense were sufficient, the judgment against the defendant was reversed, and the case remanded for further proceedings. Accordingly there was a trial in the circuit court, and a verdict rendered in favor of the plaintiff for \$6,964.18, the court reserving "the question whether there is any evidence to go to the jury in support of the plaintiff's claim." Afterwards the court entered judgment for the defendant non obstante veredicto. This writ of error is to that judgment.

The question of law involved in the reservation is whether the decree or judgment of the supreme court in and for the county of New York, in the state of New York, in a former action wherein the Glencove Granite Company was the plaintiff, and Patrick Costello and the City Trust, Safe Deposit & Surety Company were defendants, against Patrick Costello, the principal in the bond here in suit, and dismissing the complaint as against the City Trust, Safe Deposit & Surety Company, the surety in the bond, was an adjudication in favor of the surety company upon the question of its liability upon the bond, and conclusive against the plaintiff in the suit in the circuit court. 114 Fed. 978. This question is presented to this court for the first time. It was not before us upon the former writ of error. The only question we were then called on to decide was whether the affidavits of defense sufficiently averred a former adjudication of the subject-matter of the suit in the circuit court. This court determined no other question. City Trust, Safe Deposit & Surety Co. v. Glencove Granite Co., 51 C. C. A. 139, 113 Fed. 177.

In stating that this court had declared that the decree or judgment of the supreme court of New York in the former action was rendered upon the merits, the learned judge below misread our opinion. From first to last that opinion dealt with the question of the sufficiency of the affidavits of defense. The particular passage from the opinion quoted by the learned judge below enforced the view that the New York action involved the merits of the case as between the plaintiff and the surety company, but did not declare that the merits were adjudicated therein. We were careful to note that we did not have before us the whole record in the New York action; and, finally, to avoid misapprehension as to the scope of the decision, the opinion concluded thus:

"We think, therefore, that, as the case now stands, there appears at least a *prima facie* defense. The apparent obstacle to a recovery may be open to explanation, and thus put out of the way. Again, if the statutory inhibition against doing business operates only on the remedy, and may be lifted if the delinquent corporation is able to procure out of time the issuance by the secretary of state of the required certificate (*Neuchatel Asphalte Co. v. City of New York*, 155 N. Y. 373, 377, 49 N. E. 1043), it may be competent for the plaintiff to show here that it obtained such a certificate since the former trial, or even before. Upon these questions we intimate no opinion.

We hold simply that the affidavits of defense sufficiently met the plaintiff's statement of claim, and that the case should have gone to trial."

Upon the trial in the circuit court an exemplification of the whole record in the New York court, showing the entire proceedings, was put in evidence. Thereby it appears how it came to pass that a decree or judgment was rendered against Costello, the principal in the bond, while there was a decree or judgment in favor of the surety company dismissing the complaint. The answer of Costello admitted that before the bringing of the action the corporation plaintiff had been granted a certificate permitting it to do business in the state of New York, whereas the answer of the surety company put this in issue. The plaintiff failed to produce the certificate, and at the close of its case the attorney for the surety company moved the court to dismiss the complaint on the ground that there was no proof that a certificate had been granted, and for this lack of proof and for no other reason the complaint against the surety company was dismissed.

Clearly, only such effect is to be given here to the decree or judgment in the New York suit as it has under the law of the state in the courts of that state. *Hampton v. McConnel*, 3 Wheat. 234, 4 L. Ed. 378. What effect, then, would be given to this decree or judgment in the courts of New York by the law of that state? Section 1209 of the Revised Code of Civil Procedure of the state of New York enacts as follows:

"A final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares or it appears by the judgment roll that it is rendered upon the merits."

It is well settled that this section applies as well to equitable actions as to legal actions. *Petrie v. Trustees*, 92 Hun, 81, 36 N. Y. Supp. 636; *Genet v. Canal Co.*, 163 N. Y. 173, 178, 57 N. E. 297. Undoubtedly section 1209 of the Code, above quoted, is applicable to the action in the New York supreme court here in question.

The final decree or judgment in that action does not expressly declare that it "is rendered upon the merits," and it does not appear by the judgment roll that it was rendered upon the merits as respects the surety company. To the contrary, upon an examination of the entire judgment roll as contained in the exemplification of the record in evidence, we find that it affirmatively appears thereby that the complaint was dismissed as against the surety company, not upon the merits, but only because of failure to produce proof that a certificate to do business in the state of New York had been granted to the plaintiff. Now, the courts of New York have uniformly held that where a complaint is dismissed in default of proof the judgment is not upon the merits. *Martin v. Cook* (Sup.) 14 N. Y. Supp. 329, affirmed in 142 N. Y. 654, 37 N. E. 569; *Colyer v. Guilfoyle* (Sup.) 62 N. Y. Supp. 21; *Kruger v. Persons* (Sup.) 64 N. Y. Supp. 841. Under the provisions of section 1209 of the New York Civil Code of Procedure and the decisions of the courts of that state (those just cited and others) it is clear, we think, that the decree or judgment in the former action dismissing the complaint as against the surety com-

pany was no bar to another suit against the company for the same cause of action. *Wheeler v. Ruckman*, 51 N. Y. 391; *Petrie v. Trustees*, supra; *Genet v. Canal Co.*, supra; *Stokes v. Railroad Co.*, 89 Hun, 2, 34 N. Y. Supp. 1051.

The court of appeals of the state of New York has held section 15 of the general corporation act of that state does not invalidate the contract of a foreign corporation, but only affects the civil remedies thereon, suspending the same, and that if the delinquent corporation is able to procure the subsequent issuance of a certificate entitling it to do business in the state the statutory inhibition is lifted and its effect removed. *Neuchatel Asphalte Co. v. City of New York*, 155 N. Y. 373, 49 N. E. 1043. This construction of the New York statute by the highest court of that state is binding upon us. At the trial of this case in the court below the plaintiff put in evidence a certificate in due form and legally executed, dated February 18, 1897, authorizing the plaintiff corporation to do business in the state of New York. Undoubtedly this certificate removed the obstacle to an action in the courts of New York upon the contract in suit here, and the like effect is to be given to the certificate in this jurisdiction.

It is true that this certificate had been issued before the former action in the supreme court of New York was brought, and it was not produced at the trial there. But its nonproduction at the former trial is not fatal to the plaintiff's cause of action; for, as we have seen, the decree or judgment in the supreme court of New York was not rendered upon the merits. For this reason the principle of estoppel which the counsel for the defendant in error presses upon our attention is not applicable here. The rule on this subject is thus authoritatively expressed in *Cromwell v. Sac Co.*, 94 U. S. 351, 352, 24 L. Ed. 195:

"In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

The certificate from the office of the secretary of state of New York, in connection with the other evidence in the case, entitled the plaintiff to the verdict which the jury rendered in its favor. From what we have said, it follows that the court erred in entering judgment for the defendant non obstante veredicto.

The judgment of the circuit court in favor of the defendant is reversed, and the case is remanded to that court, with direction to enter a judgment in favor of the plaintiff upon the verdict.

DALLAS, Circuit Judge. My concurrence in the conclusion now reached in this case is not to be understood as indicating that the views which I expressed when it was previously before this court (51 C. C. A. 139, 113 Fed. 177) are not still entertained by me, although, of course, the decision of the majority of the court upon that occasion must be taken to have determined the law respecting the matter then adjudicated.



**CURTICE v. CRAWFORD COUNTY BANK et al.**

(Circuit Court of Appeals, Eighth Circuit. October 27, 1902.)

No. 1,698.

**1. BANKS—LIEN ON STOCK—RIGHTS OF PLEDGEE.**

The lien of a bank upon its stock, given by statute, for any indebtedness to it from the stockholder, is subject to the lien of a pledgee of such stock, where the indebtedness to the bank was contracted subsequent to the pledge and after the bank had notice of it.

**2. SAME—NOTICE TO PRESIDENT.**

The president of a bank, to whom a pledgee of stock exhibited the certificate held by him to ascertain with certainty that it had been regularly issued, stating the fact of the pledge, received such information while acting in his official capacity, and the bank was thereby charged with notice of the pledge, so as to render its statutory lien on the stock for a loan subsequently made to the pledgor, although some two or three years afterwards, subject to the rights of the pledgee, whose debt had not been paid.

Appeal from the Circuit Court of the United States for the Western District of Arkansas.

This action was brought by James M. Curtice, the appellant, against the Crawford County Bank and E. B. Pierce, administrator of Robert S. Hynes, deceased, the appellees, to foreclose a lien on two certificates of stock, being certificate No. 133, dated March 15, 1894, and certificate No. 108, dated July 16, 1891, representing together 240 shares of stock, both of which had been issued by the Crawford County Bank, on the dates aforesaid, in favor of R. S. Hynes. It will suffice to say, concerning the bill of complaint, that it alleged the following facts, in substance: That in 1888 Curtice had loaned to the Crawford County Bank, hereafter referred to as the bank, and to Robert S. Hynes, its then cashier, the sum of \$5,000, taking as collateral security for the loan certain certificates of stock in the bank to the amount of \$7,500; that in 1889 the note of the bank for \$3,000 was retired, and that, in place of the two notes originally executed, Hynes gave his individual note to Curtice in the sum of \$5,000, which was secured by the stock originally pledged; that on March 15, 1894, the amount due on said note, with accumulated interest, was \$3,400, for which sum a new note was executed by Hynes, which latter note was secured by a pledge of three certificates of stock, being certificates Nos. 106, 108, and 133, representing stock to the amount of 340 shares in the defendant bank, standing in the name of Hynes; that on July 17, 1895, a portion of the latter note having been paid, Curtice surrendered to Hynes certificate No. 106, representing 100 shares of stock, but retained certificate No. 133, for 40 shares, and certificate No. 108, for 200 shares, as collateral security for the balance of the indebtedness then due; that on the filing of the bill there was due to Curtice, on the aforesaid note, the sum of \$7,000, which was secured by the shares of stock last aforesaid; and that, notwithstanding the fact that the bank had knowledge of all the transactions aforesaid, whereby the stock was pledged by Hynes to Curtice, it was asserting a superior statutory lien on the stock for a sum largely in excess of its value, for loans which it had made to Hynes after it had knowledge that he had pledged the stock. In its answer to the bill the defendant bank averred that, at the time the complainant loaned money to Hynes and received the aforesaid certificates in pledge, Hynes was indebted to the bank in the sum of \$16,845.92, and that at the time it made such advances to Hynes it had no knowledge whatever that Hynes was indebted to Curtice, or that he had pledged his bank stock to secure

¶ 1. Rights and liabilities of pledgees of corporate stock, see note to *Frater v. Bank*, 42 C. C. A. 135.

the payment of such indebtedness, as was alleged in the bill. The bank accordingly prayed that its lien might be declared superior and paramount to the lien asserted by the complainant, if he had any. The case was tried on the aforesaid issues, and upon a cross-bill which was interposed by the bank, wherein it prayed for a foreclosure of its lien, not only upon certificates of stock Nos. 108 and 133, but upon three other certificates, Nos. 106, 107, and 134, which had also been issued in the name of Hynes. The lower court decreed that the lien of the defendant bank on certificates Nos. 108 and 133 was superior and paramount to the lien or claim which was asserted by the complainant. To reverse such decree the complainant prosecuted an appeal to this court.

W. C. Scarritt and O. L. Miles, for appellant.

James F. Read (James B. McDonough, on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

On the trial in the circuit court there was no substantial controversy over the fact that Curtice, the complainant, loaned a considerable sum of money to Robert S. Hynes, he being at that time the cashier of the defendant bank, as far back as the year 1888, 1889, or 1890, and that this indebtedness had never been fully discharged. For the purposes of the trial it was admitted that, when Hynes died (an event which seems to have occurred during the summer of 1896), he owed the complainant, Curtice, and the defendant bank, the sums which they respectively claimed; and by its decree the lower court found that the amount due to Curtice, when the decree was entered, was \$5,791.26, and that the amount due to the bank was the sum of \$17,608.92, most of which latter sum consisted of advances made by the bank to a firm of which Hynes was a member, subsequent to September 23, 1893. Nor was there any controversy over the fact that Curtice had in his possession two certificates of stock, namely, certificate No. 108, for 200 shares, issued by the defendant bank on July 16, 1891, and certificate No. 133, for 40 shares, issued by it on March 15, 1894, and that these certificates had been pledged by Hynes, at least as early as March 15, 1894, to secure his indebtedness to Curtice, which at that date amounted to \$8,400. The note for \$8,400 executed on March 15, 1894, was produced, and it contained a pledge of the two certificates in question, as well as a pledge of certificate No. 106, which was surrendered to Hynes on July 17, 1895; a part of the indebtedness having at that time been paid. The real controversy in the case arose over certain issues of fact, namely, whether either of the aforesaid certificates, Nos. 108 and 133, was given in pledge to Curtice prior to September 23, 1893, and whether the bank had notice of the pledge when it began to make large advances to the firm of which Hynes was a member, subsequent to the last-mentioned date.

Before considering these issues of fact it should be stated that the laws of the state of Arkansas, under which the defendant bank was organized (Sand. & H. Dig. Ark. § 1342), gave the bank a lien upon the stock in controversy for all of Hynes' indebtedness to it; but

the lower court held, and we think correctly, that, notwithstanding this statute, the lien of a pledgee of its stock would prevail over the lien of the bank, so far as those debts of the shareholder to the bank were concerned that were contracted by the stockholder subsequent to the pledge and after the bank had notice thereof. It followed from this ruling, which is not seriously challenged, that if Curtice acquired either of the certificates aforesaid from Hynes as security for his claim prior to September 23, 1893, and the bank had knowledge of the fact, its lien for such advances would have to be postponed in favor of the superior lien of the pledgee. It is proper to observe, further, in this connection, that Curtice admitted that he did not acquire certificate No. 133 until March 15, 1894; and as Hynes was at that time indebted to the bank for an overdraft to the amount of \$28,213, of which amount something over \$17,000 is still unpaid, the complainant cannot, as a matter of course, assert a superior lien as respects that certificate. The controversy, therefore, is confined substantially to the questions of fact above mentioned, namely: Did Curtice hold certificate No. 108 in pledge prior to September 23, 1893, after which date the bulk of the advances to Hynes were made? And, secondly, had the bank been notified, prior to that time, that Curtice held the stock represented by that certificate in pledge?

The plaintiff testified, in substance, that stock certificate No. 108 was in his possession as pledgee prior to March 15, 1894, when the note of that date was executed by Hynes. He claimed that he had always held certificates of stock in the defendant bank, in pledge, since Hynes first became indebted to him in the year 1888 or 1889. He admitted that there had been some changes in the certificates thus pledged to him, owing to the fact that the bank had, on one or two occasions, increased its stock, and on that account had called in its old certificates, and issued others in lieu thereof; but he insisted that, notwithstanding such exchange of certificates, he had always held stock of the bank in pledge to secure his loan to Hynes, since the latter became his debtor, and had never been without such security. And, as respects the particular certificate now in controversy (No. 108), he stated that his impression was that this particular certificate was delivered to him in the year 1891, when he took a renewal note for the loan, and that it had been in his possession continuously since that date. Curtice further testified that on one occasion he advised Jesse Turner, Sr., who was the president of the defendant bank, that he held certain of the bank's stock in pledge to secure an indebtedness of Hynes, and at the same time exhibited to Turner the certificates which he so held. His statement was, in substance, that having been requested by Hynes, on one occasion, to send in the certificate or certificates which he held in pledge, and to take new ones in their place, owing to an increase of the bank's capital, he called at the bank to make such exchange, Hynes being at the time cashier of the bank; that when he called at the bank the stock book was opened in his presence, and that he discovered that Turner, as president, had signed certain stock certificates in blank; that, as this seemed an unusual proceeding, he took the new certificate or certificates, which Hynes attested and delivered to him,

to the president, to be sure that the stock was issued under proper authority; and that on this occasion he exhibited the certificates to Turner, told him that they had been issued by Hynes as collateral security for a debt which he owed Curtice, and that he also inquired concerning the value of the stock at that time. The complainant was unable to state definitely when this latter incident occurred; but he located it, as nearly as he was able to do, in the year 1890 or 1891,—the latter year being the one in which certificate No. 108 was issued.

The learned trial judge seems to have disregarded all of the aforesaid testimony as being unworthy of belief, holding, apparently, that there was no evidence worthy of credence showing that Curtice held any stock of the bank in pledge until March 15, 1894, after Hynes had become heavily indebted to the bank. As the issue to be determined is purely one of fact, it would subserve no useful purpose to go over the testimony in detail, and we shall not undertake to do so. Curtice undoubtedly made some mistakes in stating the details of some of his transactions with Hynes, which had been quite numerous, and the dates when particular interviews occurred and when certain certificates of stock were pledged to him; but such mistakes as he made in these respects are no greater than might have been expected of a witness who was testifying wholly from his recollection of transactions which had occurred seven or eight years previously. Considering his testimony as a whole, he appears to have testified fairly and with an evident intent to state the facts as they were. We have read his testimony carefully, and are unable to discover therein any instances of intentional prevarication which would authorize us to reject all of his evidence as being entirely untrustworthy, as the lower court appears to have done. The circumstance of his interview with Turner, in which he exhibited his certificates to ascertain if they were lawfully issued, was one of those incidents that would naturally remain fixed in the memory, although the precise date of the occurrence could not be remembered. After reading all of the evidence, which is preserved in the record, attentively, in the light of admitted facts and in the light of surrounding circumstances concerning which there is no dispute, we have reached the conclusion that Curtice continuously held stock of the defendant bank in pledge in greater or less amounts, as collateral security for the loan which he made to Hynes, from and after the year 1889 until the commencement of this action; that certificate No. 108, being the one now particularly in controversy, was turned over to Curtice as soon as it was issued,—that is to say, on July 16, 1891, or shortly thereafter; that this certificate, or possibly an earlier one, in lieu of which it was issued, was in fact exhibited to Jesse Turner, Sr., the president of the bank, in the year 1890 or 1891, most likely in the latter year, immediately after it was issued; and that he was notified at the time that the stock had been assigned to him by Hynes as collateral security for an indebtedness and was then held by him as such security. We are of opinion that the evidence is ample to sustain these conclusions of fact, and that the case should be decided accordingly.

It is strenuously urged, however, that even if it be true that Turner, the president of the defendant bank, was notified, in the year 1891, that Curtice was holding a part of Hynes' stock in the bank as security for a debt, yet that such notice did not affect the bank with knowledge of the fact communicated, because such knowledge was not acquired by Turner while he was acting for the bank and in the discharge of his duties as president. It is further said that because Turner did not take part in making the loans to Hynes subsequent to September 23, 1893, and as it was not shown that he ever communicated the knowledge which he possessed to the other officers of the bank, who did make such loans, the bank's lien, therefore, is not impaired by his knowledge acquired in the manner aforesaid. It is no doubt true that a corporation is not affected generally by knowledge which is obtained by one of its executive officers or agents when he is not engaged in the transaction of its business, although it is held that if such officer subsequently engages in a transaction for and in behalf of his company, in which the knowledge so acquired outside of the line of his duties becomes material and important, the corporation may be affected therein by the knowledge of its agent. *Bank v. Cushman*, 121 Mass. 490; *Innerarity v. Bank*, 139 Mass. 332, 334, 1 N. E. 282, 52 Am. Rep. 710. The converse of the first branch of the foregoing proposition is equally true,—that a corporation is bound, generally, by knowledge which is acquired by one of its executive officers when that officer is engaged in the legitimate transaction of the company's business. *Holden v. Bank*, 72 N. Y. 286, 292; *Bank v. Campbell*, 4 Humph. 394; *Bank v. Irons* (C. C.) 8 Fed. 1; *Birmingham Trust & Savings Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 13 South. 112, 20 L. R. A. 600. In the present case it appeared that Curtice's sole object in exhibiting his certificates of stock to Turner, they having been signed by the latter in blank, was to ascertain if Hynes, the cashier, had authority to issue them to himself as he had done. This information he sought from the proper officer, by exhibiting the certificates, without making any direct inquiry; and in explanation of his action he informed him that the certificates had been assigned to himself as collateral security for a loan. Under these circumstances we are of opinion that Turner must be regarded as having been acting for the bank when he received notice that the stock was held in pledge by Curtice, and that the knowledge which was acquired in the course of that interview affected the bank generally, even if it was not communicated to the other executive officers. It was at least knowledge of a fact which ought to have been communicated to the other officers of the corporation to govern their future action. When one acquires or is about to acquire a certificate of stock in a corporation, he is clearly entitled to seek information from the president, who has signed the certificate, if he entertains any doubt of its regularity or whether it was lawfully issued, and information which is given in response to such an inquiry is communicated by the officer in an official capacity while acting within the scope of his duty.

We conclude, therefore, that the advances which were made to Hynes by the defendant bank, subsequent to September 23, 1893,

must be regarded as having been made with knowledge that the shares of stock represented by certificate No. 108, dated July 16, 1891, were pledged to Curtice as security for a debt. It is true that these advances were not made until some time after the knowledge in question had been acquired; but it cannot be said to have been the duty of the pledgee of the stock to have given other notices from time to time that it had not been redeemed and that he still held it. It was rather the duty of the bank, before it made advances to Hynes (if the loans were made in reliance on its statutory lien), to have ascertained if Curtice still held the stock in pledge, inasmuch as it had once been advised that such was the fact, and it had received no notice that a different state of affairs existed or that the stock had been redeemed.

The result is that the decree of the circuit court was erroneous in the respect heretofore indicated, and the same should be modified to the extent of ordering that the proceeds of the sale of stock certificate No. 108, after deducting its pro rata of the costs of the action in the circuit court, be applied first to the payment of the indebtedness due from the estate of Robert S. Hynes, deceased, to the appellant, and that any sum which may remain after such indebtedness and accrued interest is discharged be applied on the claim of the Crawford County Bank. It is so ordered, and that the costs in this court be taxed against the appellees.

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BAILEY et al. v. WARNER.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1902.)

No. 1,581.

1. EVIDENCE—STATEMENTS OF PARTY.

In an action against a United States marshal and the surety on his bond for the false arrest and imprisonment of plaintiff, evidence of a conversation between the marshal and a third person in relation to the arrest, while plaintiff was still in custody, is admissible against defendants.

2. FALSE IMPRISONMENT—DAMAGES—EVIDENCE.

Upon the question of damages for the wrongful arrest of plaintiff, on a warrant for another person, it was competent for plaintiff to testify that before he was released, and while he was under bond to appear, a number of persons to whom he applied for employment asked if he had been released, and, being told that he had not, refused to employ him, and also that he suffered from nervous prostration immediately following his arrest.

3. MOTION TO STRIKE OUT TESTIMONY—FAILURE TO OBJECT TO ADMISSION.

It is not reversible error for a court to refuse to strike out the answer to a question asked a witness on the ground that the question was incompetent, where no objection was made to it when it was asked.

4. SAME—NECESSITY OF RENEWAL OF MOTION.

The refusal to strike out incompetent testimony cannot be assigned as error, where the court stated that it would be expunged unless other testimony was introduced thereafter to render it competent, and the motion was not renewed.

**5. WITNESSES—REFRESHING MEMORY—USE OF MEMORANDUM.**

A physician may properly refer to a memorandum made at the time of visiting a patient to refresh his memory as to the condition of the patient at the time of such visit.

In Error to the Circuit Court of the United States for the District of Colorado.

Greeley W. Whitford and Tom E. McClelland, for plaintiffs in error.  
J. M. Ellis and Warwick M. Downing, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This is an action which Henry E. Warner, the defendant in error, brought against Dewey C. Bailey and the United States Fidelity & Guaranty Company, the plaintiffs in error, upon the official bond of Bailey, who was the United States marshal for the district of Colorado, the United States Fidelity & Guaranty Company being the surety in said bond. The breach complained of was that Bailey arrested Warner under a warrant against one Benjamin F. Lissauer, which warrant had been issued on a complaint made by the United States attorney for the district of Colorado that said Lissauer had been indicted in the Indian territory for unlawfully selling liquor in that territory, and was a fugitive from justice at that time within the district of Colorado. The complaint averred that the plaintiff was arrested on a public street in the city of Denver by a deputy United States marshal, and was compelled to go along said street for some distance to the marshal's office; that no warrant was exhibited to the plaintiff when he was thus arrested, although he requested the deputy to exhibit his authority for making the arrest, if he had any; that the warrant aforesaid was exhibited as the sole authority for the arrest, only when he had reached the marshal's office and had again demanded by what authority the arrest was made; that when the warrant was produced he informed the marshal that his name was not Lissauer, and that he had never been in the Indian Territory, but that notwithstanding such representations he was held in custody for some four hours, and compelled to give a bond for his appearance before a United States commissioner, and was not finally discharged for some 10 or 12 days, when he was released without a hearing. The testimony at the trial disclosed that the arrest was clearly unlawful, and that the marshal was guilty of a trespass amounting to a false imprisonment in taking the plaintiff into his custody under a warrant which directed the arrest of an entirely different person. The jury returned a verdict against the marshal and his surety, the United States Fidelity & Guaranty Company, in the sum of \$600. The trial court refused to set the verdict aside, and the case was brought to this court on a writ of error by the defendants in the lower court, the chief complaint being that some incompetent evidence was admitted in the course of the trial, and that certain instructions were refused which ought to have been given.

It is claimed that an error was committed by the trial court in permitting a witness by the name of Merritt to testify as to what took

place between himself and Bailey, the marshal, before the plaintiff had been discharged, but we fail to see that the admission of this testimony was in any respect improper. Merritt called on the marshal with a telegram from Knoxville, Tenn., which tended to establish the plaintiff's identity, and to show that he was a reputable person, and that he was not the person against whom the warrant was issued, who had been indicted in the Indian Territory. Merritt exhibited this telegram to the marshal, and had some conversation with him on the subject of the arrest, which the witness detailed fully, and, while the conversation may not have been very important, it was clearly admissible against the defendant, with whom the conversation was held.

The plaintiff also testified that he was by occupation a newspaper reporter; that during the week succeeding his arrest and prior to his discharge he applied to several newspapers for employment as a reporter; that he was asked on each occasion if he had been released from arrest, and on replying that he had not been released was told by the persons to whom he applied for employment that they had no place for him. This testimony was objected to at the trial, and an exception was saved on account of its admission, but we think that it was entirely competent as tending to show the actual damage which the plaintiff had sustained by reason of the unlawful act of the marshal. The fact that such inquiries were made, and that he was refused work, showed that the fact of his arrest was known to those from whom he would naturally seek employment, and that it had some influence on their conduct in refusing to give him work.

The plaintiff further testified that up to the time of his arrest he had been able, by means of the employment which he was able to secure, to maintain himself and his wife; that after his arrest, which took place in the latter part of February, 1900, and until July 6th of that year, he could not obtain employment; and that because of his inability to get work during that period his wife was compelled to work. When the question was propounded to him, whether, because of his inability to obtain employment, his wife was compelled to work for their support, no objection was made to the question, but after it had been answered in the affirmative a motion was made to strike out his answer. There was no material error in this action. Counsel for the defendant should have objected to the question when it was propounded, as they had full opportunity to do, if they considered it incompetent. Not having done so, and having permitted the witness to answer, the trial court was under no obligation to expunge it. The plaintiff likewise testified that he was in a complete state of nervous collapse for two days following his arrest, and that he did not fully recover from this state of nervous prostration for at least two months. An objection was made to this testimony, which was overruled, and an exception was saved. We think that there is no merit in this exception. The plaintiff was entitled to show, as a part of his direct damages, what effect, if any, upon his physical condition the arrest had produced. He was privileged to describe his mental condition and the feelings of humiliation incident to the arrest for the information of the jury; and as he did not undertake to report what his physician had told him, but simply described his own feelings and the



effect which the arrest had produced, the testimony in question was clearly admissible.

Considerable importance is attached by the plaintiffs in error to another incident of the trial, which was as follows: The plaintiff was asked by his counsel if he had experienced any difficulty for two or three days previous to his arrest, while he was attending to his reportorial duties, in getting information from public officials to whom he usually applied for information. The question was objected to; whereupon the plaintiff's attorney stated that he expected to show that a rumor had been disseminated from the marshal's office, some days prior to the arrest, that the plaintiff was a fugitive from justice, and that the rumor so disseminated had led persons with whom the plaintiff came in contact to treat him with suspicion. When this representation was made the court permitted the question to be answered; whereupon plaintiff said, in substance, that he had experienced difficulty in obtaining news for two or three days previous to his arrest, and that during that period his fellow reporters, who had previously treated him very cordially, ceased to do so, and apparently regarded him with suspicion. After this answer had been given a motion was made to strike it out; whereupon the court ruled that it would be stricken out unless it was subsequently shown that the marshal was in some way responsible for the treatment of which the plaintiff complained. Subsequently another witness was called by the plaintiff, who testified that for some days prior to the arrest rumors were afloat about the City Hall in Denver and among the reporters on daily papers that the plaintiff was a fugitive from justice. After the above remark was made by the trial judge, no motion was made to expunge the testimony of the plaintiff tending to show that he had been treated coldly by his brother reporters, and what the action of the court would have been if such a motion had been made cannot now be determined. Inasmuch as counsel for the defendants did not renew their objection and move to expunge the objectionable testimony after the existence of the rumor that the plaintiff was a fugitive from justice had been established, we think that the plaintiffs in error are in no position, at this time, to urge that the case should be reversed because of the alleged error. In any event, the testimony which was given by the plaintiff on this point does not seem to us to be of sufficient importance to justify a reversal.

An exception was saved because Dr. Bertha L. Connelly, who was called to testify concerning the plaintiff's physical condition the day after his arrest, was allowed to refresh her memory as to his then condition, by consulting a memorandum which she made at the time of her visit, relative to his condition. The memorandum was, in substance, that she found the plaintiff delirious from the shock of having been arrested for another man. This exception seems to us to be without merit, as the memorandum was made under such circumstances as clearly entitled the witness to use it to refresh her memory. These are the important exceptions taken to the admission of evidence in the course of the trial, and none of them seem to us to be well founded. The plaintiffs in error further complain because, just at the conclusion of the trial, leave was denied to withdraw a

witness from the witness stand with a view of showing by another witness that a letter, which had been received by the marshal from the district attorney of the Indian Territory, could not be found. When this request to withdraw the witness for the purpose of proving that the latter could not be readily found was denied, the court remarked that it was the duty of the defendants to have hunted up the letter before the trial began. With respect to this exception, it is only necessary to say that the action of the court in this matter was purely discretionary, and the record fails to disclose any abuse of discretion. If the letter in question was of any importance, it was the duty of the marshal to have preserved it and produced it at the trial, and the trial court was under no obligation to delay proceedings until the letter could be found, inasmuch as it was not claimed that any search was instituted until after the trial commenced. Relative to the instructions, it is quite sufficient to say that the instructions given fairly covered all the questions of law arising in the case, and that the instructions so given were instructions which the defendants below requested the court to give. The three instructions which were refused, so far as they contained correct propositions of law and were material to the issues involved, were covered by other instructions which the court gave, and the giving of those which were refused was unnecessary.

A careful inspection of this record satisfies us that the case was correctly tried below, while the amount of damages assessed does not render it probable that the jury awarded any exemplary damages.

The judgment below is accordingly affirmed.

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CITY OF HUTCHINSON et al. v. BECKHAM et al.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1902.)

No. 1,655.

1. EQUITY JURISDICTION—REMEDY AT LAW—BILL OF PEACE.

A court of equity has jurisdiction of a suit to enjoin the enforcement of an illegal city ordinance imposing a license tax, where, in addition to the illegality of the tax, it is shown that, if the city is permitted to proceed to enforce it by the remedies provided, complainant will be called upon to defend a multitude of criminal prosecutions, and will suffer irreparable injury in its business.

2. JURISDICTION OF FEDERAL COURTS—SUIT TO ENJOIN COLLECTION OF ILLEGAL TAX—AMOUNT IN CONTROVERSY.

A federal court has jurisdiction of a suit to enjoin the enforcement of an illegal license tax imposed on complainant's business by a city ordinance, and enforceable by the daily arrest of its employes, which it is alleged will result in serious interference with its business and a direct loss exceeding \$2,000. In such case the amount involved for jurisdictional purposes is not alone the amount of the tax demanded, but the value of complainant's right to conduct its business without being subjected to such tax.

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¶2. Jurisdiction of circuit courts, as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Shoe Co. v. Roper*, 36 C. C. A. 459.

Appeal from the Circuit Court of the United States for the District of Kansas.

On September 5, 1901, James H. Beckham and James G. McKnight, the appellees, exhibited a bill of complaint against the city of Hutchinson, in the state of Kansas, et al., in the circuit court of the United States for the district of Kansas, wherein they averred, in substance, that they were engaged in business at Kansas City, in the state of Missouri, of which latter state they were residents and citizens, as "wholesalers and jobbers of groceries"; that their storerooms and offices were, and for a long time had been, located at Kansas City, Mo.; that they were engaged in interstate commerce, it having been their practice for a long time to sell groceries in many cities and towns in the state of Kansas and elsewhere, and particularly to retail grocers doing business in the city of Hutchinson, Kan., and in that vicinity; that in order to make a speedy delivery of goods sold in the latter city, after they were ordered, they had theretofore established and still continued to maintain a depot for the storage of groceries in original packages in the city of Hutchinson, which depot was in charge of an agent of the complainants, who represented them in said city and vicinity; that, by reason of its excellent railroad facilities and geographical situation, the city of Hutchinson was favorably situated for the location of a depot and warehouse for the distribution of the complainants' goods, and for that reason such a depot had been for a long time maintained by the complainants. The bill further averred, in substance, that the city of Hutchinson, acting by its mayor and councilmen, on June 25, 1900, had enacted a certain ordinance by the terms of which a license tax in the sum of \$1,200 per annum was imposed upon the complainants as well as upon other jobbers who had goods stored in the city of Hutchinson for distribution to retail dealers, but who did not keep and maintain their principal office for the transaction of business in said city; that by the terms of said ordinance no persons engaged as jobbers of merchandise who did maintain their principal office in the city of Hutchinson, and did store goods therein for distribution to retail dealers, were required to pay said license tax, but were wholly exempt therefrom; that on August 1, 1900, the first section of said ordinance was amended so as to provide that licenses issued thereunder by the city should expire on the last day of June and the last day of December next after they were issued, and that the license fee should be at the rate of \$1,200 per year, or \$100 per month. It was further averred that, by the terms of said ordinance, nonresidents engaged in business as wholesalers and jobbers, who stored goods in said city of Hutchinson for distribution to retailers in Missouri or other states than Kansas, were not required to pay said license tax, but were exempt therefrom; that said ordinance applied only, and was intended to apply, so as to prevent the sale and speedy delivery of goods, to retail dealers in Kansas, by merchants and jobbers, like the complainants, who did business in other states than Kansas; and that by the enactment of said ordinance it was intended to hamper, burden, and prevent commercial transactions between citizens of the state of Kansas and citizens of other states, and to prevent the complainants from speedily delivering goods which they might sell to retail dealers residing in the city of Hutchinson and its vicinity. It was also averred that the aforesaid ordinance was enacted in pursuance of a conspiracy between merchants and jobbers who resided in Hutchinson and maintained their principal offices there, the purpose of the conspiracy being to harass the complainants and others in a like situation, and to render their business in the city of Hutchinson unprofitable, and to compel them to discontinue said business by discriminating against them and in favor of persons engaged in the same line of trade who were residents of the city of Hutchinson and maintained their principal offices in said city. It was further averred that the complainants were liable to be proceeded against and compelled to pay a fine of not less than \$10 nor more than \$100, and to stand committed until the fine was paid, or to be confined in the city jail not less than 10 days nor more than 30 days, or to suffer both fine and imprisonment, in the discretion of the police judge, if they failed to comply with the provisions of said ordinance; that,

by reason of the complainants' failure to comply with the provisions of said ordinance, the defendant city had instituted criminal proceedings against their agents, and caused them to be imprisoned, and had threatened and were about to institute a great number of other like prosecutions against them, and to daily apprehend and imprison the complainants' agents until they complied with the provisions of the ordinance. In view of the premises, the complainants charged that the aforesaid ordinance was wholly illegal and void, and they prayed that the court would by its decree so declare, and perpetually enjoin the defendants from attempting to enforce the provisions thereof. The defendants below filed a general demurrer to the bill, which was overruled. Thereupon the defendants declined to plead further, and a final decree was entered in favor of the complainants below, granting the relief prayed for. From such decree the defendants prosecuted an appeal to this court.

J. W. Rose, for appellants.

C. F. Hutchings (L. W. Keplinger, on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The decree below is challenged in this court on two grounds only, the first and principal contention being that the lower court had no jurisdiction of the controversy because the amount involved was, as it is said, less than \$2,000, exclusive of interest and costs. Incidentally it is also claimed that the complainants had an adequate remedy at law, and no right, for that reason, to appeal to a court of chancery for relief. Inasmuch as no attempt has been made in the argument to defend the validity of the ordinance, and as counsel for the city have based their right to a reversal wholly on the two grounds above stated, we shall assume that the ordinance is invalid, as the lower court held, and proceed to inquire whether the amount involved was sufficient to confer jurisdiction and whether the case was properly cognizable by a court of equity.

Concerning the last of these questions, which will be noticed first, it is quite sufficient to say that the complaint which was filed in the lower court may be appropriately termed a "bill of peace." Story, Eq. Jur. §§ 852, 853. It was filed to obtain a definite determination that the ordinance complained of was void, also to prevent harassing litigation, and to establish the complainants' right to transact business in the city of Hutchinson, as it had been doing for some years, without complying with the terms of the ordinance. One paragraph of the bill, as heretofore shown, alleged that the city authorities, for the purpose of enforcing compliance with the ordinance, had already caused the arrest of their agents, and were threatening to make further like arrests, and to institute numerous criminal prosecutions, and thereby prevent them from receiving, storing, and making speedy deliveries of goods, as had been their habit. Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the city, yet, as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been

definitely established, and that in the meantime the complainants might and probably would have been compelled to defend a multitude of suits, and submit to daily interruptions of their business, which would have proven to be very annoying, and probably disastrous. In such a case, the rule that a suit in equity will not lie to restrain the collection of an illegal tax, merely on the ground of its illegality, does not apply, because circumstances are alleged which show that if left to their remedy at law the complainants would probably be subjected to numerous prosecutions, besides sustaining great and irreparable loss in the prosecution of their business. When, in addition to the fact that an illegal tax has been imposed, it further appears that the persons or corporations upon whom it is imposed will be called upon to defend a multitude of suits, or that they will sustain great injury if the state or municipality is left free to enforce the tax by the usual remedies, courts of equity never hesitate to assume jurisdiction and grant injunctions against those who are seeking to enforce the collection of the tax if it appears to be clearly illegal. *Dows v. City of Chicago*, 11 Wall. 108, 110, 20 L. Ed. 65; *Railway Co. v. Cheyenne*, 113 U. S. 516, 525, 5 Sup. Ct. 601, 28 L. Ed. 1098; *City of Ogden v. Armstrong*, 168 U. S. 224, 239, 240, 18 Sup. Ct. 224, 42 L. Ed. 444; *Heywood v. City of Buffalo*, 14 N. Y. 534.

The other and broader objection to the jurisdiction, that the amount in controversy is inadequate to confer jurisdiction upon the federal court, is based upon the ground that as the bill was filed on August 29, 1900, and the tax from June 1, 1900, to December 31, 1900, was only \$500, that was the sole sum in controversy. Counsel for the city say it was only claiming at the time \$500, and that the right to collect that amount from the complainants was the only matter in controversy. We think, however, that this view of the case is too narrow and technical. The right which the complainants asserted was the right to transact their business in the city of Hutchinson as theretofore, without being subjected to the onerous and discriminating tax which the municipality had seen fit to impose. They averred that, if the city was left at liberty to enforce the tax in its own way by making daily arrests of its employes, they would eventually quit its service; that the complainants and all other nonresident merchants in their situation would be subjected to the cost and annoyance of defending repeated suits; that they would also be prevented from carrying on their business as they had theretofore done; that they would be compelled to transact business in competition with dealers residing in the city of Hutchinson who were not subject to the tax; and that in this way they would sustain damages in a sum exceeding \$2,000. These allegations were admitted by the demurrer to be true if they were material allegations. From the complainants' standpoint, therefore,—and the case must be judged from their standpoint, and not exclusively from the standpoint of the city,—the amount involved in the litigation was not merely the license tax of \$500 which accrued on June 1, 1900, but it was the total amount of their loss incident to the causes aforesaid, if the bill was not entertained, and if the city was left free to pursue its own course in enforcing the ordinance. Our attention has been invited to several cases which were brought to enjoin the collec-

tion of taxes that were alleged to be illegal, in which it was held that the amount in controversy for jurisdictional purposes was the amount of the tax (*Transfer Co. v. Pendergrass*, 16 C. C. A. 585, 70 Fed. 1; *Walter v. Railroad Co.*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; *Railroad Co. v. Walker*, 148 U. S. 391, 13 Sup. Ct. 650, 37 L. Ed. 494); but an examination of these cases shows that they are not analogous to the case at bar, in that it did not appear that the complainants would sustain any other direct damage save the amount of the tax, which, if paid under protest, they could recover in an action at law, if the tax was found to be illegal. The present case is distinguishable from the cases relied upon by the appellants, in that the tax involved is a license tax imposed by a municipality upon a business concern, the payment of which tax may be enforced by fining and imprisoning its employes and by daily arrests that will seriously interfere with the prosecution of complainants' business, and inflict a much greater direct loss than the amount of the tax. The suit at bar, in view of the allegations touching the effect upon the complainants' business, if the city is permitted to proceed with the enforcement of the ordinance in its own way, is in reality a bill to prevent the city from breaking up and destroying an established business under the guise of enforcing an illegal ordinance. The pecuniary loss which the complainants would sustain by such an interference with or destruction of their business may, as we think, be properly taken into account in determining the amount in controversy; and, as the bill alleges and the demurrer admits that the damages incident to such wrongful conduct on the part of the city will exceed \$2,000, we are of opinion that the jurisdiction of the federal court to entertain the bill was rightfully upheld. The decree below is accordingly affirmed.

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GOODWIN v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1902.)

No. 1,676.

1. FEDERAL AND STATE COURTS—CONCURRENT JURISDICTION—EFFECT OF CONFLICTING ADJUDICATIONS.

Plaintiff, in an action in a state court against a railroad company to recover damages for the death of an employé, pending such action presented her claim for allowance and payment to a federal court, which through its receivers had taken possession of and was administering the property of the company in foreclosure and creditors' suits. Its decrees placed such claims in the preferential class, provided they were established as valid demands, but left their validity to be subsequently adjudicated. The claim was tried before a master, who decided against its validity, and his decision was affirmed by a decree of the court, from which no appeal was taken. On the same day a judgment against the company was rendered in the action in the state court, which was affirmed on appeal, and the plaintiff therein then filed a second petition of intervention in the federal court, setting up such judgment. *Held* that, both courts having jurisdiction to adjudicate upon the claim in the

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¶ 1. Conflicting jurisdiction of federal and state courts, see notes to *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 356; *Plow Works v. Finks*, 26 C. C. A. 49.

suits before them, the federal court was bound by its own decree, which had become final, so far as related to its own power to grant relief.

### Appeal from the Circuit Court of the United States for the District of Kansas.

This is an appeal from a decree of the circuit court of the United States for the district of Kansas, whereby an intervening petition, which was filed by Allie May Goodwin, formerly Allie May Henry, the appellant, in an equity cause pending in that court, was dismissed. The facts out of which the controversy arises are as follows: On December 23, 1893, the Union Trust Company of New York filed in the circuit court of the United States for the district of Kansas a bill of complaint against the Atchison, Topeka & Santa Fé Railroad Company to foreclose a certain mortgage upon its railroad property and for general relief, and on said day receivers of the mortgaged property were duly appointed, and shortly thereafter assumed possession of it. Prior thereto the appellant, who was then the widow of Frank B. Henry, had commenced a suit against the Atchison, Topeka & Santa Fé Railroad Company to recover damages on account of the death of her husband, a locomotive engineer, who had been killed on June 23, 1891, while he was in the service of the aforesaid railroad company, by the derailment of his engine at a railroad crossing in Ellsworth county, Kan. The action which was so pending in the district court for Osage county, Kan., against the railroad company, when the receivers aforesaid were appointed, was tried in that court on March 16, 1892, and resulted in a verdict for the plaintiff; but on appeal to the supreme court of Kansas the judgment entered upon said verdict was reversed on July 11, 1896, and the cause was remanded for a new trial. *Railroad Co. v. Henry*, 57 Kan. 154, 45 Pac. 576. The case was again tried in the state court on November 22, 1897, and resulted, as before, in a verdict and judgment for the plaintiff, which latter judgment, the case having been again appealed by the railroad company to the supreme court of Kansas, was affirmed on March 11, 1899. *Railroad Co. v. Henry*, 60 Kan. 322, 56 Pac. 486. A decree of foreclosure and sale was entered in the aforesaid action, which was brought by the Union Trust Company of New York, in pursuance of which the mortgaged property was duly sold on December 10, 1895. Subsequent to the aforesaid foreclosure sale, and on February 29, 1896, the Union Trust Company filed what is termed a "supplemental bill in chancery" against the Atchison, Topeka & Santa Fé Railroad Company, the purpose of which was to sequester certain property belonging to said company, which was not covered by the aforesaid mortgage, and to apply the proceeds of the same to the payment of the debts of said company, and to obtain an account of the nature and amount of such debts. On the filing of the supplemental bill the circuit court of the United States for the district of Kansas referred the matter to Eugene Quinton as special master, to take an account of all the assets and property of said railroad company which remained after the sale under the decree of foreclosure, and to ascertain and report the names of the creditors of said company and the amount of their respective claims. The special master was directed to give notice by publication to all creditors of the railroad company, and to all persons having any claims against its property or against the persons who had purchased the same at the mortgage sale, to exhibit their demands before the special master at such time and place as he might direct. The master was also empowered to hear, determine, and adjudicate upon the claims so presented. It was further ordered that all the property, assets, and effects, real and personal, of the Atchison, Topeka & Santa Fé Railroad Company, which remained after the sale under the decree of foreclosure, be sequestered; and that Aldace F. Walker and John J. McCook, who had been receivers in the foreclosure proceedings, be appointed receivers of the sequestered property, and authorized to take possession of the same and sell it at public or private sale, upon such terms as were deemed most advantageous.

On or about October 9, 1896, Allie May Henry, the appellant, filed an in-

intervening petition in the aforesaid sequestration proceedings, which were then pending, wherein she alleged, in substance, that she had a claim in the sum of \$10,000 against the funds, property, and assets involved in said sequestration proceedings on account of which she had once recovered a judgment for \$5,250 that had been reversed and the cause remanded for a new trial. She alleged that she intervened in the sequestration proceedings for the protection of her rights, and prayed that her entire claim might be allowed, and that she might be permitted to present proof of her claim, for allowance in such amount as to the special master seemed just, and that any judgment which she might thereafter obtain be allowed and paid. The claim so presented was heard by the master on July 12, 1897, the same having been submitted to him upon the testimony in the case of Railroad Co. v. Henry, as contained in the record of that case which had been made up for a hearing before the supreme court of the state of Kansas. The special master, after an examination of the claim and the testimony offered in support thereof, reported that the derailment which occasioned the death of the plaintiff's husband was occasioned by a want of ordinary care and diligence on his part, and that the claim presented by the intervenor was not a just and valid demand against the railroad for that reason, and that the claim ought to be disallowed. The report of the master to the effect aforesaid appears to have been filed in the circuit court of the United States for the district of Kansas on October 18, 1897, and on November 22, 1897, that court decreed that the report of the special master, recommending a disallowance of the claim, be in all things affirmed, and that the claim be disallowed. No exceptions appear to have been taken to such order, nor did the intervenor take an appeal therefrom, but more than two years thereafter, to wit, on or about January 23, 1900, she appears to have filed another intervening petition, based upon the same claim, which latter intervening petition was dismissed on June 3, 1901. In the last-mentioned intervention the intervenor recited, as before, the commencement of an action in the state court on September 15, 1891, and further alleged that on the second trial of the cause she had recovered a verdict in the sum of \$5,000, which had been affirmed by the supreme court of Kansas on March 11, 1899. She prayed that the amount of the recovery be declared and adjudged to be a first and preferred lien upon the proceeds of the railroad property of the Atchison, Topeka & Santa Fé Railroad Company, which had been previously sold under the decree of foreclosure heretofore mentioned. The present appeal is from the order dismissing the last-mentioned intervening petition.

John C. Waters and John F. Switzer, for appellant.

Robert Dunlap, A. A. Hurd, and O. J. Wood, for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

In view of the facts above recited, it will be observed that on November 22, 1897, the circuit court of the United States for the district of Kansas disallowed the intervenor's demand after a full hearing upon the merits, and that on the same day a jury rendered a verdict in her favor upon the same claim in the law action pending in the district court for Osage county, Kan., upon which verdict a judgment was duly entered. Both courts seem to have had full jurisdiction of the claim, but arrived at different conclusions respecting its merits on the same day. The federal circuit court had jurisdiction of the intervention as one of the incidents of the equity case which was pending before it, while the action on the same claim, notwithstanding the appointment of receivers for the Atchison, Topeka &



Santa Fé Railroad Company, was properly within the jurisdiction of the state court. The intervener took no steps to secure a review of the decision of the circuit court of the United States adjudging her claim to be without merit, and the decree to that effect, rendered on November 22, 1897, is not brought before us for review by the present appeal because it was not taken until November 30, 1901, more than 3½ years after the time allowed for an appeal had expired. On this state of facts we think that the lower court could not have done otherwise than to dismiss the second intervening petition, which was filed on January 23, 1900. As the intervener voluntarily submitted to a trial upon the merits of her demand in the federal court, and took no appeal after it had rendered a judgment dismissing her claim, she was concluded by the adjudication so far as that court was concerned. It matters not, we think, that the state court rendered a different judgment in the action upon the same demand which was brought in that jurisdiction. The federal court was not bound, by any rule of comity or law, to ignore its own judgment in a case of which it had full jurisdiction, from which no appeal had been taken, in deference to the judgment of a court of co-ordinate jurisdiction, although the latter judgment was affirmed on appeal. The conclusive effect of the decree of the federal court was not affected, so far as that court was concerned, by the appeal prosecuted from the decision of the state court nor by the result of such appeal. When the last intervention in the federal circuit court was presented and tried, it appeared that the intervener had already had her day in court in the very forum to which she applied for relief and that her claim had been adjudged groundless.

Neither the order appointing receivers for the Atchison, Topeka & Santa Fé Railroad Company nor the decree of foreclosure determined that the claim in controversy was preferential and must be paid in any event. The order appointing receivers placed the claim in the class of preferential demands provided the intervener succeeded in showing that she had a valid demand against the railroad company. The question of the validity of the claim was left open for adjudication by the order appointing receivers, and, as the intervener failed to show that the claim presented was a legal and lawful demand, her application for relief is not strengthened by anything contained in the order appointing receivers, or in the decree of foreclosure and sale, or in the order approving the sale. The result is that the decree below must be affirmed; and it is so ordered.

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#### GREAT WESTERN ELEVATOR CO. v. WHITE et al.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1902.)

No. 1,782.

##### 1. AGENTS—SCOPE OF AUTHORITY—DRAWING DRAFTS.

An agent of an elevator company, in charge of one of its grain elevators, with general authority to draw drafts on the company to procure cash necessary to pay for grain purchased and to properly conduct the business, without any specific limitation on such authority by his contract or instructions given him, did not exceed his authority by

using, in payment for grain, money collected by him for a lumber company for which he was also agent, and remitting to such company in payment for the same by drafts drawn on the elevator company.

2. SAME—LIMITATION BY CUSTOM OF BUSINESS—NOTICE TO CHARGE THIRD PARTIES.

Evidence of a general custom or usage in the elevator business limiting the power of local agents, in the drawing of drafts, to such as were drawn in payment for grain bought or negotiated for cash at the time they were drawn, was not admissible to affect the lumber company, without proof that it had knowledge of such custom; there being no presumption that it had knowledge of a custom prevailing in a particular business in which it was not engaged.

3. INSTRUCTIONS—APPLICABILITY TO ISSUES.

The complaint in an action by the elevator company against the lumber company to recover the amount of drafts drawn on plaintiff by its agent, and paid by it to defendant, alleged that defendant did not pay to such agent, for the use of plaintiff, the amount named in the drafts, or any other sum, but received and collected the drafts, well knowing that plaintiff received no consideration therefor, but that plaintiff paid the same, supposing that the amounts had been furnished to its agent. The answer admitted the receipt and collection of the drafts, but denied that they were without consideration, and alleged that defendant paid the full amount thereof to the agent for plaintiff's use. *Held*, that the action was one to recover money paid under a mistake of fact, and that instructions that plaintiff was entitled to recover if the agent exceeded his authority in drawing the drafts were properly refused, as not applicable to the issue joined by the pleadings.

In Error to the Circuit Court of the United States for the District of North Dakota.

D. G. Maclay (W. F. Ball and J. S. Watson, on the brief), for plaintiff in error.

V. R. Lovell (John D. Benton and Daniel B. Holt, on the brief), for defendants in error.

Before CALDWELL, and SANBORN, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was an action brought by the Great Western Elevator Company, plaintiff in error, against William H. White and William H. White Lumber Company, defendants in error, to recover the sum of \$2,100, the amount paid on three drafts drawn by William Clemens, the agent of the plaintiff in error in charge of its business at Leonard, in the state of North Dakota, in favor of the defendant William H. White. The facts, as disclosed by the pleadings and the evidence, show that at all the times between August 1, 1900, and November 1, 1900, one William Clemens was in the employ of the plaintiff in error as its agent and grain buyer at the town of Leonard, N. D., and that during the same time he was in the employ of the William H. White Lumber Company, one of the defendants in error, in charge of its lumber yard and lumber business at Leonard, that, as agent and grain buyer for the plaintiff in error, it was necessary for Clemens, from time to time, to have and handle large sums of money, in the form of currency, wherewith to pay for grain purchased for the plaintiff in error, and delivered at its elevator and warehouse in Leon-

ard; that the money used by Clemens in conducting the business of the plaintiff in error was furnished to him by the company, sometimes by shipments of currency from its home office, located at Minneapolis, Minn., and sometimes by Clemens drawing drafts on the company, and procuring the currency on these drafts by selling them to persons, companies, or corporations at or in the vicinity of Leonard, which drafts the elevator company paid in due course when the same were presented at the bank at which it did business in Minneapolis; that in conducting its business the elevator company was in the habit of furnishing Clemens with blank forms of drafts, drawn on the plaintiff at Minneapolis, with the word "Agent" printed under the line upon which the agent making use of the blank was to write his name as drawer; that he was to use these drafts in obtaining currency by filling the same out as to the name of the payee, the date upon which the draft was drawn, and the amount for which drawn. He was then to negotiate and sell the draft to such person, company, or corporation as would furnish to him, for the use of the elevator company in its said business at Leonard, the sum of money for which the draft was drawn. The drafts in suit were drawn, one on August 23, 1900, for \$500; one on September 19, 1900, for \$700; and one on October 25, 1900, for \$900. The first draft, for \$500, was paid on August 25, 1900; the second, for \$700, on September 20, 1900; and the third, for \$900, on October 26, 1900.

Four causes of action are set out in the complaint, but it will only be necessary for us to notice particularly the first cause of action, as the other causes of action proceed upon the same ground; the only difference being in the amount, each draft being set out in a different cause of action. In the first cause of action it is alleged, in substance, that Clemens, as agent of the elevator company, drew the draft therein described, for \$500, in favor of the defendant William H. White, who the record shows was president of the William H. White Lumber Company; that the draft was duly presented to the elevator company for payment, and supposing the amount therein named had been paid to Clemens, its agent, for the purpose of carrying on its business at Leonard, it paid the same. The complaint then proceeds:

"That in truth and in fact the said defendants did not, nor did either of them, as plaintiff is now informed and verily believes to be the fact, pay to the said William Clemens, for the use of plaintiff, said sum of five hundred dollars (\$500), or any other sum or amount whatever."

And further, upon information and belief:

"That upon making the transaction aforesaid, defendants, and each of them, well knew that no consideration passed from them, or either of them, to the plaintiff, for five hundred dollars (\$500), which they received upon said draft; that in making such transaction they were in fact receiving, and did in fact receive, from the plaintiff herein, the sum of five hundred dollars (\$500), without having paid plaintiff any consideration whatever therefor."

And further, upon information and belief:

"That the said William Clemens was on the date of such transaction, namely, August 23, 1900, largely indebted to the defendants, as their agent or otherwise, and that defendants, for the purpose of securing payment, in whole or in part, of the indebtedness aforesaid, from the said William

Clemens, received and accepted from him the said draft, and thereafter obtained upon said draft the sum of \$500 from the said plaintiff, and that defendants well knew that the money so obtained by them in such transaction was not the money or the property of the said William Clemens, and further knew that the said William Clemens, as agent of plaintiff, had neither right nor authority to make drafts upon plaintiff, to be used for the purpose for which said draft was so used; that the said William Clemens, in so drawing said draft and delivering the same to the defendants, exceeded the power and authority vested in him in respect thereto, and in drawing said draft wholly exceeded the scope of the authority vested in him as such agent for the plaintiff."

The answer admits the drawing of the draft for \$500 on the 23d day of August, 1900; that one of the defendants was named therein as payee, and that the draft was delivered to the defendant in error William H. White Lumber Company; that the same was thereafter presented to and paid by the elevator company. The answer then alleges that said Clemens made and delivered the said draft by the authority of the plaintiff, and acted within the scope of his authority as plaintiff's agent in so doing, and that the defendant William H. White Lumber Company paid as consideration therefor, and the said Clemens, as plaintiff's agent, received in money for the use of the plaintiff in the purchase of grain at the said station of Leonard, the full sum of \$500, the amount of the draft.

At the trial the court admitted evidence tending to show the scope of the agent's authority to draw and negotiate drafts drawn by him upon the company, either through instructions given him by the company, or by the practice pursued by the company with reference to the power possessed and used by its agent, but rejected an offer of proof by which it was sought to show the extent of this power of issuing drafts by local agents under the custom or usage of elevator companies generally doing business in North Dakota and other Northwestern states.

It was insisted at the argument that the evidence admitted upon this branch of the case showed, without dispute, that the local agent of the elevator company had no power to issue drafts, except in payment for grain bought at the time of the issuance of the draft, or for cash to the amount of the face of the draft delivered or paid to the agent at the time of the issuance of the draft; but complaint was made that it was deprived of the benefit of this evidence by an instruction to the jury to the effect that the agent's authority was sufficient, for the purposes of the case, at least, to enable him to take money which he collected on behalf of the lumber company and apply it in course of business to the purchase of wheat for the elevator company. After a careful examination of the testimony of Mr. Mitchell, the general superintendent of the plaintiff in error,—the only witness who testified upon this question,—we are unable to concur in the view that this evidence showed without dispute that the local agent had no power to issue drafts excepting in payment for grain bought at the time of the issuance of the draft, or for cash to the amount of the face of the draft delivered or paid to the agent at the time of the issuance of the draft. Mr. Mitchell's testimony tends to show that Clemens, as the agent of the plaintiff in error, had authority to obtain money by issuing drafts;

that he had such general authority as was necessary to properly conduct the business at the station where he was employed; that no limitation by contract of employment, either oral or written, defining or limiting his authority, was placed upon the agent, outside of the circular instructions relating to the price at which grain should be bought, and the amount of money he should have on hand. This being the situation, there was no error in the instruction complained of, for the lumber company clearly had the right to take such drafts in dealing with the agent of the elevator company, provided it gave full consideration therefor. The evidence offered by the plaintiff to show that by custom or usage the authority of the agent was limited to issuing drafts for currency at the time the currency was paid to him was, we think, properly excluded. No proper foundation had been laid for the introduction of such evidence. Knowledge of the custom sought to be proved, being peculiar to a particular business, must be first brought home to the party sought to be charged, where, as in this case, the party to be charged was engaged in a separate and distinct line of business. Whatever may be the rule as to presumptive notice of a custom or usage in the case of parties engaged in the same business, clearly no such presumption can be indulged in where the party to be charged is engaged in a separate line of business. *Isaksson v. Williams* (D. C.) 26 Fed. 642; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510.

Several assignments of error are based upon the refusal of the court to give a number of requests for instructions submitted on behalf of the plaintiff. A radical error exists in all these requests, due to the fact that they are not applicable to the issues actually on trial before the court and jury. To show the theory involved in these requests for instructions, it will only be necessary to quote the first and second of the series:

"First. You are instructed that the agent, William Clemens, had no power or authority to draw any drafts upon the plaintiff elevator company for any purpose excepting that for paying for grain purchased by him for said Elevator Company, or in exchange for currency actually paid to him at the time of the issuance and delivery of such drafts. Second. If you find that any moneys of the defendant lumber company were used by William Clemens in the purchase of grain for the plaintiff, and further find that said moneys were so used by the said Clemens before the issuance and delivery of the drafts described in the pleadings to the said defendant lumber company, then your verdict must be in favor of the plaintiff."

It only requires an examination of the complaint to show that these requests for instructions were based upon a theory not within the issues as made by the pleadings. The allegations of the complaint were to the effect that Clemens, as agent of the elevator company, drew the draft; that the company, supposing the amount therein named had been paid to its agent for the purpose of carrying on its business at Leonard, paid the same. It then alleges that the defendant did not pay to the agent of the plaintiff, for the use of the plaintiff, the amount named in the draft, or any other sum, and that in making the transaction the defendants, and each of them, well knew that no consideration passed from them to the plaintiff for the \$500 which they received upon the draft, and that in making the transaction they were

in fact receiving and did receive from the plaintiff the amount therein named, without having paid the plaintiff any consideration whatever therefor. The answer admitted the drawing of the draft by Clemens, and its receipt by the defendant, but denied that it was without consideration. Upon the contrary, it was affirmatively alleged in the answer that the defendant lumber company paid therefor to Clemens, and that Clemens, as the agent of the company, received for the draft, in money, for the use of the plaintiff in the purchase of grain, the full amount of the draft. It is clearly apparent that counsel for the plaintiff, in all the requests submitted, mistook the issues involved under the pleadings, and treated the case as one to recover the proceeds of drafts drawn and negotiated by the plaintiff's agent without authority. This was not the issue tendered by the pleadings, which the court and jury were to try. If the action were based solely upon the ground that the agent of the elevator company was without authority to issue the draft in suit, then the allegation in the petition that the defendant did not pay to Clemens, for the use of the plaintiff, any consideration whatever for the draft, was wholly unnecessary, as that fact could make no difference. On the other hand, if the action was one for the recovery of money paid by mistake of fact, which we think it was, this was a necessary allegation; hence all of the instructions asked by the plaintiff were properly refused, and none of the assignments of error based on the refusal of the court to give these requests are well taken.

The circuit court, as we view the case, rightly apprehended the issue that was involved, and rightly instructed the jury to the effect that this was an action to recover back money paid to the defendant through a mistake of fact, and that the principal question in the case was, did Clemens receive from the funds of the lumber company, and apply to the use of the elevator company, an amount equal to the face of the drafts? that, if he did, there was no mistake in paying the drafts, and the elevator company could not recover back the money which it had paid; that if the agent did not receive from the funds of the lumber company an amount equal to the draft, and apply the same to the use of the elevator company, then the elevator company was induced to pay the drafts through a mistake, and was entitled to recover the money back.

Some other assignments of error are based upon instructions given by the court to the jury, but, in view of what we have already said, it becomes unnecessary to restate them, as counsel for the plaintiff in error concede, if the action was one for the recovery of money paid by mistake, "that the charge of the court was more favorable to the plaintiff than the law and situation of the parties justified."

Upon the question, whether Clemens, as agent of the plaintiff in error, did in fact apply to the use of the plaintiff, out of the funds of the defendant, the sums for which the drafts were drawn, the evidence was conflicting, and the question was submitted to the jury under proper instructions.

While we have not, in the disposition of this case, noticed the several assignments of error separately, they have all been carefully examined, and we find no error for which the judgment of the circuit court should be reversed. Judgment affirmed.

## SOUTHERN PAC. CO. v. HUNTSMAN.

(Circuit Court of Appeals, Eighth Circuit. November 3, 1902.)

No. 1,667.

## 1. MASTER—INJURY TO EMPLOYEE—RAILWAY COLLISION—NEGLIGENCE—QUESTION FOR JURY.

Where a fireman on a freight train was injured in a collision with another train, due to the failure of the engineer of the latter train to remain at a station as ordered, the questions whether such engineer was incompetent by reason of his carelessness and forgetfulness, and whether the company knew, or in the exercise of ordinary care might have known, that he was incompetent, *held*, under the evidence, to be for the jury.

## 2. SAME—DUTY OF RAILROAD IN THE EMPLOYMENT OF ENGINEERS.

Since the proper performance of the duties of engineers in charge of railway trains depends on their being prudent, alert, and mindful of orders, railway companies must keep a close watch on the habits and mental peculiarities of the persons whom they employ as engineers; this exaction being nothing more than that they exercise ordinary care in the selection of their engineers, in the light of their duties.

## 3. SAME—EVIDENCE—ADMISSIBILITY.

Where the complaint in an action by a fireman for injuries averred that his only means of escaping serious injury when a collision with another train was imminent was to jump from his engine, which he did, and was injured, and which allegation defendant denied, the admission in evidence of photographs of the wreck, though taken after the positions of the engines had been somewhat changed, was proper, as tending to show the actual result of the collision, and the necessity which existed for the fireman leaping from the engine before the collision occurred.

## 4. SAME.

The admission of testimony that five other persons were injured in the collision was proper, for the same reason.

In Error to the Circuit Court of the United States for the District of Utah.

Jeptha D. Howe, for plaintiff in error.

W. L. Maginnis, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. On December 11, 1900, Arthur Huntsman, the defendant in error, was a fireman on an engine belonging to the Southern Pacific Company, the plaintiff in error, which was hauling one of its trains westwardly on its railroad. At a point from 2 to 2½ miles distant from a station in the state of Utah called "Fenelon," it ran into another freight train of the Southern Pacific Company, which was running east at the rate of about 25 miles an hour. The engine of the east-bound train was in charge of an engineer by the name of Sadler, and the collision occurred because Sadler, instead of waiting at Fenelon for the west-bound train to pass, as he had been ordered to do by the train dispatcher, in violation of his orders ran past Fenelon until he came into collision with the west-bound train. The evidence tended to show that the collision occurred on a curve; that the engine of the east-bound train was not discovered

until it was about 50 yards distant from the engine of the west-bound train, on which Huntsman was fireman; that, after the discovery of the train approaching from the west, it was impossible to stop the trains in time to avoid the collision; and that, in consequence of that fact, Huntsman leaped from the cab of his engine, and was injured to a considerable extent. He brought the present action to recover damages for the injury which he had sustained in consequence of the collision, and alleged, as a ground of recovery, that Sadler was incompetent to act as engineer of a locomotive engine upon the railroad in question, or upon any railroad, by reason of his being a careless and forgetful person, which fact, as it was alleged, was well known to the defendant company, or, in the exercise of reasonable and ordinary care, ought to have been known. The principal error assigned, and the one that is argued at the greatest length, is that the court erred in refusing to give a peremptory instruction directing the jury to return a verdict in favor of the defendant company. This exception to the action of the lower court, in view of its importance, will be first noticed.

The contention that a peremptory instruction in favor of the defendant company ought to have been given is based upon the ground that there was no substantial evidence tending to show that Sadler was an incompetent engineer, or that the defendant had notice of the fact prior to the collision. To sustain the charge of incompetency, the plaintiff below introduced the following evidence: First, a record kept by the company itself, which showed that Sadler had been in its employ from time to time since August 12, 1892, serving in the capacity of fireman, car inspector, and hostler; that since November, 1898, he had acted as engineer,—a part of the time as engineer on a switch engine, and later, since February, 1899, as engineer on the main line; that on August 24, 1900, he had been suspended for overlooking a train order, though no collision resulted therefrom; that he had remained suspended until December 5, 1900, when he was reinstated, and that only six days thereafter, to wit, on December 11, 1900, by disobeying or forgetting his orders, and running past Fenelon, he had occasioned the collision which gave rise to the present action. There was other evidence which tended to show, and did show, that in August or July, 1899, a train on the defendant's road, which was running west on regular time, had to back up a mile or two because it met Sadler with his engine on the main line, running an extra, without orders, on the time of the regular train; that the delay so occasioned was reported to the defendant's superintendent; and that on August 24, 1900, when Sadler was suspended, he also ran out on the main line about a mile from a station, where he should have stopped to allow another train to go by, and encountered that train, which had the right of way, but, the track being straight, no collision occurred. There was evidence tending to show that on another occasion he had forgotten his orders commanding him to stop at a certain way station, and that he would have run past it and encountered another train but for the fact that his attention was called to his orders by his fireman, who had some difficulty in convincing him that he had orders to stop. There was also evidence by one witness, who was a fireman



who had served under Sadler, tending to show that he was forgetful, and that he had the reputation among other employes of the defendant company of being forgetful, and for that reason incompetent. In view of this testimony, it cannot be said that there was no substantial evidence tending to show that Sadler was unfit to be trusted with the management of a train. It is true, no doubt, that the best of engineers will occasionally make a mistake and suffer a momentary lapse of memory; and for this reason a single error of judgment or a single act of forgetfulness ought not, as a rule, to be esteemed sufficient to warrant the conclusion that an engineer is untrustworthy. But in the present case the evidence had a marked tendency to show something more than a single lapse of memory. It tended to prove that Sadler, either through a defect of memory or other cause, was liable to overlook his orders and take dangerous risks, and that the defendant company, in the exercise of ordinary care, ought to have been aware of the fact. At all events, in view of the testimony to which we have alluded, it was the function of the jury, rather than the trial judge, to determine whether he was the kind of a man to whom the company ought to have intrusted the handling of a train. It cannot be said, we think, that all reasonable persons, in view of the testimony, would have reached the conclusion, necessarily, that there was no substantial evidence tending to establish Sadler's incompetency. Owing to the responsible duties which engineers in charge of railway trains perform, and the fact that many lives and much valuable property depend upon their being prudent, alert, ever mindful of their orders, and not given to fits of abstraction, railroad companies ought to keep a close watch on the habits and mental peculiarities of the persons whom they employ in such responsible positions. This is exacting from them nothing more than the exercise of ordinary care in the selection of that class of employes, when the responsible nature of the duties which they perform, and the consequences that may result from a slight mistake, which in other employments would be trivial, is taken into account. We are of opinion, therefore, that the learned judge of the trial court properly allowed the jury to determine whether the injury of which the plaintiff complained was due to the fact that the company had retained in its service as engineer a person whom it ought to have known was incompetent to discharge the particular duties that had been devolved upon him.

The defendant company also saved a number of exceptions to the admission of testimony, and have argued the same in this court, but a careful examination of these exceptions has served to convince us that they are without merit. Most of them are of so little moment, we think, as not to require special notice. It is strenuously urged by counsel for the defendant company that the trial court should not have admitted two photographs of the wreck, and that it also erred in permitting the plaintiff to testify in his own favor, on his redirect examination, that five other persons besides himself were injured by the collision. Concerning this testimony, it is said that it was immaterial and irrelevant, and that the photographs of the wreck should not have been admitted in evidence, because they were taken after the

positions of the wrecked engines had been somewhat changed. It is also said that this testimony was harmful to the defendant, because it aroused the sympathy of the jury for the plaintiff, excited their indignation, and diverted their minds from the real questions in controversy. We are of opinion, however, that the admission of the testimony, even if it was not very material, would not warrant a reversal of the judgment. Nor are we able to concede that the testimony was, as claimed, immaterial. The plaintiff below had averred in his complaint that his only means of escaping serious injury when the collision was imminent was by jumping from the engine, and that he did so jump, thereby sustaining injury. The defendant company denied this allegation, and for this reason it was competent for the plaintiff to show the actual result of the collision, and the necessity which existed for leaping from the engine before the shock of the collision occurred. He could show this fact in no better way than by producing photographs of the wreck, and by testifying that other persons besides himself were injured; and, while there was some testimony that one or both of the engines had been moved slightly before the photographs were taken, yet, as the plaintiff testified that the photographs, as taken, correctly showed the extent to which the engines were broken up by the collision, the fact that they had been moved slightly in no way impaired the competency of the evidence for the purpose for which it was admitted. It is clear, we think, that no material error was committed in permitting the photographs to be shown, or in permitting the plaintiff to testify that five other persons besides himself sustained injury. Three of the men so injured were killed, but the trial court was so careful, as it seems, to prevent the admission of any unnecessary testimony which might prejudice the defendant's case, that it declined to permit the fact to be proven that three persons were killed. It simply permitted the plaintiff to testify that five other persons were hurt.

The case was fairly tried throughout, and no sufficient ground is disclosed by the record for reversing the judgment. It is accordingly affirmed.

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FIREMAN'S FUND INS. CO. v. M'GREEVY.

(Circuit Court of Appeals, Eighth Circuit. November 3, 1902.)

No. 1,681.

1. INSURANCE AGENT—POLICY ISSUED TO HIMSELF—FRAUDULENT CONCEALMENT—MATERIALITY—WITHDRAWAL OF ISSUE FROM JURY.

An insurance agent issued a policy to himself on a warehouse purchased by him a few days before for \$500. He reported the insurance to the company with the statement that the building was worth from \$3,500 to \$4,000, but did not disclose his recent purchase, nor the fact that the building had been erected as a creamery, and had been put to various uses, none of which proved profitable. The company's instructions to its agent were to consider risks with reference to their moral hazard, and not to issue a policy for an amount the insured would rather have than the risk covered; and, if a building was badly located, too large, in a business not adapted to it, not to write it. *Held*, in an action on a policy after loss, that the materiality of the

agent's concealment was so obvious as to be decided as a matter of law, and it was error to submit that question to the jury.

**2. SAME—EFFECT.**

Where the court submits to the jury an issue which it itself should have decided, such error will necessitate a reversal, even though another issue was submitted, upon which the jury might have rendered the general verdict they did.

**3. SAME—WAIVER BY COMPANY.**

An insurance agent issued a fire policy to himself, concealing the actual value and condition of the property. After loss the company's agent, when visiting him to effect an adjustment, learned of the price paid by the insured, but nevertheless endeavored to reach a compromise. He induced insured to secure a carpenter's estimate of the cost of rebuilding, for which insured gave the carpenter \$5 worth of damaged grain. Failing to secure a compromise, the adjusting agent said to insured that, if he did not arbitrate, the company would fight him, and take him into the United States courts. After the adjusting agent's departure, the company learned of the insured's concealment, denied liability on the policy, and tendered back the premium. *Held*, that the company had not waived the defense of fraudulent concealment.

**In Error to the Circuit Court of the United States for the District of Nebraska.**

Bernard McGreevy, the defendant in error (plaintiff below), was, in June and July, 1897, and before and after that time, the local agent, at the city of O'Neill, Holt county, Neb., of the Fireman's Fund Insurance Company, of San Francisco, Cal., the plaintiff in error (defendant below). On July 2, 1897, upon one of the executed blanks furnished him by said defendant, he made out, and as such agent countersigned, a policy of insurance, by the terms of which the defendant company, in consideration of the sum of \$75 premium, insured said plaintiff for one year from noon of that day against all direct loss or damage by fire to his two-story frame, brick foundation, shingle-roof warehouse, situate in said city, on a described parcel of land of the plaintiff, to the amount of \$3,000; and on the same day transmitted said policy by mail for approval to the assistant manager of said defendant at Chicago, Ill., together with his daily report as such agent, describing said insurance, and stating that said warehouse was built about 1883, of wood, and was of the cash value of \$3,500 to \$4,000. Thereupon said policy of insurance was, on July 3, 1897, approved by said assistant manager, and returned to the plaintiff, who paid therefor to defendant the sum of \$63.75, being the amount of said premium of \$75 after deducting therefrom 15 per cent. thereof as plaintiff's commission as such agent for effecting the insurance. Said warehouse building had been erected in 1883 as a creamery. That business proving unprofitable, the appliances were removed after two or three years, and it was changed and used for a time as a hotel. That use was also abandoned, and shortly before June, 1897, it had been used for storing chicory and other commodities. In the meantime, prior to 1890, the title to the property became vested in the Holt County Bank to satisfy a debt owing it by the creamery company, and about 1893 became vested in Oscar O. Snyder, as receiver of said bank, which had become insolvent. For more than two years said receiver had offered and endeavored to sell said building and the land on which it was situated—about one-half acre—for the sum of \$600, and was unable to make such sale until June, 1897, when he sold and conveyed the same to plaintiff for the sum of \$500, with plaintiff's agreement to pay the outstanding taxes against the same, which were less than \$100. In a book of instructions issued by defendant to its agents, a copy of which had been furnished plaintiff when first appointed, defendant had directed that: "All risks should be considered with reference to their moral hazard. Never issue a policy for an amount that the insured would rather have than the risk covered. If a building is badly located, too large, in a business not adapted to it, don't write it. Don't cover large hotels or factory risks built in expectation of a population that has not

materialized. If a risk is an elephant on the hands of its owner, let those cover it who write menageries. We don't." Agents were also directed to decline to insure all unsalable and unprofitable property. The plaintiff, when he sought the approval of defendant's assistant manager of said policy, did not inform him or defendant company anything about the use or occupation of said building, or about his purchase of the same, or the price he had paid therefor, or at which it had previously been offered for sale by the receiver; and defendant company had no information of any such matters before the destruction of said building by fire. After plaintiff's purchase of the building, it was used as a grain warehouse, and grain was stored in it when it was burned on December 18, 1897. A few days after the fire, Frank D. Lyon, an agent of defendant, came to O'Neill to examine and adjust the loss, and while there ascertained the price which plaintiff had paid for the property. Offers of settlement were made on each side, and not accepted; and at the suggestion of said Lyon plaintiff obtained from a carpenter whom they met an approximate estimate of the cost of replacing the building, for which service plaintiff gave the carpenter grain from the burned building of the estimated value of \$5. Afterwards, and not later than January 4, 1898, said Lyon having learned the contents of the daily report which plaintiff had sent to defendant's assistant manager when he sent said policy to him for approval, on behalf of defendant and by direction of its attorney notified said plaintiff that defendant denied all liability on said policy because of plaintiff's fraud and suppression of facts when the policy was issued; and on behalf of defendant tendered to plaintiff the sum of \$66.23, being the sum paid by plaintiff for the policy and interest thereon until the day of such tender. After formal proofs of loss, this action was begun in the district court of Holt county, Neb., and was thereafter properly removed to the circuit court of the United States for the district of Nebraska; and upon trial a verdict was rendered February 19, 1901, in favor of the plaintiff for \$3,656.25 upon which judgment in favor of plaintiff was entered September 21, 1901, for \$3,806.26 and costs.

W. W. Morsman, for plaintiff in error.

J. B. Sheean and M. F. Harrington, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

In issuing the policy of insurance to himself, the plaintiff not only acted on his own behalf, but also acted and assumed to act as the agent of the defendant insurance company. He did not send to the defendant an application for insurance to be acted on through some other agent who might investigate the risk, but made out the policy himself as defendant's agent, and sent it for approval to defendant's manager, accompanied by his daily report of that risk; on which report he expected the manager to act, as he did act, in approving the risk. And plaintiff countersigned the policy as defendant's agent, and charged and was allowed his commission of 15 per cent. of the premium for effecting the insurance as defendant's agent. The court therefore correctly instructed the jury that as such agent the duty devolved on the plaintiff to disclose to his principal, when applying for insurance, or for the approval of the insurance policy, such facts as he possessed a knowledge of, which he had reason to believe, if brought to the attention and knowledge of the insurance company, would influence them, or might influence them, not to approve the policy upon the property in question. An agent may deal directly

with his principal when the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation. But the strictest of faith is required. *Mechem*, Ag. § 466. But the court further charged the jury as follows:

"Then, on the other hand, if you find that the plaintiff, knowing of the various facts, failed to communicate them to the defendant, determine whether or not they were of such a material nature as that, under the instructions which the defendant had given the plaintiff with regard to not insuring property of a certain kind, whether or not the fact that this property had been offered in the market for a period of time at \$600 and no purchasers, and the plaintiff had bought it, together with the land upon which it stood, a few days before, for \$500, and all of those facts with which he was familiar, and which were alleged in the answer to have been concealed, whether or not had he disclosed them to the insurance company, whether or not they were of such a material character that the insurance company would have refused to have issued a policy of insurance in this case. If they were of that character, it was his duty to disclose them to his principal, he being the agent of the insurance company, and dealing with the insurance company in his own behalf."

This portion of the charge was excepted to, and is erroneous. It assumed to submit to the jury, as matters which they were to pass upon and determine, facts about which there was actually no dispute or question. The plaintiff had resided in the city and was engaged in active business there for many years, and there was no pretense that he did not know that the building had always been unprofitable. He certainly knew that he had just purchased it, with the land, for \$500. From the instructions which he had as agent of defendant, he must have known that the defendant company would regard these matters which he did not disclose, but knowingly concealed, as material to the risk; and they were plainly material, and the jury should have been instructed that they were material. The defendant had instructed the plaintiff, as its agent, to "never issue a policy for an amount that the insured would rather have than the risk covered"; and it seems reasonably certain that it would not, had it been informed of the fact, have insured for \$3,000 a building which plaintiff had just bought, with the ground, for \$500. The facts concealed, had they been disclosed, would have contradicted his representation that the value of the building was \$3,500 to \$4,000. The concealment was fraudulent, and knowingly such. In *Druse v. Wheeler*, 26 Mich. 189, 196, the court says:

"And when all the evidence upon the point on both sides tends clearly to prove, and if true does prove, a fact, and there is none to cast a doubt upon it, such fact may, and generally should, be assumed as proved; and the jury should be told that there is no evidence from which they can find against the fact as proved. And under such a state of proofs, a charge which, in effect, tells the jury that it is competent for them to find either way,—for or against the existence of the fact so proved,—is erroneous, as it assumes that there is evidence in the case tending as well to disprove such fact as to prove it."

See, also, *Gavigan v. Evans*, 45 Mich. 597, 8 N. W. 545; *Seligman v. Ten Eyck's Estate*, 49 Mich. 104, 109, 13 N. W. 377.

Where the evidence leaves any doubt as to the existence of a fact, the matter should be left to the jury; but where it is established by all the evidence on both sides the jury cannot be permitted to find

to the contrary. And, in respect to concealments, the materiality of matter concealed may, as in this case, be so apparent that it should not be left open to a jury to find it not material.

For this error the judgment must be reversed, even though another issue, which was submitted to the jury, and upon which they may have found for the plaintiff, was properly submitted to them. Where several issues are left to a jury, and in respect to any one of them error is committed in the charge of the court, a general verdict cannot be sustained, as it may be that the jury founded their verdict upon the very issue erroneously submitted to them. *Maryland v. Baldwin*, 112 U. S. 490, 493, 5 Sup. Ct. 278, 28 L. Ed. 822; *Coal Co. v. Johnson*, 56 Fed. 810, 6 C. C. A. 148, 151; *Railway Co. v. Needham*, 11 C. C. A. 56, 63 Fed. 107, 113, 25 L. R. A. 833.

But, in view of the evidence in this case, the court also erred in submitting to the jury the other issue in the case, which was whether the adjusting agent, Lyon, with knowledge of the representations and concealments of the plaintiff in procuring the insurance, satisfied the jury by his conduct and actions in his transactions with plaintiff after the fire that he intended to and did ratify and accept the policy as a valid and binding policy against the company. Exceptions were duly taken to those parts of the charge which submitted this issue to the jury. It is true that the misrepresentations and concealments of the plaintiff in obtaining the policy while acting in the matter as defendant's agent did not render the policy void, but only voidable at the election of the defendant; and such election, if to rescind the policy, should be exercised, and plaintiff notified thereof, within a reasonable time after the fraud was discovered by the defendant. The defendant, with full knowledge of the facts, might waive the objection, either expressly or by acts evincing an intention to treat the policy as valid; or it might, after such knowledge, estop itself from urging that defense by requiring or inducing the plaintiff to take such action or incur such expenses, on defendant's implied admission that it was still bound by the policy, as would make it inequitable to allow the defendant afterwards to interpose that defense. In this case there was no evidence of any knowledge on the part of defendant company of the misrepresentations or concealments by which plaintiff obtained the policy at the time Lyon was sent to O'Neill, after the fire, to examine and adjust the loss. So far from there being any evidence that Lyon was authorized to waive the defense of plaintiff's fraud, the circumstances make it certain that when he was sent there no such fraud was contemplated or suspected by the defendant. That Lyon did not assume or intend to waive any defense is shown by plaintiff's own testimony that Lyon closed the discussion, when plaintiff refused to arbitrate, by threat of litigation, saying: "If you do not, we will fight you,—bring you into the United States court, or the United States supreme court." "All right," says I, "go ahead." So that ended it." Lyon learned, after he reached O'Neill, of the price which plaintiff had paid for the property. Notwithstanding that, he conferred with plaintiff, without result, as to the method or terms upon which the claim might be settled, and litigation avoided. Attempts to settle controversies are commendable, and not to be discouraged. The

conference lasted a part of one day, and from it no element of estoppel arose in favor of the plaintiff. The trifling amount of scorched grain which plaintiff gave the carpenter for a loose estimate of the cost of rebuilding was to obtain some basis for discussing one of the mooted theories of settlement. It was proper on the part of Lyon that while there he should inform himself as to the views and disposition of the plaintiff, that the defendant might act understandingly when informed of all the facts. And the defendant company, as soon as it had full information, promptly rescinded the policy, and tendered back to the plaintiff the money it had received from him, with interest.

The case is unlike that of *Insurance Co. v. Baker*, 27 C. C. A. 658, 83 Fed. 647. There it was very doubtful whether the representations could be regarded as fraudulent or untrue; and the insurance company became aware of all the facts in March, 1894, but continued to treat the policy as a subsisting obligation, dealing with the plaintiff on that basis for more than seven months thereafter. At its instance the plaintiff was induced, at considerable expense and trouble, to take out letters of guardianship, and to complete proofs of loss. Later it entered into negotiations with her for a reduction of her claim, in the course of which it first advanced the claim that the policy was void. No offer to repay the premium was made until March, 1895, a year after all the facts were known to the company, which was properly held to be estopped by its conduct. In this case there is no ground upon which the verdict in favor of the plaintiff can be supported.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

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NEPTUNE STEAM NAV CO. et al v. BORKMANN.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1902.)

No. 443.

1. SHIPPING—INJURY OF STEVEDORE—UNSAFE APPLIANCES.

The fact that a piece of wire rope furnished by a ship for the use of stevedores broke under a weight only one-tenth as great as it should have safely supported if in good condition is sufficient evidence that it was not in good condition to render the ship liable for a resulting injury to a stevedore on the ground of its failure to furnish proper and safe appliances.

2. SAME—LATENT DEFECTS.

A stevedore was injured through the breaking of a band furnished by the ship for rigging a hoisting boom to the mast. Such band was made some three months before, under direction of the ship's officers, from a piece of old wire hawser, and covered with service or parcelling, and broke on account of the rusted and weak condition of the wire. *Held*, that the ship was not exonerated from liability on the ground that the defect was latent, because not apparent by reason of the covering.

Appeal from the District Court of the United States for the District of Maryland.

Robert H. Smith, for appellants.

John C. Kumpf and Louis P. Hennighausen, for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

BRAWLEY, District Judge. This is an appeal from the decree of the United States district court of Maryland, in admiralty, awarding \$4,000 damages to the libelant for personal injuries sustained while in the performance of his duty by reason of defective appliances used on the steamship Venango. Borkmann, the libelant, was one of a gang of stevedores employed to unload the ship, January 22, 1901, while lying at her wharf in Baltimore, and was assisting in rigging a heavy boom which was to be used in discharging the ship's cargo, and while so engaged a wire rope or band which was fastened to one end of the boom parted, causing the boom to fall. The operation of unloading was in charge of the stevedores, the ship furnishing the appliances. This boom was about 25 or 30 feet long, about 6 inches in diameter, and its weight, with the rigging attached, was probably about one-half a ton. While the boom was being raised, three men were stationed on the port side to hold the lines on that side, so that the boom should not swing to starboard, as it had a strong tendency to do on account of a heavy list to that side. Borkmann was holding the guy rope on the starboard side. It does not appear to have been necessary for him to have been on that side, as the ship had a heavy list to starboard, but it cannot be said that he was improperly there. The boom was raised by a winch, and after being elevated to its proper position, and while two of the stevedores were on the mast, endeavoring to fasten it to the mast, where it was to be used as a derrick, the strap or band with which it was to be fastened gave way, and the boom fell with a sudden crash, and at the same time Borkmann fell senseless to the deck. One of the witnesses nearest to the scene says that when the boom fell it struck the after house, breaking off a piece about three feet in length, and that this broken piece struck Borkmann on the head. Other witnesses say that the boom did not strike the house, but struck the hatch combing, and that Borkmann was not struck by it, but slipped on the deck, which some of the witnesses say was icy. Other witnesses deny that there was any ice on the deck. The wire band or rope, covered with what is called variously "service" or "parceling" or "season," was not produced at the trial below, but by leave of the court was produced later, and was one of the exhibits before us. According to the testimony of the mate, it was made from a wire hawser between three and four months before the accident, and would have had strength, if new and in good condition, to bear ten times the weight of the boom. That it broke while being properly used, and while subject to no unusual strain, is a fact which is not disputed, and that seems to demonstrate that it was not safe and sufficient for its purpose. Several witnesses have testified that the wire looked rusty. It is claimed by the appellants here that, inasmuch as it was covered with the parceling or service, no weakness or defect was apparent, and that the ship is not liable for injuries caused by latent defects. We cannot allow this defense, for the testimony shows that the wire rope used in making the band was cut from an old hawser



and made into a band under the supervision of the ship's officers only three or four months before, and it does not fall within the class of appliances to which the rule as to latent defects applies; and we are of opinion that the tackle which the ship furnished was not safe and sufficient, as required by law. It does not seem to us material to decide between the conflicting theories as to how Borkmann received his injuries. Whether he was struck by the boom, as he thought, and which we think is not probable, or by the piece of the boom which was broken in its fall, or whether, confronted by sudden danger, compelled to act instantaneously to avoid the consequences of impending peril, he slipped and fell, and thereby inflicted the injuries to his head, seems immaterial, under the circumstances. The fact that the strap broke under the circumstances disclosed is sufficient evidence of its weak and insufficient condition; and that a ship whose duty it is to furnish safe tackle is liable if the tackle is insufficient, is clear. The testimony of the medical expert who examined the libelant, as disclosed in the record, would seem sufficient to raise a doubt whether the enfeebled condition of the libelant at the time of the trial could be properly attributable to the injuries received, this witness testifying that, in his opinion, his condition is due to tuberculosis; but in view of the uncontradicted testimony offered in behalf of the libelant that he was put to bed immediately after the accident, and was confined to his bed for 17 weeks, and that previous to that time he was apparently healthy and an able-bodied man, able to work every day, and that he has not been able to do any work since, and with the opinion of the district judge, who saw the witnesses and the libelant, that the injuries were due to this accident, we feel constrained to the same conclusion.

The decree of the district court is affirmed.

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WALLACE et al. v. ARKANSAS CENT. R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1902.)

No. 1,612.

1. CARRIERS—TARIFF SCHEDULE FIXED BY STATE COMMISSION—CONSTITUTIONALITY.

A railroad company is entitled to an injunction restraining a state railroad commission from putting in force a proposed tariff schedule where the bill alleges that the rates established by such schedule will amount to a taking of complainant's property without due process of law, by reducing its earnings far below the amount required to pay its operating expenses, taxes, and fixed charges, and the cause is submitted for final decision on demurrer to other paragraphs of the bill, and without any denial of such allegation.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

George W. Murphy, Atty. Gen., for the State.

Oscar L. Miles (George E. Dodge and B. S. Johnson, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. The record in this case discloses that the Arkansas Central Railroad Company, the appellee, filed a bill against Jeremiah G. Wallace, Felix M. Hanley, and Henry W. Wells, composing the board of railroad commissioners of the state of Arkansas, whereby it prayed for an injunction restraining said board of railroad commissioners from putting in force a certain freight tariff applicable to certain railroads in the state of Arkansas, which, by an order of the board, had been adopted and made effective as of August 2, 1900, and declared to supersede all other tariffs then in effect on said railroads. Besides asking for an injunction restraining the commission from putting this tariff in force, the railroad company also asked for an injunction restraining the commissioners from instituting any suits against the complainant for the recovery of any penalties under the laws of the state by virtue of the fact that the complainant had not adopted and made such rates effective on its road as it was ordered to do. At a later date the term of office of Henry W. Wells, one of the commissioners, having expired, and Abner Gaines having been elected in his place, he was substituted as one of the defendants in place of Wells. On the presentation of the bill of complaint to the honorable Jacob Trieber, United States district judge for the Eastern district of Arkansas, a temporary restraining order, such as was asked, was granted at chambers on August 2, 1900. At a later date, to wit, on August 14, 1900, the complainant company obtained leave to file an amended or substituted bill of complaint, which was thereupon filed. It will suffice to say, of the original and substituted bills, that by the fifth and tenth paragraphs thereof it was charged, in substance, that the effect of the freight tariff which had been put in force by the order of the commission was to establish a joint through rate as between the complainant and connecting carriers, and it was averred that by the laws of the state of Arkansas, under which the commission acted, no power or authority was given to it to establish a joint through tariff as between the complainant company and other railroads upon freight which was carried wholly within the state, and that the tariff which the commission had attempted to put in force was void and illegal for that reason. In another paragraph of the original and substituted bills, being paragraph 7, the complainant alleged that the schedule of rates which had been put in force by the commission as of August 2, 1900, and concerning which complaint was made as above,—because it established a joint through rate,—would, if put in force, reduce the revenues of the complainant to the extent of  $33\frac{1}{3}$  per cent. below its present revenue, and would amount to a confiscation of the complainant's railroad property, and have the effect, if put in force, of taking the complainant's property for public use without just compensation, in violation of the provisions of the constitution of the United States.

The defendants below, who are the appellants in this court, filed an answer to the original and substituted bills on February 2, 1901; but subsequently, on April 25, 1901, they appeared by their solicitor, and by leave of court withdrew the aforesaid answer, and filed a demurrer to paragraphs 5 and 10 of the complaint, which, as before stated, averred, in substance, that the laws of the state of Arkansas did not vest in the commission the power to establish joint rates be-

tween connecting carriers, such as the commission had attempted to establish. On the hearing of the demurrer to the fifth and tenth paragraphs of the bill the same was overruled. The defendants thereupon declined to plead further, and an order was subsequently entered making the temporary injunction perpetual, and adjudging that the complainant recover its costs and have execution therefor. In other words, a final decree was entered in favor of the complainant below. The case comes to this court on appeal from the last-mentioned decree.

It is obvious, we think, that no relief can be afforded to the appellants in this court, whether the action of the lower court upon the demurrer to the fifth and tenth paragraphs of the bill was erroneous or otherwise. Both the original and substituted bills contained a specific allegation that the tariff schedule which had been put in force by the commission, and made effective as of August 2, 1900, would reduce the complainant's earnings to such an extent as would amount to a taking of its property for public use without just compensation. It was averred in that paragraph of the bill that such would be the effect of the proposed schedule, because the income which the complainant was at the time deriving from all sources, by the use of its property, was not sufficient, under the existing schedule of rates, to enable the company to pay its operating expenses, taxes, and fixed charges, and that the proposed schedule of rates would yield far less than the existing schedule. In view of the action taken by the defendants when their demurrer to the fifth and tenth paragraphs of the bill was overruled, these allegations stood confessed; and, such being the case, the decree of the lower court was clearly right under repeated decisions of the supreme court of the United States holding that a state law or regulation establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such a compensation as under all the circumstances of the case is just to it and the public, operates to deprive the company of its property without due process of law, and to deny to it the equal protection of the law, in violation of the fourteenth amendment to the federal constitution. *Smyth v. Ames*, 169 U. S. 466, 522, 523, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. It may be that the failure of the defendants below to deny the allegations contained in the seventh paragraph of the bill was due to an oversight, but if such was the fact the mistake cannot be remedied in this court.

Upon the face of the record and the admitted facts, the decree below was clearly right, and it should be affirmed. It is so ordered.

## PEARCE v. TERRITORY OF OKLAHOMA.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1902.)

No. 1,747.

## 1. LARCENY—ACCESSORY BEFORE THE FACT—INDICTMENT AS PRINCIPAL.

The law of Oklahoma (St. Okl. 1893, §§ 1863, 5087) abolishes the distinction between accessories before the fact and principals, and provides that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals, and must be indicted, tried, and punished as such, and also that no other facts need be alleged in any indictment against an accessory than are required in an indictment against a principal. *Held*, that under such statutory provisions an indictment for the larceny of a buggy was sustained by evidence showing that defendant, although 75 miles from the place where the buggy was stolen, and in another county, had previously counseled and advised one of the persons who actually committed the theft to steal a buggy and bring it to him, promising to pay for it a portion of its value and to conceal the theft, and that the buggy stolen was in fact taken to and received by him pursuant to such agreement.

In Error to the Supreme Court of the Territory of Oklahoma.

S. H. Harris, for plaintiff in error.

J. C. Robberts, Atty. Gen., for the Territory.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This case comes from the supreme court of the territory of Oklahoma. 68 Pac. 504. The plaintiff in error, Amos E. Pearce, was convicted of grand larceny in the district court of Payne county, Okl. T., on May 20, 1899, and was sentenced to be imprisoned for the term of five years in the territorial penitentiary of Oklahoma, which is the Kansas penitentiary situated at Lansing, Kan. From the conviction and sentence he took an appeal to the supreme court of the territory of Oklahoma, by which court the sentence was affirmed on January 18, 1902. Thereupon the accused brought the case to this court upon a writ of error.

The substantial question for our determination is whether the territory introduced any substantial evidence to sustain the charge which was laid in the indictment, and this question was raised by a general demurrer to the testimony at the conclusion of the evidence. The indictment alleged, in substance, that on March 7, 1899, in the county of Payne, in the territory of Oklahoma, one top buggy, of the value of \$90, the same being the property of Thomas Broyls, the defendant, Pearce, did then and there unlawfully, feloniously, and by stealth, take, steal, and carry away, with intent to deprive the owner thereof, contrary to the form of the statute in that case made and provided. The testimony which was offered to sustain the indict-

¶ 1. Prosecution and punishment of accessories, see note to Bliss v. U. S., 44 C. C. A. 326.

See Criminal Law, vol. 14, Cent. Dig. §§ 89, 90; Larceny, vol. 32, Cent. Dig. § 55.

ment showed that the buggy in question was actually stolen by W. O. Stanley and Alfred French in Payne county, Okl.; but there was evidence tending to show that prior to the theft of the buggy these men had had a conversation with Pearce, wherein he requested them to steal a buggy and two sets of harness, telling them that if such articles were stolen and brought to him, and they would "make the price light enough, so it would be a cut between" them, he would buy the articles stolen, and change the buggy so that it would not be recognized, and that he would also conceal the buggy if he was warned at any time that any one had obtained a trace of it and was liable to discover it. The testimony further showed that Pearce also said that he preferred to have the buggy and harness stolen down in Payne county, where the buggy in question was actually stolen; that when the felony was committed the buggy was taken immediately to the defendant, and delivered to him in the Osage country, about 75 miles from the place where it was stolen; that at the time of receiving it he promised to pay the thieves \$40; and that he also promised to change the name on the buggy, and to change the dashboard so that it would not be recognized.

By the laws of Oklahoma (St. Okl. 1893, § 5087), the distinction between an accessory before the fact and a principal, and between principals in the first and second degrees, in cases of felony, has been abrogated, and all persons concerned in the commission of a felony, whether they directly commit the acts constituting the offense, or aid and abet in its commission, though not present, must be indicted, tried, and punished as principals. The statute in question further provides that no additional facts need be alleged in any indictment against an accessory than are required in an indictment against a principal. The laws of the territory further provide (St. Okl. 1893, § 1863) that all persons concerned in the commission of a crime, whether it be a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals. In view of these statutory provisions modifying the common law, it is manifest, we think, that the evidence aforesaid was sufficient to warrant the jury in finding that the defendant was guilty of the offense charged in the indictment. The testimony tended to establish something more than the offense of receiving stolen property. It showed that the defendant had not only requested and counseled others to commit the larceny, but that he had shared in the spoils of the crime after it was committed. It disclosed that he was the real instigator of the crime, without whose advice it might not have been committed. Both in morals as well as in law he was as guilty as those who actually laid hands on the stolen property, although he was 75 miles distant from the place where it was taken, and in another county, and did not know the exact hour when the offense was committed. He was an accessory before the fact, according to all the definitions given of "accessories," because his will contributed intentionally to the felony, while he was himself too far away to take part in the act (Bish. New Cr. Law, § 673), and because he procured and counseled others to commit the offense, being himself absent from the scene of the crime.

4 Bl. Comm. 35. As the evidence justified a finding that he was an accessory before the fact, he was rightfully indicted, tried, and convicted as a principal, by virtue of the territorial statute.

The record further shows that the defendant requested the trial court to instruct the jury, in substance, that before they could return a verdict of guilty they must be satisfied from the evidence in the case, beyond a reasonable doubt, that the defendant participated in the commission of the offense charged in the indictment, by abetting or advising the commission thereof, "with knowledge that the parties aided or advised intended to commit the identical offense charged and described in the indictment in this case." The court refused this request, and an exception was saved; but in lieu thereof it charged the jury that, in order to convict the defendant, they must be satisfied from the evidence, beyond a reasonable doubt, that the defendant actually aided or abetted the commission of the crime charged in the indictment, and that a mere knowledge on the part of the defendant that Stanley contemplated the commission of the crime charged, or the purchase of the buggy, with information sufficient to indicate that the same had been stolen, would not warrant them in returning a verdict of guilty. In another instruction given by the trial court, and to which no exception was taken, the jury were told, in substance, that if Pearce entered into an arrangement with Stanley by which it was understood between them that Stanley was to steal a buggy and take it to Pearce, and Pearce was to pay him a sum of money for such stolen buggy, and that in pursuance of such arrangement, and in carrying out their common design, Stanley, either alone or in company with French, did steal the buggy in question from Thomas Broyles, in the county of Payne, and carried it to Pearce, in the Osage country, and Pearce took possession of the buggy and paid for it, then the accused was guilty, as charged in the indictment. We are of opinion that this latter instruction, to which no exception seems to have been taken, correctly stated the law applicable to the facts, and that the instruction aforesaid, which was asked by the defendant and refused, was properly refused. To constitute the defendant an aider and abettor, or to constitute him an accessory before the fact, it was not necessary, we think, that the defendant should have requested or advised Stanley to steal any particular buggy; but it was enough, to constitute him an accessory before the fact, that the particular kind of property to be stolen was agreed upon, and that property of that kind was stolen by the defendant's procurement and advice. Such seems to have been the view entertained by the trial court, and we think that it was correct.

Finding no error in the record that would warrant a reversal, the judgment below is hereby affirmed.

## FREESE et al. v. KEMPLAY et al.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1902.)

No. 1,678.

## 1. FRAUDULENT CONVEYANCES—EVIDENCE—INTENT OF VENDOR.

Upon an issue as to fraud in the sale of property in a controversy between attaching creditors and the vendee of the alleged fraudulent vendor it is always competent to show the intent of the vendor, and evidence of statements made by him prior to the sale showing a fraudulent intent, and evidence that when he went to the place where the sale was negotiated he registered under an assumed name, is admissible as tending to show such intent.

## 2. INSTRUCTIONS—COMMENTS ON THE EVIDENCE.

Comments on the evidence by the trial judge in his instructions are not assignable as error, where the jury were left at full liberty by the charge to determine all issues of fact for themselves.

## 3. VERDICT—SUFFICIENCY OF EVIDENCE.

A party who does not move for the direction of a verdict in his favor thereby admits that there is some evidence upon each material issue which should properly be considered by the jury.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Joe Kirby, D. H. Sullivan, and Thomas Griffin, for plaintiffs in error.

J. M. Parsons, for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. Herman C. Freese and Charles M. Rhode, the plaintiffs in error, brought an action against James Kemplay, H. A. Jandt, William Tackaberry, and William E. Tackaberry, wherein they alleged that the defendants had wrongfully and unlawfully taken possession of a stock of goods belonging to the plaintiffs situated at George, in the state of Iowa, and had unlawfully converted them to their own use, to the plaintiffs' damage in the sum of \$5,500. The defendants filed an answer to the complaint, wherein they admitted the seizure of the stock of goods in question, but alleged that the seizure was made by the defendant Kemplay, acting as sheriff of Lyon county, Iowa, under a writ of attachment theretofore lawfully issued out of the district court of Lyon county against Albert Miller at the suit of certain of his creditors. They further averred that about the time said writ of attachment was issued Miller had made a pretended sale of the stock of goods in controversy to one Joe Kirby; that said Kirby had immediately transferred the goods to the plaintiffs, Herman Freese and Charles M. Rhode, and that the sale so made was fraudulent, and was made in pursuance of a conspiracy between Kirby, Miller, and the plaintiffs to place the stock of goods, which was really the property of Miller, beyond

¶1. See Evidence, vol. 20, Cent. Dig. §§ 835, 843, 854; Fraudulent Conveyances, vol. 24, Cent. Dig. § 841.

the reach of his creditors. It was further alleged that at the time of the pretended sale Miller was indebted to the defendants Jandt and the Tackaberrys in a sum exceeding \$3,000, and that the plaintiffs had taken the stock of goods in controversy from Miller in pursuance of the aforesaid fraudulent arrangement, and for the purpose of defrauding Miller's creditors. The plaintiffs filed a reply, alleging, in substance, that they purchased the stock of goods in good faith, and denying the allegations of fraud which were contained in the defendants' answer. The case was subsequently tried to a jury on these issues, and resulted in a verdict in favor of the defendants.

The plaintiffs below, who have brought the case to this court on writ of error, complain in the first instance because, on the trial below, the defendants were allowed to give in evidence certain statements of Miller to one of his clerks showing that about 10 days prior to the sale he was contemplating a sale of the stock of goods in question with a view of defrauding his creditors. They also complain because the defendants were permitted to show that when Miller went to Sioux Falls, S. D., where the plaintiffs resided, with a view of negotiating the alleged fraudulent sale, he registered at a hotel under an assumed name, as if to conceal his identity. Both of these complaints are clearly without merit. In such cases as the one at bar, where a fraudulent sale of property is alleged, and the controversy is between an attaching creditor and the vendee of the alleged fraudulent vendor, it is always competent to show the intent of the vendor, and the evidence in question had an undoubted tendency to show that Miller was actuated by a fraudulent purpose. It may be conceded that the motives which actuated him would not impair the plaintiffs' title to the purchased property unless they were aware of his purpose or bought the stock of goods under such circumstances as that knowledge of his fraudulent intent may be inferred, and to that effect the jury were instructed. Nevertheless, the existence of a fraudulent intent on Miller's part was one of the facts to be established, and the statement which he made to his clerk shortly before the sale was accomplished, that "if he could just sell out and pocket the money and skip out he would do so," no less than the evidence tending to show that he registered under an assumed name when the negotiations for the sale were under way, was clearly competent. Whatever may be the true rule relative to the admissibility of the declarations of a fraudulent vendor, made subsequent to the sale and delivery of property to his vendee, the rule is well established that his declarations made shortly prior thereto, and while he is in possession of the property sold, which tend to establish his intent, are competent. *Brittain v. Crowther*, 4 C. C. A. 341, 343, 54 Fed. 295; *U. S. v. Griswold* (C. C.) 8 Fed. 556; *Jones v. Simpson*, 116 U. S. 609, 611, 6 Sup. Ct. 538, 29 L. Ed. 742; 14 Am. & Eng. Enc. Law (2d Ed.) 494, and cases there cited.

The only other complaint made concerning the proceedings below is that the instructions were in some respects faulty; but an inspection of the charge shows that the assignments of errors, so far as they relate to the charge, are not addressed to any specific declaration of law which the court gave, but rather to certain commentaries



on the evidence in which the trial judge indulged in the course of his charge. And, inasmuch as the jury was left at full liberty to determine the various issues of fact as they thought proper, such comments, relative to the facts, as the court made, afford no ground for a reversal of the judgment, since it appears that the law was correctly declared. The trial judge instructed the jury, in substance, that the plaintiffs were entitled to recover unless it appeared that Miller made the sale with intent to defraud his creditors, and unless it further appeared that the plaintiffs purchased the goods with knowledge of his intent, or under circumstances which charged them with knowledge, or which made it their duty to inquire and ascertain if he was not committing a fraud. The jury was further instructed that the burden was upon the defendants to establish the invalidity of the sale. These instructions comprehend substantially all of the questions of law in the case, and they were not materially erroneous. The plaintiffs did not ask the trial court to direct a verdict in their favor upon the ground that there was no evidence tending to connect them with the alleged fraud, and, not having made such a request, they, in effect, admitted that there was some evidence tending to show their complicity in the fraud, which should properly be considered by the jury. *Insurance Co. v. Unsell*, 144 U. S. 439, 451, 12 Sup. Ct. 671, 36 L. Ed. 496.

The judgment below is accordingly affirmed.

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### ELLIS v. FITZPATRICK.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1902.)

No. 1,701.

1. LANDLORD AND TENANT—ACTION OF DETAINER—DENIAL OF LANDLORD'S TITLE.

In an action of detainer in the Indian Territory between white men who are citizens of the United States, the rule that a tenant cannot deny his landlord's title applies as fully as elsewhere; and it is no defense by a tenant who has been put into possession of a lot, and has paid rent under his lease, that the landlord has not made improvements on the property of the permanent and substantial character required to entitle him to obtain title to the lot.

2. SAME—INDIAN TERRITORY—VALIDITY OF LEASES BETWEEN WHITE MEN.

The Atoka agreement (30 Stat. 495) did not have the effect of annulling all leases of lots between white men in the Choctaw and Chickasaw Nations, but, rather, recognized their validity, by providing the means for transference of the legal title.

3. SAME—TERMINATION OF LEASE.

Under a lease for one month, and from month to month thereafter until terminated at the option of either party, or by the failure of the lessee to pay the rent, an action of detainer lies where the lessee has refused to pay rent or to surrender the premises after written demand therefor.

4. SAME—ACTION FOR UNLAWFUL DETAINER—SUFFICIENCY OF COMPLAINT.

The sufficiency of a complaint in an action for unlawful detainer is not affected by the fact that it also seeks to recover rents which accrued prior to the commencement of the action.

In Error to the United States Court of Appeals in the Indian Territory.

F. E. Riddle, for plaintiff in error.

M. M. Beavers and D. D. Sayer, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This case comes on a writ of error from the United States court of appeals in the Indian Territory (64 S. W. 567), which court affirmed the judgment of the United States court for the Southern district of the Indian Territory; the latter judgment being in favor of Theo. Fitzpatrick, the present defendant in error, who was the plaintiff in that court. The case was treated at nisi prius and by the court of appeals in the Indian Territory as an action of unlawful detainer, and was tried as such, without objection, before a jury, which returned a verdict in favor of the plaintiff. No exceptions were taken to the admission or exclusion of evidence, nor were any instructions asked by either party, save a general instruction at the conclusion of the evidence to find for the defendant. This instruction seems to have been asked by the defendant below for no other purpose than to raise questions which had already been raised by a demurrer to the complaint, so that the substantial question to be decided is whether the complaint, on its face, stated a cause of action. The complaint to which the demurrer was addressed contained, in substance, the following allegations: That Fitzpatrick was in the peaceable possession of a lot of ground in the village of Chickasha, in the Indian Territory, in the year 1897; that during that year, by a verbal agreement, he leased the lot in question to J. P. Ellis "for the term of one month, and from month to month thereafter until terminated at the option of either party, or by the failure of the lessee to pay rent therefor according to the terms of the lease, at a monthly rental of five dollars per month, payable in advance"; that the defendant, Ellis, went into possession of the premises under said lease, and that he and those under him paid rent to the plaintiff; that they had refused, notwithstanding frequent demands for the rent were made, to pay the same after April 1, 1898, this suit having been brought in February, 1899; that the plaintiff had made a written demand for the possession of the property prior to bringing the suit, and that, notwithstanding such demand, the defendant had refused to surrender possession of the premises; and that rent at the rate of \$5 per month was due from April 1, 1898, the rental value of the premises being that amount.

It was alleged by the defendant, as the principal ground of the demurrer, that the complaint was defective, in that it nowhere alleged that the plaintiff, at the time of or prior to the institution of the suit, had made any improvements on the demised premises that were of a permanent and substantial character. It is claimed that the complaint stated no cause of action, because it failed to contain such an allegation. With reference to this contention on the part of the defendant, the court of appeals in the Indian Territory said, in sub-

stance,—and we think that the proposition so enunciated is sound,—that a tenant cannot, in the Indian Territory, any more than elsewhere, deny the title of his landlord, under whom he has entered into possession of premises, and to whom he has paid rent, because there were no valuable improvements on the leased premises when he entered. We are aware of no rule of law which permits a tenant to deny the title of his landlord for that reason. By receiving possession of land from the landlord, of which he was in peaceable possession at the time of the demise, and by engaging to pay rent therefor, and by actually paying it, the tenant estops himself from denying or finding fault with his landlord's title. This rule should be applied in the Indian Territory as it is elsewhere, especially when, as in the case at bar, the controversy is between citizens of the United States who are not members of any Indian tribe, either by nativity or adoption. The United States court of appeals in the Indian Territory decided (*Ellis v. Fitzpatrick*, 64 S. W. 567) that there was no merit in the defendant's contention that the Atoka agreement, so termed (vide 30 Stat. 495, 500, c. 517), annulled all leases between white men of town lots in the Choctaw and Chickasaw Nations. It also said, in substance, that, if the act in question had any effect on such contracts, its effect was rather to validate them, in that it recognized the validity of such holdings by white men in towns and villages, and provided a means for the transference of the legal title, thereby removing any objection which might theretofore have been urged against the validity of such contracts between white men. We are of opinion that this was a correct view of the act in question, and that nothing therein contained can be held to justify the contention that Ellis was entitled to challenge his landlord's title because it was not alleged that permanent improvements had been erected on the demised premises.

Another point which is urged in support of the demurrer is that the only ground alleged for bringing an action of unlawful detainer was the nonpayment of rent, and it is said that this fact did not constitute a sufficient foundation for the action. Relative to this proposition, it is sufficient to say that the complaint showed that the lease, by its terms, was terminated by the nonpayment of rent, and that the action was well brought because it appeared that the tenant had held over after the natural termination of the lease, and had refused to surrender possession after demand made therefor in writing.

The third and final objection to the complaint is that it seeks to recover rents which accrued before the filing of the complaint, but this is a matter which does not touch the sufficiency of the complaint, in that it only goes to the measure of recovery.

We are of opinion that the complaint stated a good cause of action for unlawful detainer, and as this is the only question which is before this court for review, and as it was correctly decided by both of the lower courts, the judgment of each court is hereby affirmed.

## UNITED STATES v. OLMSTED.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1902.)

No. 1,606.

**1. ARMY OFFICERS—CLAIM FOR LOSS OF PRIVATE PROPERTY—REOPENING AFTER ALLOWANCE AND PAYMENT.**

Where the claim of an army officer for the loss of private property in the service, filed under Act March 3, 1885 (23 Stat. 350 [U. S. Comp. St. 1901, p. 172]), was audited, allowed, and paid in the usual manner, the government cannot reclaim the money without showing that it was obtained by fraud or paid under a mistake of fact. Act July 31, 1894 (28 Stat. 207, c. 174 [U. S. Comp. St. 1901, p. 159]), providing that a revision of an account by the comptroller of the treasury may be obtained within a year after it has been settled by the auditor, does not authorize the comptroller to take up a claim and revise it of his own motion, *ex parte*, after it has been paid in the regular course of business, and thereby create a legal demand against the claimant for repayment of the money received, but applies only to claims which are unpaid, and therefore still pending.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

Lewis Miles, U. S. Atty.

Milton Remley and John J. Ney, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. The United States sued Jerauld A. Olmsted, the defendant in error, for the sum of \$60, alleging, in substance, the following facts: That in November, 1896, the defendant, Olmsted, was a captain in the eighth regiment, United States cavalry, and had a claim then pending against the United States in the sum of \$60 for the value of a horse which died at Ft. Robinson, Neb., on February 7, 1896; that the auditor of the war department allowed said claim on November 27, 1896, in the sum of \$60, and that that amount was paid to the claimant on December 2, 1896, by a draft drawn on the treasurer of the United States; that on May 28, 1897, the comptroller of the treasury revised said claim and disallowed it for the reason that the death of the horse was not due to an exigency of the military service, in which the claimant was at the time engaged; and that thereafter, on May 23, 1898, the auditor for the war department examined and settled said claim, and found that the claimant owed the United States \$60, being the sum previously paid to him on December 2, 1896. On this state of facts the United States demanded a judgment against the defendant in the sum of \$60, and interest from the last-mentioned date at the rate of 6 per cent. per annum. The lower court sustained a demurrer to this complaint, and entered a judgment accordingly. 106 Fed. 286.

The sole question presented to this court for determination is whether the complaint stated a good cause of action. There is no allegation in the complaint that the auditor of the war department, when he allowed the claim, was induced to do so by fraud or accident

or by mistake as respects any of the material facts on which the claim was based, while it is conceded that the claim was laid before the proper accounting officer, to wit, the auditor for the war department, and that he had full power and authority to adjudicate thereon. It must also be presumed, in the absence of any allegation to the contrary, that after the allowance of the claim in question it was paid in the due and orderly course of business, pursuant to regulations governing the treasury department and the disbursement of public funds.

The contention of the government is that after the claim had been thus presented, audited, allowed, and paid in the usual manner, without the employment of any fraudulent means to induce such action, it was nevertheless competent for the comptroller of the treasury, within a year after the allowance, to revise the claim *ex parte*, and direct the auditor for the war department to state an account against the claimant for the sum of money which he had received. It is further claimed that a recovery can be had on an account so stated, without reference to the question whether the claim was or was not well founded or rightfully allowed and paid in the first instance. We are of opinion that such contention on the part of the government cannot be sustained. It is founded, in the main, on section 8 of an act of congress approved July 31, 1894 (28 Stat. 207, c. 174 [U. S. Comp. St. 1901, p. 159]), which provides, in substance, that the balances which may from time to time be certified by the various auditors to the division of bookkeeping and warrants, upon the settlement of public accounts, shall be final and conclusive upon the executive branch of the government, except that any person whose account may have been settled, the head of the executive department, or of the board, commission, or establishment not under the jurisdiction of an executive department, to which the account pertains, or the comptroller of the treasury, may, within a year, obtain a revision of the account by the comptroller of the treasury, whose decision upon such revision shall be final and conclusive upon the executive branch of the government. We think, however, that this section cannot be construed to mean, with respect to a claim like the one now in hand, that the comptroller may wait until months after an account is duly allowed and paid, and then take the claim up and revise it of his own motion, and practically render a judgment against the claimant, without a hearing, that he restore the money which he has received. When a claim is allowed and paid it is no longer pending against the government, but is settled and discharged. If the comptroller, in the exercise of the authority conferred upon him by the aforesaid section, elects to revise a claim which has passed the scrutiny of the proper accounting officer, he should do so, we think, before it is paid and while it may be said to be a pending demand. If he fails to do so, and the demand is audited and paid in due course of business, the government can only reclaim the money under the same circumstances that a private individual can do so; that is to say, by showing that the money was obtained by fraud or paid under a mistake of fact. *Dickerman v. Lord*, 21 Iowa, 338, 89 Am. Dec. 579; *Wheeler v. Hatheway*, 58 Mich. 77, 24 N. W. 780. At all events, the decision

of the comptroller that a claim has been improperly paid, made after the claim was discharged and when no claim was pending against the government, furnishes no sufficient ground for a recovery, and such a decision was the only fact alleged, in the present instance, as a basis for a recovery.

We agree with the trial court that the complaint did not state a good cause of action, and accordingly direct that the judgment below be affirmed.

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NELSON et al. v. HINCHMAN.

(Circuit Court of Appeals, Eighth Circuit. November 10, 1902.)

No. 1,731.

**GUARANTY—VALUABLE CONSIDERATION—ORIGINAL OBLIGATION VOID.**

The owner and holder of municipal bonds that have been sold and delivered to him by the municipality or some previous owner, who subsequently sells the same to a third party for a valuable consideration, and as a part of the contract of sale guaranties their payment, may be held liable on his guaranty, if it subsequently transpires that the bonds were illegally issued and not enforceable against the municipality. Such a contract being collateral to the contract evidenced by the bonds, and made subsequently, and resting upon an independent consideration, the general rule of law, that whatever serves to discharge a contract and render it unenforceable against the principal debtor will render it unenforceable against his surety or guarantor, has no application.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

F. W. Lehmann (W. F. Boyle and H. S. Priest, on the brief), for plaintiffs in error.

George W. Lubke (Hugo Muench, on the brief), for the defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This action, which was instituted by Charles S. Hinchman, the defendant in error, against Lewis C. Nelson and Henry M. Noel, the plaintiffs in error, was tried in the lower court without the intervention of a jury, and the trial judge found the facts specially. From such special finding it appears that on June 26, 1885, Hinchman, the plaintiff below, was the owner of certain bonds of the county of Leavenworth, state of Kansas, of the total value of \$6,500, with interest accrued thereon at the rate of 7 per cent. per annum from March 1, 1887, and that Nelson & Noel, the defendants below, were the owners of four water bonds of the city of Dallas, state of Texas, of the total value of \$4,000, which bore interest at the rate of 6 per cent. per annum, and were to mature on May 1, 1934. To each of the four bonds 48 coupons were attached, representing the interest to accrue thereon annually. The parties plaintiff and defend-

ant, on June 26, 1885, entered into an agreement for an exchange of bonds, which was as follows:

"Philadelphia, June 26th, 1885.

"Received of Chas. S. Hinchman, Esq. (Leavenworth County Kans. 7s). Nos. 64, 65, 66, 67, & 67-6 of \$1,000 ea. & No. 31 for \$500 \$6500. with 7 % Int since Mch 1/77—coupon due Sept 1st 1877 on, for which we agree to pay you \$7,702.50 in Bonds as follows:

"4000 Terrell Texas 7s at 95 flat.....\$3920  
 "4,000 Dallas Water 6s at 100 " .....\$4000

\$7920

& difference in cash \$217.50 to be paid to us. No 25 Terrell Tex 7s \$1000. delivered, balance of Bonds to be sent to you by express charges paid.

"[Signed] Nelson & Noel, of St. Louis, Mo."

"Sold to Charles S. Hinchman for our own a/c the following Bonds viz:

"\$4,000 Texas City of Terrell Water 7s at 95 flat.

"\$4,000 " " " Dallas Water 6s at par flat,

to be expressed to him by us from St. Louis to-day, charges prepaid. For value received we hereby guarantee the payment of principal and interest thereon to said Hinchman his heirs & assigns as the same fall due. Witness our hand & seals this 26th day of June A. D. 1885.

"6/26/85.

[Signed] Nelson & Noel. [Seal.]

The bonds which were referred to in the above contract were exchanged in accordance with the terms of the agreement; but it subsequently transpired that under the laws of the state of Texas, as interpreted by its highest court, two of the bonds of the city of Terrell that were delivered under the agreement were utterly void and of no value, and that the remaining two bonds of the same class were illegal and not enforceable as respects 25 per cent. of the amount thereof. *Citizens' Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. 1003. The bonds that were wholly invalid and those that were invalid in part not having been paid by the municipality, this action was instituted by Hinchman on the guaranty, and a recovery was allowed in the sum of \$3,847.60.

As the case was tried without a jury, and as there is no bill of exceptions bringing the evidence before us, or any rulings of the court thereon, the sole question for determination is whether the special finding is sufficient to sustain the judgment. The substantial objection which is urged against a recovery appears to be that because no judgment could have been recovered by Hinchman against the city of Terrell on the bonds to which the guaranty relates, because they were invalid, therefore he cannot recover against the guarantors who stood as sponsors for their payment. In other words, the general doctrine is invoked that whatever serves to discharge a contract and render it unenforceable as against the principal debtor will render it unenforceable against his surety or one occupying a similar relation, like a guarantor. *Tied. Com. Paper*, § 423. Admitting the general doctrine to be as stated; it has, we think, no proper application to the case in hand. The guaranty here sued upon was not indorsed upon the bonds and executed contemporaneously with their execution and delivery by the municipality; nor is it one which rests upon the same consideration that moved from the original purchaser of the bonds to the city when they were delivered; but it is a separate and independent contract, made long afterwards, which rests upon a different

consideration. Nelson & Noel had acquired these bonds and had them in their hands for sale or exchange. To induce the plaintiff below to buy them and to give them currency in the market, they guarantied the payment of the principal and interest thereon. It was this guaranty, undoubtedly, that induced Hinchman to buy the bonds, giving in exchange the Leavenworth county bonds which he then owned, and the delivery of these latter bonds formed the consideration for the guaranty. The guaranty was a contract collateral to the agreement evidenced by the bonds; it having been made long afterwards for a valuable consideration that was in no wise tainted with illegality. Probably the guaranty was exacted because Hinchman was aware that the bonds, though apparently valid, by virtue of extrinsic facts attending their issuance that were unknown to him, might at some time prove to have been issued without the requisite authority to render them enforceable against the municipality. It was this risk of some unknown defense which he required the guarantors to assume, because they were doubtless better acquainted with the history of the bonds than himself; and by the guaranty they agreed to assume it. Neither party did anything wrong in entering into such a contract, and if it were now held that the guaranty is not enforceable because a judgment against the municipality cannot be obtained on the bonds, the very object which the purchaser had in view in exacting the guaranty would be defeated. Fortunately the authorities are abundant that a guaranty made under such circumstances as those disclosed in the special finding, after the bonds had been issued and were in the hands of an owner for sale, may be enforced against the guarantor, resting, as such a guaranty does, on an independent and valuable consideration in no wise connected with the original transaction, in the course of which the bonds were issued, although the bonds are invalid and not enforceable against the obligor. *Purdy v. Peters*, 35 Barb. 239, 248; *Veazie v. Willis*, 6 Gray, 90; *Mason v. Nichols*, 22 Wis. 376; *Remsen v. Graves*, 41 N. Y. 472; *Jones v. Thayer*, 12 Gray, 443, 74 Am. Dec. 602; *Railroad Co. v. Smith*, 27 Mo. App. 371, 378. An indorser of a negotiable note, when sued by his immediate indorsee or by a remote indorsee on his contract of indorsement, cannot defend successfully on the ground that, because of illegality of consideration or other reason, no recovery can be had against the maker; and no greater reason is perceived why the guarantors in the present instance, who also made a collateral contract to induce a sale of the bonds, should be permitted to make such a defense. Certainly no public policy is violated in holding them liable on the guaranty.

The judgment below was clearly for the right party, and it should be affirmed. It is so ordered.



## DOUGLAS CO. v. TENNESSEE LUMBER MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. October 18, 1902.)

No. 1,098.

## 1. EQUITY JURISDICTION—SUIT TO ENJOIN WASTE—ADJUDICATION OF TITLE.

A court of equity has jurisdiction of a suit to enjoin the commission of waste by the cutting of timber, which it is alleged constitutes the chief value of the land, and incidentally for an accounting for waste previously committed; and, having obtained jurisdiction for those purposes, it may determine the question of title to the land, although the plaintiff is not in possession.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Daniel Trigg and S. J. Kirkpatrick, for appellant.

C. St. John and Thomas Curtin, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

PER CURIAM. Bill and demurrer. The demurrer was sustained upon the theory that the bill was filed simply for the purpose of quieting title. The subject-matter is a large tract of wild mountain land, and its value consists almost entirely in its timber. It is alleged that the defendant is engaged in cutting down and removing this timber, and that the value of the property will be ruined if this is not restrained. The prayer is for an injunction to restrain waste, for an accounting, and that defendant's alleged title be canceled. Neither party has any actual possession. The facts stated in the bill and the relief sought bring it clearly within *Peck v. Ayers & Lord Tie Co.* (C. C. A.) 116 Fed. 273, and the decree dismissing the bill and sustaining the demurrer is reversed upon the authority of that case.

Remand, with directions to overrule demurrer, with leave to defendant to answer.

## ROBINSON v. CHICAGO CITY RY. CO. et al.\*

(Circuit Court of Appeals, Seventh Circuit. January 29, 1902.)

No. 810.

## 1. PATENTS—INFRINGEMENT—MOLD FOR CASTING CAR WHEELS.

Claims 7 and 9 of the Robinson patent, No. 594,286, covering a mold for the casting of composite or other wheels, disclose invention and are valid; also construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

S. A. McEliver and James E. White, for appellant.

C. K. Offield and T. A. Banning, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges.

PER CURIAM. In the suit below, the appellant alleged infringement of letters patent No. 594,286, issued to himself November 23,

\* Rehearing denied November 15, 1902.

1897, and relating to a mechanical combination process for the casting of composite or other wheels. The object of the invention is to make a composite wheel with the outer portions or sides of one metal and the inner portions of another, and, in the case of pulleys, to give to the center of the groove of the pulley a hard or chilled surface, while leaving the balance of the metal soft. The letters patent contain ten claims, but it is apparent, from an examination of the record now before us, that appellant must depend upon the seventh and ninth claims of his patent alone for the relief sought. It is insisted, however, by counsel for appellant, that these claims must be read in connection with the specification. The seventh and ninth claims above referred to read as follows:

"(7) In combination with a mold for casting grooved wheels, a metal ring for forming the grooved periphery of said wheel, and having a radial cavity, 10, intermediate its faces, to receive a filling of sand, for substantially the purpose set forth."

"(9) In a mold for casting composite grooved wheels, the metal ring, 7, constructed to fit between the top and bottom of the mold, and disks forming the sides of the wheel, fitted to said ring and spaced apart by the ring to receive the metal filling between them, substantially as herein described."

The defense is noninfringement, but must, of course, be considered in connection with the entire claims. Upon final hearing the court below dismissed the bill for want of equity, but without prejudice to the appellant. In the preparation of his record the appellant, although not an attorney, acted as his own counsel, and on his own behalf has furnished a record in this case so unusual, both as to form and extent, that the court has been forced to labor and investigate the evidence and the patent, unaided by the expert presentation commonly found in patent litigation. He did not avail himself of an expert, capable of pointing out the similarities and differences that exist in the mechanical art between mechanical devices, nor did appellant himself disclose a capability of so doing. In dismissing the bill for want of equity, but without prejudice, the court below evinced a recognition of the failure of the appellant to properly conduct his case, and therefore dismissed the bill without prejudice to the appellant.

A study of the patent in suit clearly discloses that the appellant supposed, when he filed his application for letters patent, that the patent carried with it three particular inventions: (1) That he had invented an improved method or process for casting composite or other wheels; (2) that he had invented an improved form of mold adapted to carry out such improved method or process for casting composite or other car wheels; and (3) that he had invented a new wheel or resulting product thereby. The above conclusions are borne out by the following quotations from the letters patent in question:

"My invention has for its objects to provide a method and apparatus whereby wheels of various kinds may be cast in an economical and effective manner, and which method and apparatus are for the most part adapted for making composite wheels wherein the outer portions or sides are of one metal and the interior portions are of another metal, cast upon the outer portions or sides, and also to casting a filling of a certain character in grooved wheels."

"By my improved method of procedure and with my improved form of mold I am not only able to successfully cast hard metal of high electric conductivity, such as brass or copper, into the groove of an iron trolley wheel, but I am enabled to produce, by casting, an entirely new construction of trolley wheel."

"In carrying out my invention as above outlined I employ certain novel features in the construction of the mold in addition to what has been described. \* \* \* With a mold constructed as described there is ample room for escape of the gases through the sand fillings, and the mold is practically a ventilated mold. I have found in practice that perfect castings may be obtained by a mold constructed in this way, and such a mold may be repeatedly used, and wheels of any kind turned out therefrom which require little or no finishing."

The appellant cannot contend, under the patent in suit, as to claims 7 and 9, that the improved method or process, therein asserted as his invention, has been infringed. Nor can he contend that the resulting product of his process is infringed, because the molds of claims 7 and 9 are for a specific construction only, forming the sole subject-matter of these claims, and further because he distinctly indicates in the patent in suit that the invention of his improved process forms the subject-matter of a separate application then pending, of which he gives the serial number and date, and respecting which he says, in the patent in suit:

"I do not herein claim the construction of a wheel formed by the mold just described, as the same constitutes a part of the subject-matter of an application filed on even date herewith, serial No. 622,819."

The patent in suit, we are convinced, rises to the level of distinct invention, in the production of a composite metallic wheel with the qualities and characteristics disclosed, and by the means particularly described and claimed; but it is equally clear to us that, as to claims 7 and 9, the appellant has contented himself with, and has claimed only, a particular mechanical form or combination of mold, adapted to carry out the improved process and to produce the desired wheel product. In these two respects—the improved process and the wheel product—the appellant has made a substantial step forward in the practical effectiveness of the molder's art. The difficulties of appellant's case do not lie in the question of utilities.

The defense, in substance, contend that the metal ring mentioned in claims 7 and 9 (in claim 7, as a metal ring for forming grooved periphery, and having a radial cavity, 10, intermediate its faces, to receive a filling of sand; and in claim 9, as the metal ring, 7, constructed to fit between the top and bottom of the mold) is the entire ring, including both the inside ring, the sand circles, and the outside frame with the radial cavity, 10, and that upon such a construction there is no infringement. The appellant, on the other hand, insists that such is not the intent of the claims; that the metal ring spoken of is the first effort in the art of molding to present a ring that would be firm and not moved by the pouring in of the metal, and that, though appellees do not copy the ring of appellant exactly, they nevertheless copy this idea, and thereby are able to produce a mold which preserves the center to the wheel.

The patent, in this respect, we have closely studied, and are of the opinion that the metal ring of claim 7, with its radial cavity, 10, intermediate its faces, to receive a filling of sand, when used in the mold as described in the patent, undoubtedly produces and assures a depth of central chill not previously found in the molders' art, and that this radial cavity is the essential element of the claim,—the element that gives to it vitality and value. We are of the opinion, also, that the metal ring, 7, referred to in claim 9, and constructed to fit between the top and bottom of the mold and the disks fitted to such ring, and spaced apart by the ring to receive the metal filling between them, are the essential elements of the claim,—the elements that assure to the mold in question the resulting effect of its construction, and give to the wheel a true circle, thus preventing the grinding of the wheel necessary in the previous art.

With claims 7 and 9 thus construed, it is evident that the mold used by the appellees does not infringe the patent in suit. The mold of appellees is a two-section mold, employing a well-known form of chill, made in two parts and lying entirely within the lower section of the mold, and not between the two sections thereof, while the mold of the patent in suit is a three-part mold, having an upper and lower section, with an interposed metal ring for forming grooved periphery of the wheel between these upper and lower sections. There is absent from appellees' mold the metal ring, with its radial cavity, 10, intermediate its faces, as provided for and made certain in claim 7 of the patent in suit; and there is absent, also, from appellees' mold the metal ring, 7, and the disks fitted to such ring, as provided for and made certain by claim 9 of the patent in suit. Nor, in our judgment, is there a substitution of mechanical equivalents, or of devices adapted to perform the duty of any of these omitted parts. In reaching this conclusion we have not considered the evidence tending to show that the wheel claimed to infringe and the process used in its production was in use as long ago as the year 1889, some eight years prior to the appellant's patent.

In view of the mechanical features that distinguish the mold employed by appellees from that of the patent in suit, we are constrained to hold that the former constitutes no infringement upon the latter, as covered by the seventh and ninth claims thereof, and the decree of the circuit court must therefore be affirmed.

## UNITED STATES v. LEE HUEN. and fourteen other cases.

(District Court, N. D. New York. October 6, 1902.)

## 1. ALIENS—EXCLUSION—PROVINCE OF COURTS.

The power to exclude or expel aliens, being one affecting our international relations, is vested in the political departments of the government, and is to be regulated by treaty or act of congress, and executed by the executive authority, except so far as the judicial department has been authorized or is required by the constitution to intervene.

## 2. SAME.

The mode and manner of ascertaining the fact of citizenship, as a means for excluding or expelling aliens, is exclusively within the power of congress, acting within its constitutional limitations, to determine; and it may vest the power to determine such fact exclusively in executive officers.

## 3. SAME—PROCEEDING FOR DEPORTATION OF CHINESE—EVIDENCE.

Proceedings for the exclusion or deportation of Chinese aliens under the exclusion act are not criminal in character, and if the defendants therein fail to give testimony in their own behalf to explain doubtful matters peculiarly within their own knowledge or to contradict testimony given against them, such fact may be considered, where the testimony is contradictory.

## 4. SAME—BURDEN AND MEASURE OF PROOF—SATISFACTION OF COURT OR COMMISSIONER.

The provision of section 3 of the Chinese exclusion act of May 5, 1892 (27 Stat. 25), which places the burden on a Chinese person or person of Chinese descent arrested thereunder to "establish by affirmative proof, to the satisfaction of the justice, judge or commissioner, his lawful right to remain in the United States," requires him to produce credible evidence sufficient to satisfy the judgment of a reasonable man, considering the same fairly and impartially. A commissioner may not, arbitrarily, capriciously, or against reasonable, unimpeached, and credible evidence, which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied; but, on the other hand, he is not bound to be satisfied by the testimony of a single witness as to facts which, if the testimony is true, must necessarily be known to other obtainable witnesses who are not produced.

## 5. SAME—CREDIBILITY OF WITNESSES.

While it is impossible to prescribe any fixed rule by which the credibility of a witness is to be tested, or which shall bind the conscience of the court or commissioner, the record should ordinarily disclose to the appellate court something to justify the refusal to give his testimony full faith and credit.

## 6. SAME—CITIZENSHIP OF DEFENDANT.

Upon the issue as to the citizenship of a person of Chinese descent, evidence from a male person, not the father, that the defendant was born at a certain time and place in the United States, unaccompanied by any details as to how or why the witness knows such fact, is not conclusive on the commissioner or court.

## 7. WITNESSES—CREDIBILITY

The credibility of a witness may be affected by circumstances or by his own testimony, as well as by contradictory evidence; and the improbability of his statements, or his apparent lack of memory, accuracy, or intelligence, as well as his apparent lack of truthfulness, may justify a refusal to accept his testimony as satisfactory, even though uncontradicted.

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¶ 3. Citizenship of the Chinese, see notes to *Gee Fook Sing v. U. S.*, 1 C. C. A. 212; *Lee Sing Far v. U. S.*, 35 C. C. A. 332.

9. PROCEEDINGS FOR DEPORTATION OF CHINESE—CREDIBILITY OF WITNESSES—INTEREST.

The mere fact that a witness for the defendant in a proceeding for deportation is himself a Chinese person does not render him an interested witness, within the rule which permits interest to be considered as a discrediting circumstance.

9. SAME—CHINESE WITNESSES.

In proceedings under the Chinese exclusion act, the testimony of Chinese witnesses, unknown and coming from a distance,—especially that of foreigners,—may be regarded as more or less weak; and, when contradicted or really discredited in any of the modes recognized by our law, the commissioner is justified in regarding it as insufficient, standing alone, to convince the judicial mind, where he acts from a fair conviction that the case is not made out; and in such case the appellate court is not warranted in reversing his finding.

10. SAME—SUFFICIENCY OF EVIDENCE.

Evidence considered on appeal from the decisions of a commissioner ordering the deportation of Chinese persons, and such orders affirmed.

Appeals from Orders of Deportation by United States Commissioners.

United States v. Lee Huen, alias Ui Lee Huen.

This case presents the questions: (1) Was the evidence given by the defendant, who had the burden of proof, sufficient to demand a judgment that he was born in the United States? And if so, (2) was the evidence given on the part of the United States sufficient to overcome that presented by the defendant? And (3) on the whole evidence was a case made establishing the defendant's right to be and remain in the United States? The defendant admitted that he is a Chinese person, and not a member of the exempt classes; that he came into the United States from the dominion of Canada on or about July 21, 1902, and was apprehended as stated in the complaint and warrant. The defendant was not sworn, and there is no evidence showing the point of his entrance, or the circumstances attending it. The defendant called Ui Jee, a Chinese person, and the United States called Tow Dong, a Chinese person. These were the only witnesses sworn, and both gave their evidence through an interpreter. Thirty days intervened between the examination of Ui Jee and that of Tow Dong. The substance of the testimony of Ui Jee is: That he is 57 years old. Has been in the United States 28 years. Came from China with his brother and wife, and landed at San Francisco. Went thence in 3 or 4 days to Colfax. That this defendant was born there to his brother and wife. That witness remained at Colfax 18 years, and then, with his said brother and wife and this defendant, returned to China, where witness remained about a year, when he came again to the United States, and now resides on Park avenue, New York. Says Colfax had a Chinese population of several hundred, and he cooked for Wing Ling, and that his brother was bookkeeper for same man. Has never seen his brother since leaving Colfax. Does not know whether he is living or dead. Sister-in-law never writes him. Was surprised to find this defendant in the United States. Found it out by a letter from him written from the jail at Malone and sent to Hom Mon Kip, who lives in laundry with witness, and who has been known to him a year. Says Hom Mon Kip delivered defendant's letter, but it was not produced. No explanation is given why the defendant wrote Hom Mon Kip instead of his uncle, the witness, or how defendant came to know him or of him. This person was not called as a witness. This completes the defendant's case. This witness was not impeached, and there is nothing against his character. His appearance and manner of testifying were good, so far as appears on the record. It does not appear that he hesitated or showed bias or interest, except that of relationship. He gives none of the particulars or circumstances attending the alleged birth of the defendant in the United States, nor was he questioned on this subject. The government then called Tow Dong, who, according to his testimony, lives at 16 Pell street, New York, and has been in the United States 28

years, and is 42 years of age. Landed at San Francisco, Cal., remained 3 or 4 days, and went thence to Colfax, where he remained 18 years, cooking and doing odd jobs. Says population of Colfax was five or six hundred white people and a few Chinese; that he knew the witness Ui Jee in China, who is an uncle of his by marriage; that they came to the United States together on same boat; that Ui Jee was married before he came to the United States, but his wife did not come over with him, and neither witness had any relatives on the boat that brought them over; that Ui Jee had no brother who came with them. Says he and Ui Jee went to Colfax together, and came from there to New York together; that Ui Jee had no brother in Colfax, and has never been back to China. He gives particulars of their residence in China which are not contradicted. He was subjected to a rigorous cross-examination, but nothing was developed affecting his general character, and, from the record, nothing can be said against his appearance and manner of testifying. In some collateral matters he did show lapse or want of memory, and this somewhat weakens his testimony. The testimony of Ui Jee is weak and unsatisfactory, in that it does not give any of the circumstances attending the birth of the defendant. Was the witness present in the same house, or, if not, where was he? Did a physician or midwife attend, and if so, who? He is squarely contradicted by Tow Dong on the material points of the case, either directly or indirectly. If the brother and wife of Ui Jee did not come over as stated, then their son, the defendant, was not born in the United States at the time and place mentioned, and no evidence of his birth in this country has been presented. If Ui Jee has not been back to China since he came over, 28 years ago, he did not see the defendant in China. The discussion of the legal principles controlling this and other cases will be reserved until the facts of such cases have been stated.

United States v. Chan Hin, alias Chin Hen.

The question in this case is whether or not the defendant's name is Chin Hen, and he is the partner of that name in the Chinese mercantile firm of Sun Kwong On & Co., doing business at 33 Mott street, New York City. The defendant is a Chinese person, and not claimed to be a citizen of the United States. It is claimed that he is a merchant and a member of the firm named, and not a Chinese laborer, and hence entitled to be and remain in this country. Two or three witnesses state more or less positively that they know Chin Hen, have seen him working with the firm at its place of business, 33 Mott street, city of New York, and that he was recognized as a member of that firm. They claim to identify this defendant as that man. Other witnesses, with equal, if not greater, positiveness, assert that they know the defendant, and identify him. One says he knew him in China, and knows him here,—pointed him out in court; that his name is Moy Pin Kong, and that he is a son of Moy Nai Pok, well known to him; that defendant went by that name (Moy Pin Kong) in China; that defendant stated to him a few months since, prior to the commencement of this proceeding, at Malone, that he was ordered deported, and must go back to China. The evidence shows that when a Chinaman marries he changes his name, taking that of the wife, but does not change his surname. No attempt was made to explain when or why defendant changed his name, if he ever did. Another witness says defendant's name is Moy Bing Keong, and his father's name is Moy Nai Pok, and that he knew him (defendant) in Worcester, Mass., where he was a laborer in a laundry, and also knew him in Boston. The defendant was not sworn. If the defendant is in fact Chin Hen, member of the firm mentioned, the fact was susceptible of overwhelming proof by witnesses living and doing business in the city of New York, and ample time was given for the production of such witnesses. The difference in the spelling of defendant's alleged name, as given by the witnesses mentioned, is not material. Such differences are not at all unusual. The evidence given by the witnesses who claimed to identify the defendant as Chin Hen, member of the mercantile firm, is not strong or necessarily convincing. Two, at least, showed an interest sufficient to seriously impair their credibility as witnesses in this case. It is not at all improbable, and the evidence will justify the conclusion, that

this so-called Chin Hen, the defendant Moy Pin Kong, or Moy Bing Keong, is not a Chinese merchant, or the Chinese merchant Chin Hen, if there be one, but a Chinese laborer working at the laundry business, or as a helper in any business wherever he goes, and that he passes himself off, and is passed off by his countrymen, as a member of the firm, for the purpose of keeping him in the country. It may be that he was in the store at Mott street, working at packing goods, etc., as mentioned by his witnesses; but if he is Chin Hen, the merchant, and a member of that firm, why was he in Malone, as described, confessing his judgment of deportation; why in Worcester, working as a laundryman; why in China with another family name; and, finally, why was not an effort made to contradict or discredit this testimony? Was not a question of fact, on contradictory and conflicting evidence, fairly presented? Can it be said the finding of the commissioner was against the weight of evidence? Was not the determination of the credibility of those witnesses for the commissioner? Is there anything that suggests he acted capriciously or arbitrarily, or was swayed by prejudice?

United States v. Fong Ham, alias Ho Fong Sing, and Yee Yim, alias Ho Yee Duck.

It was conceded that the defendants are Chinese persons, not members of the exempt class, and that they came into the United States from the dominion of Canada, as charged in the complaints and warrants. The only question presented is the sufficiency of the evidence to satisfy the commissioner that the defendants, who claim to be brothers, were born in the United States. Only one witness, a Chinese person born in China, an alleged uncle of the defendants, gave testimony. He says: "Am 36 years old. Have been in the United States 23 years. Came from China with my brother and sister-in-law [this brother's wife, presumably], landed at San Francisco, and remained there ten years, at 503 Dupont street," and while there the defendants were born, and are nephews of the witness. It is left to conjecture whether or not they are the children of the brother who came over with him; whether or not the sister-in-law who came over at that time is the mother. Says that at the end of the 10 years he returned to China, and his brother, sister-in-law, and the defendants went with him. Witness remained in China one year, then returned to the United States, landed at San Francisco, where he remained five days, when he came on to New York, where he remained 10 days, and then went to Brooklyn, where he remained 8 years, and then returned again to China, and remained 1 year. States that he saw the defendants there daily during that year. The witness then returned to Brooklyn, and has resided at 457 Central avenue, Brooklyn. Says the boys, Ho Fong Sing and Ho Yee Duck, identifying the defendants in court, are the same persons who were born in Dupont street, San Francisco, Cal., and the same he saw in China, as stated. On cross-examination, says he lived at Ho Uk with his father and this brother before he first came to the United States, and attended school two years. The brother married Wong She, who lived at Wong Uk, two-thirds of a mile from his father's home, but witness does not know whether she had any brothers or sisters. In China he knew Ho Sew, Ho Lew, and Ho Fat, aged 14, 12, and 13 years, respectively, but remembers no other persons he knew in China. He gives the day, hour, and minutes of his leaving home, arrival in Hong Kong (except the day and minute), and arrival in San Francisco (except minutes). He then says he and this brother (alleged father of defendants) ran a store at Dupont street those 10 years, and that he (the witness) had \$300 in the firm, which he borrowed from a friend, Ho Kong, who came with him from China to the United States. He had failed to recall the existence of this financial friend and backer of his childhood when asked to give the names of persons he knew in China. He names the firm of Hop Lung, on Dupont street, but forgets the address, and cannot remember the name of any other firm or the location of any firm in Dupont street, except his own. Says he seldom went out, and does not know or remember the streets running parallel with, or those crossing Dupont street, although he was doing business in the store No. 503 Dupont street, buying and selling goods and cooking, all the time while he grew from 13 to 23 years of age. Does not remember the par-



particulars of his arrival in New York and Brooklyn. He does not state, and no one asked, the ages of the defendants, or as to any of the circumstances of their birth or life in San Francisco. All this evidence amounts to is that the defendants enter the United States from Canada and are arrested. A Chinese person from Brooklyn, whose general character is not impeached or questioned, claims to be their uncle, and says they were born in Dupont street, San Francisco, Cal., at some time during the 10 years following the coming of their parents to the United States, and went with their parents to China, where they were seen by this uncle every day for a year on a visit he made to his native land eight years later. This witness exhibited such a vivid, special, and remarkable memory as to some things, and such an absolutely blank memory as to others he would naturally observe and remember, that the commissioner doubted his truth and veracity, and held that his testimony did not establish to his satisfaction that these defendants were born in the United States. Does it establish the asserted fact? The record discloses no evidence to the effect that the financial precocity of the Chinese race generally, or of this witness in particular, justified this alleged loan of the \$300 to a boy of 13, who had no property, so far as appears, gave no security, had no business experience, and only two years' schooling. On the other hand, it may be urged with great force that this boy's friend had the right to let him have the money; that the sum is not large, and that such acts of friendship, even towards boys, are not uncommon; and that the story is not improbable. This story, however, did not relate directly to the point in issue, but to a collateral matter, and same is true of the rather remarkable exhibitions of memory and want of memory in the witness. May the evidence of a witness be disregarded when the only discrediting features are of this nature, and appear in a detailing of such collateral matters? Does the law compel the commissioner to be satisfied with such evidence, and may or ought the appellate court to reverse the judgment of the commissioner who acted thereon? Had the defendants produced no evidence, judgment of deportation would have followed of course. Having presented some evidence, which is discredited only as stated, the question is, was the commissioner bound to be satisfied therewith?

United States v. So Ho Lung (2d), alias Ching So Ho Lung (1,290), and Wong Hum, alias Ching Wong Lem (1,329).

Admitted that defendants are Chinese persons, not members of the privileged classes; that they came into the United States from the dominion of Canada, and were duly apprehended, as charged. The only questions to consider in this case are the credibility of the defendants' witness Chong On, and the sufficiency of the identification of the defendants made by him. No other witness testified. Chong On is 43 years old. Has been in the United States 24 years. Came from China with Chong Sew and Chui See, his brother and sister-in-law. Landed at San Francisco, and was there for 14 years, living at 503 Dupont street. Says the record: "Did Chong Sew have any children born in San Francisco while you were there? A. He had two,—Chong So Ho Lung and Chong Wong Lem. Q. Are those the two defendants in court? A. Yes." Witness went to China at the end of the 14 years, and remained a year. Came back to the United States, and has been in New York 9 years. Says Wong Lem is 20 years of age; the other, 22. For 9 years he had not seen them, until he saw them in court at Malone. Hence one was 11 and the other 13 when he last saw them in China. The last question on the direct examination of this witness was: "Are the defendants in court, Chong So Ho Lung and Chong Wong Lem, the same boys that were born at 503 Dupont street, and that you took home to China with you? A. Yes; the same." No more leading and suggestive questions could have been asked, but no objection was made. It is evident the witness assumed the defendants were present in court, expecting to be identified by him, and that he was there for the purpose of making the identification. When the witness reached Malone, and whether or not he had had an opportunity to see and identify the defendants before going to the court room, does not appear. If he had the opportunity, and did not avail himself of it, the claim may fairly be made that he was willing to testify to their identity in all events. The record does

not show whether other Chinamen were in the room. In any event, in the first instance the defendants were pointed out to the witness by their counsel, and the suggestive question quoted asked at the same time. No other answer would be expected from a witness brought there to identify the defendants. On the cross-examination, when counsel for the government came to the question of identification, this took place: "Q. Which is the defendant that has a scar on his face? A. I don't remember any scars. Q. Didn't have any scars when you last saw them? A. I don't remember anything about it. Q. You don't remember much how they looked when you last saw them, do you? A. I cannot remember their faces very well. If I saw them, perhaps I would remember them; perhaps not. Q. You are not very sure about it? A. I cannot describe their faces. If I saw them, I would remember them. Q. They have changed a good deal in 9 or 10 years, haven't they? A. They have changed somewhat, and perhaps I cannot recognize them. Q. You are not perfectly sure that you would be able to identify them? A. I am not positive." Redirect: "Q. Point out the defendants. A. (The witness did this by touching them.) Q. Would you know them in a thousand? A. I would remember." Recross: Denied having seen them in the jail, or before seeing them in the courtroom. "Q. And the first you saw of them was when you saw them sitting on the bench here? A. I recognized them as I came into the room. Q. You haven't spoken to them,—haven't said a word to them? A. Not a word." Remembering that this witness is the uncle of the defendants, if they are the children of his brother, as witness claims, and that he had not seen them in 9 years, we are somewhat surprised that, when he found them under arrest and in court, he did not at once speak to them, if he recognized them when he came into the room. Did he recognize, but neither speak nor attempt to speak to, his two nephews, under these circumstances, after 9 years' separation? Strangers to all about them, in a land far from home, confronted by their uncle, who gives no word or sign of recognition or sympathy. The defendants, so far as appears, did not recognize their uncle. This identification did not satisfy the commissioner. The witness had previously shown a very weak or nonretentive memory as to Dupont street, where he resided 14 years, and could only remember two persons, aside from his father and brother, he knew in China when he left, at the age of 19 years. At that age he must have known scores of people at his home in China by name, and that he forgot all but two in 24 years, and still could remember and identify these two boys, whom he had not seen in nine years, and who must have changed greatly in size, action, expression, and appearance, is hardly credible. Such evidence cannot be said to compel the mind and judgment of an intelligent man, acting judicially, and required by law to be satisfied, or to have the fact proved to his satisfaction, to accept the identification, or believe these defendants were born in the United States at the times and place mentioned by the witness. It may be urged that to give to this evidence the effect claimed would enable nearly every Chinese laborer in the Chinese empire, between the ages of 10 and 30 years, who comes to this country, to establish in court that he is a citizen of the United States, and evade the law altogether. But be the result what it may, rules of evidence established by the decision of the courts and by statute, if any, must be applied and adhered to.

United States v. Wong On, alias Chin Wong On, and Chin Yuen.

This appeal presents the single question whether or not the commissioner was bound to accept as true the testimony of a single witness, Chin Way Soy, a Chinese person 50 years old, now living in the United States, who testifies that he has been in the United States 27 years, and is the uncle of the defendants, sons of an older brother, aged 22 and 25 years, respectively, and that they were born in a shoe factory on McComb street, San Francisco, and went to China about 16 years ago. The witness also states that about 21 years after first coming to this country he went to China, and saw these defendants there frequently during the year he remained. He states that he is only visiting in New York City; has worked but very little; works with friends; has no steady residence; sleeps wherever he works, and works wherever he sleeps; and lives in Chinatown, New York City, mostly. Says

he lived at 85 McComb street, San Francisco, 9 years, and on Dupont street for 5 years. Cannot remember the number, does not remember the years he left either street. Does not know the name of a single store on Dupont street, or of any store in Chinatown, San Francisco, and does not know any persons who lived in San Francisco when he left there. His story is hazy and unsatisfactory in some other particulars. We have here a strange, and, in a sense, a tramp, Chinaman, who, testifying to the birth of two children in San Francisco at the times and place mentioned, fails to remember other facts as to collateral, but important and pertinent, matters, which he must have known if he was there as stated, and which he must remember if he has sufficient mind and memory to recall the birth of and identify the defendants. The collateral matters referred to are important and pertinent on the question whether or not he was at San Francisco, as stated by him, and could have known of the birth of these defendants, and also on the question of his memory generally.

**United States v. Chin How (1,379) and Chin Tung, alias Chin Tank (1,380).**

Only one witness was sworn in this case; it having been admitted that defendants are Chinese persons, not members of the exempt class, and that they came into the United States from the dominion of Canada, and were apprehended, as charged. Is this testimony, given by the alleged uncle of the defendants, so contradictory that the commissioner was justified in holding that the birth of the defendants in the United States had not been proved to his satisfaction? Sam Sing (Chin Sam Sing), a Chinese person, says he is 45 years old; lives at 14 Main street, Yonkers, N. Y.; has been in the United States 25 years. Says on direct examination that he landed at San Francisco, where he remained 3 months, when he went to Chico, where he remained 10 years. From there went to San Francisco, and remained 1 year, after which he came on to New York, where he remained a year and a half. Then went to China for 1 year, returned, and has been in Yonkers since. Has been in Yonkers 6 to 7 years. This time, allowing 3 months for travel, makes only 21 years. The witness says the defendants were born in Chico, and that Chin How is 24 years of age, and Chin Tung 23. Says the boys were in Chico when he left; that he saw them in China on his visit there; that his older brother wrote him the boys and their father and mother returned to China soon after witness left Chico. Says the defendants are his nephews, children of his older brother. On his cross-examination he repeated in detail his places of residence in the United States, and the time he lived in each place, without variation, and stated that he had not lived in any other place in the United States. There is nothing in the evidence given by the witness that discredits him in any way, except this variance between the time of his being in the United States, 21 years, allowing 3 months for travel, and the ages he gives the defendants, 23 and 24 years, respectively. He testifies to the last fact (that of age) as positively as to the former facts (those of his residence in this country). If the defendants were born in Chico, or elsewhere than in China, 23 and 24 years ago, the witness was in China at the time, and cannot know the fact testified to by him. If they were born in Chico when the witness was there, they are not of the ages sworn to. It cannot be law that the commissioner was bound to find that this witness was mistaken merely as to the ages of the defendants, or as to the time he had been in the United States. The discrepancy may arise from an honest error of the witness, from his ignorance of the facts, from his inability to add or subtract, or from his want of truth and veracity. This court will not undertake to guess where the truth is. It was for the defendants to prove the facts. The record shows that attention was sharply drawn to this discrepancy, and that no substantial effort was made to correct or explain. Was not the commissioner justified in holding that this testimony given by the alleged uncle, and entirely unsupported and uncorroborated, was too weak, uncertain, and contradictory to establish to his satisfaction that these defendants were born in the United States?

**United States v. Wong Ching, alias Jung Wong Chong (1,382).**

Only one witness was sworn in this case. It stands admitted that the defendant is a Chinese person, not of the exempt class, and came into the

United States from the dominion of Canada, as charged on the record. The testimony of the witness is so uncertain and contradictory that no court would be justified in acting on it to the prejudice of the rights of the United States; and even if we conclude that the witness intended to testify that he is the uncle of the defendant, and that the defendant is the son of the brother of witness, the failure of the defendant to procure the evidence of his father, who at the time of the trial was in San Francisco, and who must know all the facts, is fatal to his case. The right of a Chinese person to remain in the United States as a citizen thereof is of sufficient importance to require the production of substantial obtainable evidence from those who must know the facts, when such right is challenged by the law. At the close of the cross-examination of the witness the defendant's case was so weak that clearly further evidence was required. The witness testified on his direct examination that he came to the United States 28 years ago with his older brother and sister-in-law. His counsel immediately asked this question: "Did your older brother and your sister-in-law have any children born in San Francisco?" The answer is: "No. Q. What was your father's name? A. Jung Kun. Q. Did Jung Kun have a son born in San Francisco? A. After one year in the United States, one son was born to them. Q. What was his name? A. Jung Wong Chong." He then says the defendant is that child, and that he (witness) returned to China with the defendant and his mother, and that witness remained there two years. In court he claimed to identify the defendant as the same person born in San Francisco. The direct examination left the evidence in this shape. On cross-examination the witness states where he lived in China (Kut Chai), and then: "Q. What was your father's name? A. Jung Fong, a farmer. Q. What is your brother's name? A. Jung Kun. Q. Did you have any other brothers? A. No. Q. Where does he live? A. He is in San Francisco at present. Q. Where did he live in China? A. Kut Chai." Brother always lived there with his father before coming to the United States, 28 years ago. Then: "Q. What 3 persons did you know in this village in China [Kut Chai] when you left there? A. Jung Choy, Jung Sze, Jung Sing. Q. You didn't know any others that lived in that village. A. That's all." As the witness was 15 years of age when he left Kut Chai, a village with a population of 150 persons, it is hardly credible that he knew 3 persons only. States he went to school one year. Some other scholars, "but I didn't know them." Says, also, he never went outside the village where he lived until he left for this country. He also states that after they reached San Francisco his brother and wife lived in the second story—no one else—at 511 Dupont street; witness in first story, same house. Third floor used as a warehouse. Only remembers that one place in San Francisco, although he lived there 16 years at same number. Knew no other person who lived there in San Francisco. Lived there 1 year before this defendant was born. Never went upstairs until the child was born, when he went up with food. These statements and other inconsistencies and contradictions made it impossible for the commissioner to believe the testimony of the witness relating to the alleged birth of the defendant in San Francisco. As matter of fact, who would? As a matter of law, was he obligated to be satisfied with this improbable statement?

United States v. Yet Sang, alias Wong Yick Song (1,227), and Fong John, alias Wong Fong Chun (1,221).

The only question in this case is, were the defendants born in the United States? If so proved, the defendants are entitled to a reversal of the judgments and to be discharged. Tong Yuen, for defendants, says they were born in Austin, Nev., 22 and 17 years ago, respectively, and are children of a brother of the mother of the witness. Lee Huen, for the government, says he is first cousin of Tong Yuen; knows the family; tells how and why, when and where, he knew them; and that his mother and Tong Yuen's mother were sisters, and the only children, and had no brother or brothers; no boy in the family. It follows that the whole story of the defendants' only witness is discredited to an extent, at least, and that serious doubt, to say nothing further, is created as to the truth of his statement regarding the birth of the defendants. Was not the commissioner justified in deciding that

such evidence did satisfy him, when in fact it did not? The government witness was longer in China, and knew most about the family.

United States v. Soo Hoo We (1,226) and Chong Jack, alias Soo Hoo Chong Jack (1,229).

The only question in dispute is, were the defendants born in the United States? Defendants called Lee Fook, and the government called Fun Tang. These witnesses flatly contradicted each other on the main issue, and then the defendants called Frank C. Parks, born in China, who contradicted Fun Tang as to the population of Sun Nieng, China. The commissioner and this court can place as much confidence in the one witness as in the other on the main issue. The defendants did not, on the whole evidence, make their case.

United States v. Ah Wing, alias Chun Ah Wing (1,303), and Bak Hen, alias Chun Bak Hen.

Moy Tong says defendants were born in the United States. Moy Gop Jung, a relative of the family by marriage, testifies for the government to matters which, if true, demonstrate that Moy Tong's statement is not true. Neither witness is seriously discredited, except by this flat contradiction. Clearly, the defendants did not make their case.

United States v. Jung Lee (1,330) and Lee Gung (1,331).

Conceded that the defendants are Chinese persons not members of the exempt class, and that they came into the United States from the dominion of Canada, and were apprehended, as charged. It is contended that inasmuch as the only witness in the case, Young Sue, gave direct and positive testimony that the defendants, Jung Lee and Lee Gung, were born in the United States, and later were seen by him in China, and are now identified by the witness, and he is not impeached or discredited, except by some contradictions in his testimony, claimed to be either errors of the stenographer in reporting the testimony, or the result of a prolonged and severe cross-examination, or the error of the interpreter, or errors of computation hastily made, the commissioner should have held, and the court should now hold, that the defendants established their case, and sustained the burden of proof which the law casts on them; that the refusal to so hold was an error of law. The facts testified to will be stated fully, as the question is an important one, and ought to be settled, for the guidance of commissioners in future cases. Young Sue, through an interpreter, says, in substance: That he lives at 648 Bedford avenue, Brooklyn. Has been in the United States 25 years. Landed at San Francisco, and remained 1 day, when he went to San José, and remained there 10 years. That he then returned to China, and remained 5 years, when he returned to New York, where he has lived 10 years. "Q. Do you know the defendants, Jung Lee and Lee Gung? A. They are nephews from an older brother. Q. Do you know where they were born? A. San José. I don't remember the street or number." Their father's name is Young Lum, a farmer. Says he (the witness) was living in San José with his brother and sister-in-law when defendants were born, and saw them there frequently. "Q. Did you see them afterwards in China? A. I saw them there." Says Jung Lee is 22, and Lee Gung 24, years of age. "Q. How old was Lee Jung when you saw him last in China? A. Nine. Have you seen the defendants since they left San José? A. I saw them again in China." Then says that his brother and sister-in-law came to the United States with him, but does not at this point state when. This closes his direct examination. Cross-examined, he gives his father's name and business, and his brother's name and place of residence when in China, and states that this brother lived with the father up to the time he came to the United States, including the few months after he was married, which marriage took place before he came to the United States. Gives the population of the village where they lived, and names Young Hin Wah, Young Hin Nam, and Young Hing Fuy as the only persons he can remember who were living in that town at the time he (witness) lived there. Says he was 11 years of age when he left China, and gives the ages of the Youngs, and repeats that they are the only

persons he knew in China. Gives the time, with exactness, when he left his village in China, and when he arrived in San Francisco. Does not claim to remember some other minor matters. He states that his brother and sister-in-law came to the United States with him, and says his brother married Jee She. Gives the names of villages near his home in China, and the distances thereto. Says he stayed in San Francisco on his first trip one day. "Q. What time of day did you leave San Francisco to go to San José? A. I don't remember. Q. Was it in the afternoon or morning? A. Morning. Q. Don't you remember about what time it was? A. 6 a. m. Q. Are you sure? A. Yes; no mistake." He then describes the journey to San José, and what he did there. "Q. How many years had you lived there before Lee Gung was born? A. Seven years; Jung Lee, six years. Q. After you lived in San José 10 years, where did you go? A. New York. Q. How many years did you live in New York? A. Ten years." Says he then went to China for five years. Is now living at 648 Bedford avenue, and has three years. Before that, lived at Third avenue, Brooklyn, for three months, to best of his recollection. Before that, at 823 Fulton street for one year, and before that two months in Chinatown, New York,—32 Pell street. Before that, three months at Forty-Second street, New York, and before that does not remember. These are the only addresses in New York he remembers, and does not remember how long he stayed at other places since his return from China. Works at laundry business. He then states on redirect the first boy was born three years after he first went to San José, and second five years thereafter. "Q. How old were these boys when you left China to come to the United States the last time? A. One was seven, the other nine." In this testimony we find many contradictions. Are they material, and of such a nature as to affect the credibility of this witness. He says he left China at the age of 11 years, and first says that Lee Gung was born 7 years thereafter, when witness was 18 years of age; Jung Lee 6 years thereafter, or when witness was 17 years of age. He does not say he was present at their birth, or how he knows the fact. According to his statement, he remained three years at San José after Lee Gung was born, and then went to China and remained 5 years, and therefore Lee Gung was 8 or 9—he says 9—when witness left China last. But if Lee Gung was born 5 years after they went to San José, then he was 5 when witness went to China, and 10 when he left, and witness made an error of 1 year in giving the age. He stated distinctly on the cross that Lee Gung was born 7 years after they went to San José, and on redirect changed to 5; evidently endeavoring to correct the discrepancy his testimony exhibited if the boy was 9 when he saw him in China. He was in error in either event. This error of figures alone does not necessarily indicate a purpose to misrepresent. The witness gave no reason for changing the time of the birth of defendants. There was also a serious conflict between his direct and cross-examination as to where he lived and where he went on leaving San José. On the direct he went from San José to China, while on the cross-examination he went from San José direct to New York. His inability to account for himself in New York during 6 of the last 10 years is also a fact of importance; also his lack of memory regarding persons in China. His inability to remember the street on which the defendants were born may indicate either ignorance of the facts or failure of memory. The witness, now 36 years of age, stated that he could not remember the time of day he left San Francisco for San José, but, on being pressed, perhaps thinking it would help the case, testified that it was at 6 o'clock in the morning,—“no mistake.” True, he may have recalled that fact, but it was for the commissioner to judge the truth of the witness. The commissioner saw this witness, and observed his manner and appearance, and can it be said that this testimony is so connected and straightforward and evidently reliable that the commissioner was not justified in refusing to accept it as satisfactory evidence that these defendants were born in the United States? Are boys of that age likely to know of the birth of nephews, and remember about it, when they cannot tell the street or number where the event occurred? Is it unfair to suspect that his failure to state where he has lived in New York for 6 years and 6 months since his return from China is not due to failure of memory, but indicates want of truth? The

testimony of the witness does not show that he knew anything of the actual birth of those children. His knowledge on that subject must have been largely hearsay. Was not a question of fact for the determination of the commissioner presented? Does not this testimony itself create such a doubt of its truth or reliability that reasonable and prudent men are justified in refusing to accept it as satisfactory proof of the fact sought to be established?

**United States v. Yee Min, alias Chin Yee Min (1,309), and Chin Rock Ting, alias Chin Pak Ting (1,306).**

It having been admitted that defendants are Chinese persons not of the exempt class, and that they came into the United States from Canada, and were apprehended, as charged, Low Ming, for the defendants, testifies that defendants are children of his older sister, and were born at San José, Cal.; that one is 22, the other 20, years of age; was not present at birth, but saw them about two weeks thereafter. When the oldest defendant was 8, all went back to China. Defendants are just reappearing in this country. The witness says he had a younger brother. Chin He, for the government, says he knew Low Ming and his family in China, and has known him here, and states positively he did not have a sister or a brother, and that he came to the United States only 17 or 18 years ago. Low Ming says he came 24 years ago. These witnesses are so at variance on material points that it is not possible to more than guess at the truth. There is no preponderance of credible evidence. The commissioner could not well have been satisfied from the testimony before him that the defendants were born in the United States.

**United States v. Yee Ark Tai and Woo Fun, alias Yee Woo Fun.**

It was admitted that the defendants are Chinese persons, not of the exempt class, and that they came into the United States from the Dominion of Canada, and were apprehended, as charged. Young Jung, of Pell street, New York, testifies for the defendants, and states, in substance, that he came to the United States from China 22 years ago, and was at Salmon Island, Cal., for 7 years; then at Brooklyn 9 years; then in China one year. On his return from China he came to New York and has been here 5 years. Testifies he had an older sister, and that she had two sons born in the United States, who returned to China when 6 and 4 years of age, respectively; that he (witness) had been here about 1 year when these sons were born, and they returned to China with their parents. This makes the defendants 19 and 20 years of age, respectively. Witness says Yung Chee was 27 when he (witness) first came to the United States, and was only 36 when he went back to China, 16 years later. Yung Tin was 10 or 12 when witness came to the United States, and only 18 or 19 16 years later, when witness was back in China. Says he is sure about these ages of the persons described. For the government, Young Shai Foo says he knows and identifies Young Jung; knew him and his family well in China; is his cousin; that their mothers were sisters; and that Young Jung had no sister. This witness identified a photograph other than that of Young Jung as that of Young Jung, but did not fail to identify Young Jung's photograph. There is nothing to show how close the resemblance was, and hence this error is not very significant here. The main contradiction is that Young Jung had no sister, and hence the sister of that witness did not give birth to the defendants. If in error as to having a sister, he is easily in error as to the birth of the defendants. The commissioner was not satisfied the witness told the truth, and such contradictory evidence, read all together, failed to establish the main facts to his satisfaction.

**United States v. Lin Park and Lee Choy.**

It being first admitted that the defendants are Chinese persons, not of the exempt class, and that they came into the United States from the dominion of Canada, and were apprehended, as charged, Di Ging, who, according to his testimony, resides at 16 Pell street, New York City, is 46 years of age, was born in China, and came to the United States 22 years ago, and resided at San José for 12 years, and has been in New York since, further testified that he knows Lin Park, aged 20 years, and Lee Choy, aged 18 years, the defend-

ants, and knew them in San José. Being asked, "Where were they born?" he said, "San José." Being asked when they returned to China, he said one was 10 and the other 8 years of age when that occurred. He also says they were sons of his older sister, and their father's name was Woo Ah Tuk. On cross-examination he states some facts regarding his life, etc., and says Lee Choy was born 4 years after the witness came to the United States, or 18 years ago. He has not seen the defendants before in 10 years; hence one was 8 and the other 10 when last seen by the witness. Asked, "How did you recognize them?" he said, "I remember them;" no physical marks. He was then asked how he knew they were in jail at Plattsburg, and answered that he had a letter from them, sent from the steamer, saying "they were going to be in jail here." Letter also told him the trial would be the day it took place. He was told to go to an attorney, which he did, and the attorney took him over to testify. Chu Hall, for the government, testified that he knows the witness Di Ging, knew him in China, and also knew his father and family,—visited them often,—and that Di Ging had no brother or sister. It is evident that the defendants expected to bring up in jail before they landed in America, and that this witness was expected to be on hand to make a case for them. This is hardly consistent with the claim that they were born in the United States. In any event, there was such a conflict of evidence that the commissioner's judgment should not be disturbed.

United States v. Fook Chung, alias Fook Taing.

It was admitted that the defendant is a Chinese person, not a member of the exempt class, and came into the United States from the dominion of Canada, and was apprehended, as charged. Tsang Tsun testified for the defendant, Lem Sing for the government, and Hom Bing for the defendant in reply. All are Chinese, and gave their testimony through an interpreter. Tsang Tsun resides at Ridgewood, N. J., is 39 years of age, and came to the United States when 18. Says his brother Tsang Loong and his wife came with him to this country from China, and, after two weeks in San Francisco, went to Butte City, Mont.; that they all lived together, on a vegetable ranch, in the same house; that the defendant Fook Chang was born there 3 years after their coming to this country, and is son of this brother; that they lived there 8 years, when this brother, wife, and child all went to China; that witness came on to New York, where he lived five years, and then went to Ridgewood, and remained 4 years, when he went to China, and stayed one year, and then returned to the United States; that in China, on this visit, he lived in the same house with defendant. In court he identified defendant, and stated he is his only nephew. On cross-examination states he has no sister, and only one brother. The witness states about the birth of defendant, and there are no errors or discrepancies in his lengthy cross-examination. None of his statements are improbable on their face, except that the father, a vegetable gardener, was a doctor, and understood the business of attending women in childbirth. Lem Sing, sworn for the United States, says he is 43 years old, lives at 12 Pell street, New York, and came to the United States 20 years ago, landing at Portland, Ore., and then went to Spokane Falls and worked on the railroad; that he knows the witness Tsang Tsun, and knew him first when they worked on the railroad together. Says they came on the same steamer, and worked together at Spokane Falls 4 years. Has seen him a few times within the last few years. He identifies the photograph of the witness as the same person. The cross-examination of this witness did not shake or discredit his testimony, and contained no contradictions. It exhibits no want of intelligence or bias. Hom Bing, for defendant, testified that he knew Tsang Tsun in Butte City, Mont., and his wife, and that defendant was born there, and that he recognizes him, although he is not related, and has not seen the child since it was 4 years old, some 15 to 17 years ago. The cross-examination of this witness demonstrated that he knows nothing of the birth of this defendant, except by hearsay, and cannot identify him. His testimony, as a whole, is inherently improbable, and, as it appears on the record, fails to carry conviction that he was speaking truthfully. In fact, it gives the contrary impression, decidedly. If Tsang Tsun spoke the truth, the defendant made his case. If Lem Sing spoke the truth,



and was not mistaken in his identification, Tsang Tsun did not tell the truth. The other witness added nothing to the strength of defendant's case. The commissioner saw these witnesses, and observed their manner, etc., and hence was better able to judge their credibility. When the testimony given to establish a fact is evenly balanced, should not the judgment of the trial court be sustained on appeal?

Geo. B. Curtiss, U. S. Atty., and H. E. Owen, Asst. U. S. Atty.

Jas. F. Akin, for defendants Lee Huen, Fong Ham, Yee Yim, So Ho Lung, Wong Hum, and Wong Ching.

R. M. Moore, for defendants Chan Hin, Yet Sang, Fong John, Soo Hoo We, Chong Jack, Ah Wing, and Bak Hen.

B. W. Berry (R. M. Moore, of counsel), for defendants Wong On, Chin Yuen, Chin How, and Chin Tung.

J. B. Riley, for defendants Jung Lee, Lee Gung, Yee Ark Tai, Woo Fun, Lin Park, and Lee Choy.

John B. Riley (R. M. Moore, of counsel), for defendants Yee Min and Chin Rock Ting.

J. H. Booth, for defendant Fook Chung.

RAY, District Judge (after stating the facts as above). Having given a somewhat detailed statement of the testimony in these cases, it only remains to call attention to the rules of law and evidence applicable thereto, and which must control this court in determining the appeals.

The influx of Chinese laborers into the United States attracted the attention of the congress prior to 1880, and has resulted in the enactment of certain laws from time to time applicable to all classes of Chinese aliens within or seeking entrance into the United States. With the wisdom of these laws the courts and judges have nothing whatever to do. It is the duty of the judicial officers charged with their enforcement to accept such laws as wise and suitable to the conditions that demanded and secured their enactment, and interpret and (so far as they are found to be constitutional and capable of execution) enforce them accordingly. Unless a different course of procedure is provided by law, these statutes to prohibit or regulate the coming of Chinese aliens into the United States, or to expel them therefrom, are to be executed, and all trials thereunder conducted according to the established rules and practice of the courts of the United States in similar cases. Except as stated, the same rules of evidence are to be applied, and there should be no relaxation of these established rules in the administration of the law, on the plea that the laws are severe or rigorous. For the modification of such laws, if any modifications are desired, application must be made to the law-making branch of the government, which, within its sphere and constitutional power, is supreme.

Chinese persons within the United States (meaning thereby the organized states and territories), and their descendants, when born therein of parents residing here, and not employed in a diplomatic or official capacity under the emperor of China, are citizens of the United States, and, when such fact is established in the mode and manner prescribed by the proper authorities, are entitled to be and remain

therein, and are entitled to the equal protection of the laws. *U. S. v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. Residents, alien born, are also entitled to the equal protection of the laws. *Yick Wo. v. Hopkins*, 118 U. S. 356-369, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Wong Wing v. U. S.*, 163 U. S. 242, 16 Sup. Ct. 977, 41 L. Ed. 140. The power to expel or exclude aliens, being a power affecting our international relations, is vested in the political departments of the government, and is to be regulated by treaty or act of congress, and is to be executed by the executive authority, except so far as the judicial department has been authorized or is required by the constitution to intervene. *Fong Yue Ting v. U. S.*, 149 U. S. 711, 713, 714, 13 Sup. Ct. 1016, 37 L. Ed. 905; *U. S. v. Wong Kim Ark*, 169 U. S. 699, 700, 18 Sup. Ct. 456, 42 L. Ed. 890. The mode and manner of ascertaining this fact of citizenship as a means for excluding or expelling aliens is exclusively within the power of congress, acting within its constitutional limitations, to determine. *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; *U. S. v. Wong Kim Ark*, 169 U. S. 699, 700, 18 Sup. Ct. 456, 42 L. Ed. 890. The right to exclude or expel aliens of any nationality is our inherent and inalienable right as a sovereign and an independent nation, and this power may be exercised entirely through executive officers. Same cases. It follows that a proceeding under our law to expel or exclude aliens is not a criminal prosecution or proceeding. 149 U. S. 730, 13 Sup. Ct. 1016, 37 L. Ed. 905. The defendants are not on trial for the offense of coming into or being in the United States contrary to law, but the government, in the exercise of its sovereign power, is seeking to expel or exclude aliens who have no right to be here. This is not done as a punishment for coming in or being here, whether lawfully or unlawfully, but as a matter of public policy. A crime is "a wrong which the government notices as injurious to the public, and punishes in what is called a 'criminal proceeding,' in its own name." 1 Bish. Cr. Law, § 43; *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *People v. Donohue*, 84 N. Y. 441. Cent. Dict. tit. "Crime." True, congress may make it a crime for an alien to come into this country in violation of our laws, or, being herein, to remain in violation of such laws after being ordered to depart; and should this be done, and a punishment prescribed for the violation of such law, the trial would be by the judicial, and not by the executive, branch of the government, and the constitutional right of trial by jury, etc., would necessarily inure to the benefit, and operate for the protection, of the offender. *Wong Wing v. U. S.*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

Section 4 of the act of May 5, 1892, "An act to prohibit the coming of Chinese persons into the United States," was declared unconstitutional by the supreme court of the United States, in the above-cited case, because no judicial trial according to the constitution to establish the guilt of the accused was provided, not because the power to enact a criminal statute in accordance with the constitution, and accompanied or limited by the safeguards of that instrument, does not exist. This was also declared, in substance, by Mr. Justice Gray in *Fong Yue Ting v. U. S.*, 149 U. S. 730, 13 Sup. Ct. 1016, 37 L. Ed.

905. The decision in the Wong Wing case, *supra*, took from the act of May 5, 1892 (27 Stat. 25), its criminal features. The result is that in all these Chinese deportation cases the defendants may be sworn as witnesses in their own behalf. *Potter v. Bank*, 102 U. S. 163, 26 L. Ed. 111; *Bradley v. U. S.*, 104 U. S. 442, 26 L. Ed. 824; *Green v. U. S.*, 9 Wall. 655, 19 L. Ed. 806. At their own request, defendants may testify in all criminal cases. In civil cases there is no provision of law that their failure to be sworn shall neither create a presumption nor permit an inference against them. In criminal cases there is such a provision. Act March 16, 1878, c. 37 (U. S. Comp. Stat. 1901, p. 660). "And his failure to make such request shall create no presumption against him." If defendants fail to give testimony in their own behalf, and explain doubtful matters peculiarly within their own knowledge, in these deportation cases, that fact may be commented on, and used to their disadvantage, possibly, for such fact may be considered by the court or commissioner, with all the evidence and circumstances of the case, and justify him in taking testimony they might have explained or denied, strongly against them. See cases cited below. Hence the commissioners in each of these cases had the right to consider the silence of the defendants in their respective cases in that regard, and such silence or failure to deny or contradict certain statements, or even give evidence on the main issue, may have turned the scales. Such silence cannot be taken as proof of any fact, or as an admission, but it is a circumstance which may be considered in determining which of two witnesses contradicting each other has testified correctly. *Quock Ting v. U. S.*, 140 U. S. 420, 11 Sup. Ct. 733, 851, 35 L. Ed. 501; *Schwier v. Railroad Co.*, 90 N. Y. 564; *Grinnell v. Taylor*, 85 Hun, 85, 32 N. Y. Supp. 684, affirmed in 155 N. Y. 653, 49 N. E. 1097.

Said the court, per Field, J., in *Quock Ting v. U. S.*, *supra*:

"It is incredible that a father would allow the exclusion of his son from the country where he lived, when proof of his son's birth and residence there for years could have been easily shown, if such in truth had been the fact."

Section 3 of the act of May 5, 1892 (27 Stat. 25), has wisely and necessarily provided (if the law is to be enforced):

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States."

The burden of proof, not of evidence, merely, is on the defendant. There is a wide difference between testimony and evidence, as well as between evidence and proof. There may be pages of testimony of some relevancy, without any substantial evidence of the fact sought to be established. So there may be some evidence of such fact, but no sufficient proof. Testimony is the statements given by the witnesses, and, if relevant, they are evidence. Evidence is whatever may properly be considered by the court, or properly may be submitted to the jury for its consideration, while proof is the legal effect of evidence. *People v. Beckwith*, 108 N. Y. 67-73, 15 N. E. 53; *Steph. Dig. Ev.* (2d Ed.) p. 3, note 2. See 1 *Tayl. Ev.*, notes 2, 3, by Chamberlayne.

This statute demands proof to the satisfaction of the commissioner or judge, not the production of a mere preponderance of testimony or of evidence. Evidence may or may not be believed by the court or jury, but proof must be accepted and acted on. And the rule is well settled that in civil cases only a preponderance of credible evidence is demanded. *Insurance Co. v. Ward*, 140 U. S. 76-90, 11 Sup. Ct. 720, 35 L. Ed. 371; *Seybolt v. Railroad Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. 710; *Strand v. Railway Co.*, 67 Mich. 380, 34 N. W. 712. But when the credible evidence on the two sides is in equipoise, the verdict or decision should be against the party having the general burden of proof on the main issue. *Broult v. Hanson*, 158 Mass. 17, 32 N. E. 900; *Whitlatch v. Casualty Co.*, 149 N. Y. 45, 43 N. E. 405; *Railroad Co. v. Hale*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748; *Rogers v. Wallace*, 10 Or. 387; *Gage v. Railway Co.*, 88 Tenn. 724, 14 S. W. 73. See, also, *Trust Co. v. Siefke*, 144 N. Y. 354, 39 N. E. 358. In this connection it should be remembered that credible and undisputed evidence amounts to proof, and must be accepted as such. What shall be accepted as satisfactory proof is evidence that satisfies the judicial mind. The defendant is not required to satisfy the prejudiced, the capricious, the unreasonable, or the arbitrary mind; but he must satisfy the judgment of a reasonable man, acting honestly and with good judgment, and without prejudice or bias. The commissioner may not arbitrarily or capriciously, or against reasonable, unimpeached, and credible evidence, containing no element of inherent improbability, and which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied. When clearly, from the evidence, the judicial mind ought to be satisfied, in the eye of the law it is satisfied. To hold otherwise would subject the Chinese citizen to the caprice of the commissioner before whom brought. The right of a Chinese person, born in the United States under the circumstances stated, to be and remain therein, cannot be questioned or denied on any ground; assuming, of course, such right has not been forfeited by the commission of some act entailing that consequence.

The general rule is that uncontradicted evidence, free from inherent improbability, when given by disinterested witnesses, and in no way discredited, is conclusive. *Quock Ting v. U. S.*, 140 U. S. 420, 11 Sup. Ct. 733, 851, 35 L. Ed. 501; *Kavanagh v. Wilson*, 70 N. Y. 177-179; *Wait v. McNeil*, 7 Mass. 261. See, also, numerous cases hereafter cited. The witness must be credible, and it must appear that he knows whereof he speaks. This may be shown by his own testimony in many, and probably in most, cases. It cannot be said, however, that when a statute provides, in terms, as here, that the fact must be proved to the satisfaction of the commissioner, that officer is bound, as matter of law, to be satisfied with the evidence of a single witness, a total stranger to the court and community, however fair, clear, and conclusive the statement alone may appear to be. 3 Greenl. Ev. § 377. It must be that the court is at liberty to consider the source of the testimony given, as well as its quality and amount. "Satisfactory or sufficient evidence: That amount or weight of evidence which is

adapted to convince a reasonable mind." Steph. Dig. Ev. (2d Ed.) p. 3, note 2. *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *Deal v. State*, 140 Ind. 354, 39 N. E. 930.

Greenleaf says (1 Greenl. Ev. § 2):

"By 'satisfactory evidence,' which is sometimes called 'sufficient evidence,' is intended that amount of proof which ordinarily satisfied an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined. The only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest."

2 Starkie, Ev. 514.

It is not improbable that this rule was in the mind of the congress when it enacted the law under consideration.

The truth of the unsupported statements of a single witness may be tested by their inherent probability, by their clearness and their consistency with each other, by the intelligence of the witness in observing and reporting upon the facts to which he testifies, by his freedom from bias and prejudice as evidenced by words or conduct, or by his known character for honesty and truth. *Cornwell v. Riker*, 2 Dem. Sur. 354. If the witness be a total stranger in the community where called, and to the party against whom he gives evidence, and such evidence relates to an alleged fact of which several obtainable witnesses may and must know, but as to the existence or nonexistence of which no other person gives testimony, this circumstance alone may justify the court in refusing to find that the alleged fact has been established to its satisfaction. A presumption, or inference, rather, may arise from the nonproduction of obtainable living witnesses, having knowledge of the facts, that the fact is otherwise than as stated by the witness produced, or at least that the absent witnesses would not sustain the witness produced. *Quock Ting v. U. S.*, 140 U. S. 420, 11 Sup. Ct. 733, 851, 35 L. Ed. 501. The result in such a case is that the asserted fact may not be proved to the satisfaction of the commissioner or court. The court or commissioner may not unreasonably demand a large amount of cumulative evidence, but it may demand, if in existence and obtainable, more than one witness on any given material point. The liability of a witness to mistakes demands this. The source whence the witness derived his knowledge, or the probability of his having been in a situation to know the fact or observe the transaction testified to, may also be considered by the court in determining the truth of the statements made in court. Same case. Evidence from a male person, not the father, that a certain person was born at a certain time and place (that being the fact in controversy) unaccompanied by any details as to how or why he knows such fact, may not be conclusive on the court. But to warrant a finding against the statement of the witness, something should appear upon the record to justify the court in refusing to give it full faith and credit. It is true that many times the appearance of a witness on the stand, his quibbling, his reluctance, his hesitation, or his zeal and apparent interest, not expressed in words, effectually discredits the witness, and

in such case the court is at liberty to refuse to find in accordance with the statements made. *People v. Tuczkewitz*, 149 N. Y. 251, 43 N. E. 548. In such cases the record should be made to show the facts, so far as such facts, by proper questions, may be noted on the records of the court. It is impossible to prescribe any fixed rule by which the credibility of the witness is to be tested, or which shall bind the conscience of the court as to the conclusiveness of the evidence in a given case, but ordinarily the record will disclose to the appellate tribunal the reasons why full faith and credit were not given and should not be given to the witness.

Attention is called to the following New York cases, all pertinent and more or less in point: *Lomer v. Meeker*, 25 N. Y. 363; *Seibert v. Railroad Co.*, 49 Barb. 587; *Conrad v. Williams*, 6 Hill, 447; *Staford v. Leamy*, 2 Jones & S. 269; *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109; *Plyer v. Insurance Co.*, 121 N. Y. 691, 692, 24 N. E. 929; *People v. Tuczke-witz*, 149 N. Y. 240-250, 43 N. E. 548; *Dwight v. Insurance Co.*, 103 N. Y. 341, 359, 360, 8 N. E. 654, 57 Am. Rep. 729; *Elwood v. Tel-egraph Co.*, 45 N. Y. 549-553, 6 Am. Rep. 140; *Koehler v. Adler*, 78 N. Y. 287-291; *Kavanagh v. Wilson*, 70 N. Y. 177-179.

In a criminal case it is not within the power of the court to direct a verdict of guilty or not guilty, or compel the jury to find such a verdict, however clear and conclusive the evidence may be. Therefore the jury may find a verdict of guilty or not guilty arbitrarily or capriciously, and when the finding is "Not guilty" the verdict must stand. The court may, however, advise the jury to find a verdict of not guilty, and may reverse a conviction as against or unsupported by the evidence. Therefore the rule that reasonable, disinterested, credible, and uncontradicted evidence, having no element of inherent improbability, cannot be disregarded, has no application in a criminal case. The main reason for this is that in criminal trials the jury is the sole judge of the facts. Not so in civil cases. Here there is always a preliminary question for the court, viz., is there any evidence sufficient to support a verdict? Therefore decisions in criminal cases have no great weight in determining the question now before this court. *People v. Tuczkewitz*, 149 N. Y. 240-250, 43 N. E. 548. The decisions of the federal courts are equally clear and conclusive. *Quock Ting v. U. S.*, 140 U. S. 417-420, 11 Sup. Ct. 733, 851, 35 L. Ed. 501; *Willett v. Fister*, 18 Wall. 91, 21 L. Ed. 804.

In *People v. Tuczkewitz*, 149 N. Y. 240, 43 N. E. 548, the trial court was requested to charge "that the jury are bound to believe the testimony of any disinterested witness which is not contradicted and which is not in itself improbable." The court declined, and the court of appeals, per Haight, J., in passing on this question, after reviewing the cases, says (no dissent on this point):

"It will be observed that the words 'unimpeached,' 'discredited,' and 'not incredible' are used in the cases, but we find no such words in the request. A witness may be discredited even when not contradicted. The examination may disclose that the witness was of bad character, a criminal and perjurer, and yet it may not be within the power of a party to contradict his testimony. His manner upon the witness stand, his halting and quibbling in answering

questions, may satisfy both the court and the jury that he is swearing falsely, and yet no witness may be in existence that could contradict his testimony. He may have told a probable story, and yet it may have been false and rendered incredible by reason of his character and manner."

In *Quock Ting v. U. S.*, 140 U. S. 420, 11 Sup. Ct. 734, 35 L. Ed. 501, the supreme court, per Field, J., says:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

That court cites with approval, and thus makes those cases authority here, *Kavanagh v. Wilson*, 70 N. Y. 177-179; *Koehler v. Adler*, 78 N. Y. 287; *Elwood v. Telegraph Co.*, 45 N. Y. 549, 6 Am. Rep. 140; and *Wait v. McNeil*, 7 Mass. 261.

In *Elwood v. Telegraph Co.*, supra, the court, per Rapallo, J., said:

"It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony should be credited, and have the effect of overcoming a mere presumption. *Newton v. Pope*, 1 Cow. 110; *Lomer v. Meeker*, 25 N. Y. 361. But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when interest absolutely disqualified a witness necessarily assumed that the witnesses were disinterested. That qualification must, in the present state of the law, be added. And furthermore it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness for the simple reason that no other witness has denied them, and that the character of the witness is not impeached."

The court then refers to some of the evidence, and adds:

"There is also a want of distinctness in the statements of the witnesses irrespective of any question of credibility."

In *Koehler v. Adler*, supra, the court cites, quotes, and approves the *Elwood* case.

In *Kavanagh v. Wilson*, 70 N. Y. 179, the court clearly states that the inherent improbabilities of the statements made, as indicated by established or known facts, are sufficient to discredit the evidence.

In *Dwight v. Insurance Co.*, 103 N. Y. 355, 8 N. E. 654, 57 Am. Rep. 729, the failure to call certain witnesses known to have knowledge on the subject is commented on as some evidence that certain facts alleged had no existence.

In *Stafford v. Leamy*, 2 Jones & S. 269, it is held that a witness may impeach himself by his own contradictory or conflicting statements, or—

“By exhibiting such a want of intelligence or of memory as to incapacitate him from representing a past event so that reliance could be placed on his statement, or by giving testimony not credible on its face.” Also: “Although witnesses are presumed to testify correctly, unless something appears in the case as a basis for a judgment to the contrary, yet if there appears in the case, even if it be in his own testimony only, anything which tends to the impeachment of their credibility, the finding of the jury or referee on that fact will not be disturbed, any more than a finding on any other fact.”

It is true that hesitancy in giving testimony may be due to physical infirmity or to sluggish mental action; that discrepancies in giving dates or in making computations or correct figures may be due to lack of arithmetical training; that a witness may assert that a person was born at a certain place and is of a certain age, and, in giving an account of his life since such event, honestly err in computation of time, and so fill his testimony with discrepancies. But if such mistaken and erroneous statements are made under oath in a court of justice, and left uncorrected, and the court has no other evidence upon which to base a judgment, and the contradictions are on material points, the party adducing such evidence and relying solely thereon must necessarily fail, for the witness, however honest, is lacking in sufficient intelligence or memory to properly inform the court. Hence the necessity for testimony that is both truthful and intelligent. Otherwise it cannot be satisfactory to the court. An honest witness, who has sufficient memory to state but one fact connected with an important transaction, and that fact a material one, cannot be safely relied upon, as such weakness of memory not only leaves the case incomplete, but throws doubt upon the accuracy of the statement made. Such a witness may be honest, but his testimony is not reliable. Mere error of statement, if corrected by the witness, will not discredit him or seriously impair the weight of his testimony, but the statement of a witness which abounds in errors would show such a weak or confused mental condition as to justify the court in refusing judgment based thereon, even when otherwise uncontradicted; and the appellate court, in the discharge of its duty, would be called upon to reverse any decree based solely on such weak and untrustworthy testimony. Testimony given in court may be insufficient to prove an alleged fact, because of the mental incapacity of the witness, as well as because of his moral obliquity. Full weight is given the fact that certain acts in a given transaction, or happening in former years, impress and are retained by the memory more vividly than others; but the legal effect of such a transaction, made up of many acts, cannot be properly adjudicated from even a correct statement of but one, and no court should attempt to do so. A witness who goes back many years and describes one transaction, and confesses his inability to recall any other occurring within years of that time, may not be wholly reliable. Hence when a party comes into court with but one witness, and that witness attempts and purports to correctly state an event occurring at a given time, and at a place where he had resided for a long time, and with



which place he was familiar, but is unable to give any description of the locality, or to state any other transaction occurring at about the same time, the court is fully justified in refusing to be satisfied that the transaction described occurred as stated. A memory so weak and nonretentive cannot be said to satisfy the judicial mind to a degree that compels reliance thereon. These conclusions are fully justified by the remarks of Mr. Justice Field in *Quock Ting v. U. S.*, 140 U. S. 419, 420, 11 Sup. Ct. 734, 35 L. Ed. 501, viz.:

"The testimony given by himself amounted to very little. Indeed, it was of no force or weight whatever. The particularity and positiveness with which he stated the place of his birth in San Francisco was evidently the result of instruction for his examination on this proceeding, and not a statement of what he had learned from his parents in years past. And his failure to mention any particulars as to the city of San Francisco, which he certainly ought to have been able to do if he resided there during the first ten years of his life, was surprising. A boy of any intelligence, arriving at that age, would remember, even after the lapse of six years, some words of the language of the country, some names of streets or places, or some circumstances that would satisfy one that he had been in the city before. But there was nothing whatever of this kind shown. He gave the name of no person he had seen; he described no locality or incident relating to his life in the city, nor did he repeat a single word of the language, which he must have heard during the greater part of several years, if he was there."

Such want of memory, whether in fact attributable to ignorance of the whole matter, to an unwillingness to testify, or to an inability to remember, justifies the court in refusing its assent to the statement made, for the reasons stated, and for the further reason that many times the court is unable to determine whether the witness is mentally or morally unreliable. It is all-sufficient, in legal contemplation, that the evidence is unsatisfactory and insufficient, and the court is not called upon to determine whether the witness testifies falsely, or is mentally incapable of giving correct testimony. In either event the result is the same,—the case is not proved. In Pennsylvania it is expressly held that the accuracy of the witness is always material. *Derk v. Railroad Co.*, 164 Pa. 243, 30 Atl. 231.

There is some apparent conflict in the cases whether mere interest in the result is sufficient to justify the court or jury in finding against the evidence of the witness, when uncontradicted or otherwise unimpeached, and his testimony is clear, reasonable, and inherently probable. In *Honegger v. Wettstein*, 94 N. Y. 261, mere interest of the witness was held sufficient to send the question of the credibility of the witness to the jury, and justify a finding either way. There are other cases to the same effect. See cases cited in *Munoz v. Wilson*, 111 N. Y. 300, 18 N. E. 855. In *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102, the court held:

"The rule that the credibility of a witness who is a party to the actions must be submitted to the jury is not an absolute and inflexible one, and where his evidence is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and is not improbable, nor in its nature surprising or suspicious, there is no reason for denying to it conclusiveness."

See, also, *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109.

May not the evidence of a party be as effectually contradicted by indirect evidence or circumstances as by direct evidence?

In *Kavanagh v. Wilson*, 70 N. Y. 177, the witness, while not a party, was pecuniarily interested in the result, and "other circumstances rendered the statement of the witness not entirely free from improbability."

This court cannot assent to the proposition that in one of these cases a witness for the person sought to be deported is interested merely because he is a Chinese person. Such a rule would make most witnesses in a court of justice interested witnesses, and, if interest alone justifies the court in refusing credence to the testimony of a witness, then many in every trial would be more or less discredited by reason of mere national kinship, and the court or jury, as the case might be, would be at liberty to refuse to be bound by their testimony when testifying in favor of a party of their own nationality. There is no rule of law that justifies the assumption that a Chinese person is more interested in his countrymen than is a person of some other nationality in his. A Yankee may testify for a Yankee, but he is not therefore interested. An Irishman may testify for an Irishman, an Englishman for an Englishman, a German for a German; but such witnesses are not, in the eye of the law, interested. No discredit can legally attach to the testimony of a person because he gives his evidence in behalf of a party belonging to his own nationality. A Chinese witness in one of these cases, if engaged in securing the entrance of Chinese persons into the United States, is open to suspicion; and if he is engaged in aiding the entrance of such a person, and gives evidence in that behalf, he is interested, and such fact legitimately tends to discredit his testimony. We are all brothers in the family of Adam,—all brothers in the national family to which by birth or adoption we belong,—but these ties of race or color do not make us interested witnesses when we testify in court, within the rule that permits interest to be used as a discrediting circumstance. If it affirmatively appears that a witness has a bias in favor of persons of his own nationality, in whose behalf he is testifying, or against the other party to the litigation, or a bias in favor of persons of his own nationality generally, or against those of another nationality, such fact may be used to discredit his testimony. Such facts may be considered by the court and jury, but we cannot assume or presume the existence of such a bias either in favor of persons of the same nationality, or against persons of another nationality. The one assumption is as unjust and ill-founded as the other. It is quite true, however, that the testimony of foreigners and of others who are brought from a distance to the place of trial requires to be scrutinized with more than common caution. The tribunal before which they speak knows little of them, and they care little for it, and may have no respect for the laws of the country in which they are giving evidence. They have little to fear from having their falsehoods exposed, as there is little danger of conviction of perjury, and they lose nothing in reputation among their fellows. In our courts a witness who does not understand or who cannot speak our language, but who speaks through an interpreter, if at all, has the time and opportunity to prepare his

answers to each question with care, and hence the force of a cross-examination is broken, if not destroyed. So, too, it is common knowledge that enslaved peoples develop an inordinate propensity for lying, and this is characteristic of most oriental nations. This comes largely from their being subject to the caprice and exactions of their masters or superiors, and, having no sense of moral responsibility to them, they come to regard lying to them as no sin, and an habitual disregard of the truth is thus engendered. See 1 Tayl. Ev. (Ed. 1897, Am. Notes) §§ 53, 56. See, also, *Chae Chan Ping v. U. S.*, 130 U. S., 598, 9 Sup. Ct. 623, 32 L. Ed. 1068, and 149 U. S., 730, 13 Sup. Ct. 1016, 37 L. Ed. 905. Hence in all these Chinese exclusion cases the testimony of Chinese witnesses, unknown and coming from a distance, —especially that of foreigners,—may be regarded as more or less weak; and, when contradicted or really impeached in any of the modes suggested and recognized by our law, the commissioner is justified in regarding such testimony, standing alone, as insufficient to convince the judicial mind. This conclusion must not be reached arbitrarily or capriciously or from prejudice, but from conviction that the case is not made out; and in such cases the appellate court or judge is not justified in reversing the finding of the tribunal which had the opportunity of observing the witness, and noting his manner and sincerity or want of sincerity in giving testimony. It is true that an intelligent and experienced judge often detects the falsehood of a witness who tells a story which, reduced to writing, reads smooth as the Psalms of David. The rule is now settled in England, the state of New York, and in the courts of the United States, that the evidence must be of "such a character" as to support a finding in favor of the party introducing it, and upon whom the burden of proof rests. A mere scintilla of evidence no longer suffices. *Commissioners v. Clark*, 94 U. S., 284, 24 L. Ed. 59; *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780; *Ryder v. Wombwell*, L. R. 4 Exch. 39. It follows that "some evidence," merely, unless it be in a legal sense satisfactory and convincing to the ordinary mind, when uncontradicted and unimpeached, fails to establish the case so as to demand or justify a judgment in favor of the party introducing it. The testimony contained in these records, respectively, is either contradicted by evidence of equal or greater weight, inherently improbable, or so weak, unsatisfactory, and contradictory as to fail to establish the right of the defendants to remain in the United States.

A full and careful examination and consideration of all the evidence in each of the cases now before the court fails to disclose any ground of reversal in either case, and hence the judgments of deportation must be affirmed.

## FILES v. DAVIS.

(Circuit Court, E. D. Arkansas, W. D. November 12, 1902.)

## 1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—ACTION ON ATTACHMENT BOND.

An action on an attachment bond executed in a suit pending in a national court presents a federal question, within the meaning of the judiciary act, and is within the jurisdiction of a federal court, where the requisite amount is involved, regardless of the citizenship of the parties; the effect of Rev. St. § 915 [U. S. Comp. St. 1901, p. 684], giving the same remedies by attachment in common-law causes in the circuit and district courts as are provided by the laws of the state in which such courts are held, being to make the state statutes in that regard laws of the United States.

## 2. SAME—ANCILLARY SUITS.

An action on an attachment bond executed in a suit pending in a federal court is ancillary to the action in which the bond was given, and may be maintained in the same court, without regard to the citizenship of the parties or the amount involved.

At Law. On demurrer to the jurisdiction.

George Scott, a citizen of Missouri, instituted in this court an action at law against A. P. Simms, W. F. Files, and the plaintiff in this case, J. T. Files, to recover money alleged to be due him from these parties, whom he charged to be partners. At the commencement of that suit he procured the issuance of a writ of attachment against the property of all the defendants, having filed the necessary affidavit and the bond as required by law, with William Farrell, who has since died intestate and the administrator of whose estate the defendant Davis is, as surety. The marshal executed the writ of attachment by seizing a stock of merchandise alleged to have been owned by and in the possession of the plaintiff in this action. Pending the attachment proceedings, the merchandise was, by order of the court, sold by the marshal, and the proceeds, less the costs of sale, deposited in the registry of the court. The original suit resulted in a final judgment of dismissal as to this plaintiff, and he thereupon instituted this action on the attachment bond, claiming \$9,500 damages alleged to have been sustained by him by reason of the wrongful seizure of his property under the writ of attachment. The complaint fails to show any diversity of citizenship of the parties, and the defendant demurs upon that ground to the jurisdiction of the court.

Rose, Hemingway & Rose and A. W. Files, for plaintiff.  
Ratcliffe & Fletcher and J. A. Watkins, for defendant.

TRIEBER, District Judge. There being no diversity of citizenship alleged in the complaint, the jurisdiction of this court can only be maintained upon the ground that the issues involve a federal question, or that this action is merely ancillary to the original attachment suit.

1. Does an action on an attachment bond executed in a suit pending in a national court present a federal question, within the meaning of

¶ 1. Jurisdiction of federal courts in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308.

¶ 2. Supplementary and ancillary proceedings and relief, see note to *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 36 C. C. A. 195; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

the judiciary act? Section 6 of the act of congress of June 1, 1872 (17 Stat. 197; section 915, Rev. St. U. S.),<sup>1</sup> is as follows:

"In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

If the effect of this act is to make the statutes of the state regulating the affidavit and bond in attachment proceedings laws of the United States for the national courts within such state, then the jurisdiction of this court is beyond question, for plaintiff's cause of action would then be arising under the laws of the United States. Upon this ground it is now well settled that suits on bonds of the United States marshals and other federal officers are actions arising under the national laws and within the jurisdiction of the national courts. *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; *Backrack v. Norton*, 132 U. S. 337, 10 Sup. Ct. 106, 33 L. Ed. 377; *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314. An action by an internal revenue collector on the bond of his deputy may be maintained in the national courts, upon the ground that it is an action arising under the laws of the United States. *Orner v. Saunders*, 3 Dill. 284, Fed. Cas. No. 10,584. So it is also the settled law that actions by or against corporations created by an act of congress may be maintained in the national courts solely upon that ground, which it is held makes the suit one arising under the constitution and laws of the United States. *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Supreme Lodge K. P. v. England*, 36 C. C. A. 298, 94 Fed. 369.

Congress has frequently adopted by reference the statutes of the states as national laws, or as laws for a territory for which congress legislated directly. The act of May 17, 1884 (23 Stat. 24), providing for a civil government for Alaska, adopted the laws of the state of Oregon as the laws of that territory. The various acts establishing the national courts for the Indian Territory (25 Stat. 783, 26 Stat. 81, and 28 Stat. 693) adopted certain laws of the state of Arkansas as laws for that territory. The conformity act of June 1, 1872 (17 Stat. 197), the act prescribing the competency of witnesses in civil actions pending in the national courts (13 Stat. 351; section 858, Rev. St. U. S.),<sup>2</sup> the national election laws (Acts May 31, 1870, 16 Stat. 145), and numerous other acts adopt certain laws of the states as national laws, and they have uniformly been sustained as a valid exercise of the constitutional powers of congress, and enforceable in the national courts as laws of the United States.

Perhaps the most important case on that subject is *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717, a case arising under the national election laws. It was there urged that, while congress had the power

<sup>1</sup> U. S. Comp. St. 1901, p. 684.

<sup>2</sup> Id. p. 659.

to assume the entire regulation of the election of representatives to congress, it had no constitutional power to make partial regulations intended to be carried out with regulations made by the states. But this contention was overruled by the court, the court saying:

"The objection that the laws and regulations, the violation of which is made punishable by the acts of congress, are state laws, and have not been adopted by congress, is no sufficient answer to the power of congress to impose punishment. It is true that congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The state laws which congress sees no occasion to alter, but which it allows to stand, are, in effect, adopted by congress. It simply demands their fulfillment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose, and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations." 100 U. S. 388, 25 L. Ed. 717.

In *Ex parte Clarke*, 100 U. S. 399, 25 L. Ed. 715, the same question was before the court. *Clarke* had been convicted in the national courts under the federal election laws for a violation of the state laws of Ohio in not conveying the ballot box, after it had been sealed and delivered to him for that purpose, to the county clerk, and the judgment of conviction was sustained. To the same effect are *U. S. v. Gale*, 109 U. S. 66, 3 Sup. Ct. 1, 27 L. Ed. 857; *In re Coy*, 127 U. S. 743, 8 Sup. Ct. 731, 32 L. Ed. 274; *Ex parte Yarbrough*, 110 U. S. 655, 4 Sup. Ct. 152, 28 L. Ed. 274; *Swafford v. Templeton*, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005. In *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708, it was held that the provisions of a state law disqualifying certain persons from testifying as witnesses are obligatory upon the national courts acting within that state by virtue of section 721, Rev. St. U. S.,<sup>3</sup> adopting the laws of the several states as rules of decision in trials at common law in the national courts. The act of March 3, 1825 (4 Stat. 115; section 5391, Rev. St.),<sup>4</sup> adopts the criminal laws of the state for offenses committed in any place under the jurisdiction of the United States, which are not provided for by any law of the United States, and this has been held to make the state laws the same as if the act of congress had defined the offenses in the very words of the state laws. *U. S. v. Coppersmith (C. C.)* 4 Fed. 198, 205; *Sharon v. Hill (C. C.)* 24 Fed. 726. In *Amy v. City of Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946, the court, in construing the conformity act of 1872 (section 914, Rev. St. U. S.),<sup>5</sup> say:

"But the statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading, and forms and modes of proceeding must conform to the state law and the practice of the state courts, except where congress itself has legislated upon a particular subject and prescribed a rule."

To the same effect is *Rush v. Newman*, 7 C. C. A. 136, 58 Fed. 158. For the same reason, the statutes of a state providing that, in actions of ejectment, the unsuccessful party shall be entitled to one

<sup>3</sup> U. S. Comp. St. 1901, p. 581.

<sup>4</sup> Id. p. 3651.

<sup>5</sup> Id. p. 684.

new trial as a matter of course, have been held binding on the national courts held within such state. *Smelting Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114; *Smale v. Mitchell*, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90; *Mining Co. v. Campbell*, 10 C. C. A. 172, 61 Fed. 932.

In *Sowles v. Witters* (C. C.) 46 Fed. 497, that part of the conformity act of 1872 digested as section 916, Rev. St.,<sup>6</sup> was before the court, and the learned judge who delivered the opinion, after quoting from the opinion of the supreme court in *Ex parte Siebold*, supra, concluded:

"This reasoning shows that, when a state law is adopted by or under the authority of congress, it becomes a law of the United States, and that a suit arising under such law arises under the laws of the United States." 46 Fed. 499.

In *Seymour v. Const. Co.*, 7 Biss. 460, Fed. Cas. No. 12,689, the action was to recover on a supersedeas bond given in a proceeding pending in a national court, and it was held to be within the jurisdiction of the federal court regardless of the citizenship of the parties, upon the ground that the cause of action was one arising under the laws of the United States. Even regulations made by the head of a department, in pursuance of authority granted by an act of congress, have been held to have the force and effect of a statute of the United States. *U. S. v. Bailey*, 9 Pet. 238, 9 L. Ed. 113; *Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; *In re Kollock*, 165 U. S. 533, 17 Sup. Ct. 444, 41 L. Ed. 813.

The same question was before the court in *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209. The jurisdiction of the circuit court in that case was invoked because a right was claimed under that part of the conformity act of 1872, digested as section 916, Rev. St.<sup>6</sup> The claim of plaintiffs in that case was that certain judgments of the federal court of Texas were liens on the real estate of the judgment debtor by virtue of the provisions of section 916, Rev. St.,<sup>6</sup> and that for this reason the action arose under the laws of the United States and the rules of the circuit court, and that the circuit court had jurisdiction thereof, regardless of the citizenship of the parties thereto. The chief justice, who delivered the opinion of the court, disposes of this question, after a careful review of the authorities, by saying:

"It is unnecessary to pursue this branch of the case further. Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien, which he asserted and the defendants denied. The disposition of this issue depended upon the laws of the United States and the rules of the circuit court, and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject-matter was properly invoked." 147 U. S. 390, 13 Sup. Ct. 346, 37 L. Ed. 209.

Actions on bonds executed in injunction proceedings pending in a national court may be maintained in this court as arising under the laws of the United States. *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642; *Tullock v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657; *Railway Co. v. Elliott*, 184 U. S. 530, 22 Sup. Ct. 446, 46 L. Ed. 673.

<sup>6</sup> U. S. Comp. St. 1901, p. 684.

But it is contended by learned counsel for defendant that these last-cited cases do not apply to the circuit court, but only to the appellate jurisdiction of the supreme court on error to the supreme court of a state. It is true that the jurisdiction of the supreme court to review decisions of the highest courts of a state is somewhat broader than that of a circuit court, for it extends to cases where a question arises under "a commission held or authority exercised under the United States." But as the federal question in the case at bar arises, if it exists at all, under the laws of the United States, that distinction cannot in any way affect this question. A careful reading of the opinion of the court in *Tullock v. Mulvane*, *supra*, will show that, while the first proposition involved in that case, as stated by the court, was, "Did the claim that there had been no breach of the condition of the bond because of the stipulation filed in the case in which the bond was given and because of the pendency of the appeal in the circuit court of appeals present federal questions?" was determined upon the ground that the right claimed was under an authority exercised under the United States, the second proposition in that case, "Did the claim of immunity from liability for attorney's fees, as one of the elements of damage under the injunction bond, present a federal question?" was determined by the court upon the ground that it arose under the statutes of the United States. Mr. Justice White, who delivered the opinion of the court, after showing that the equity rules had been promulgated by the supreme court by virtue of an act of congress (section 617, Rev. St., evidently a misprint, meaning section 917),<sup>7</sup> disposes of the objection to the jurisdiction that no federal statute was involved by saying:

"It follows that the proceedings in courts of equity of the United States are regulated by rules promulgated by this court, deriving their force from statutory authority, and the argument which we have just considered, even if it were not erroneous, would be inapposite." 184 U. S. 510, 22 Sup. Ct. 377, 46 L. Ed. 657.

In *Railway Co. v. Taylor* (C. C.) 86 Fed. 168, this question was fully discussed by Judge Clark, who, after a careful review of the authorities, held:

"It is apparent, I think, without extending the discussion further, that in that class of cases in which a federal question is involved, and on which jurisdiction in the courts of the United States depends, the character of the question is the same, whether the jurisdiction exercised is appellate, original, or by removal, the jurisdiction in either form depending on the constitutional grant of power. In this view, decisions of the supreme court of the United States in cases brought before it from the circuit courts of the United States, and those on writ of error to the highest court of a state, are equally instructive in determining when there is a federal question, such as supports the original jurisdiction of this court as being a suit 'arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority,' excluding, of course, from the original jurisdiction, those which grow out of 'a commission held or authority exercised under the United States,' as explained in *Carson v. Dunham*, 121 U. S. 422, 7 Sup. Ct. 1030, 30 L. Ed. 992, and again in *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209." 86 Fed. 177.

The only distinction as to the jurisdiction of the two courts in actions claimed to arise under the laws of the United States is that in

<sup>7</sup> U. S. Comp. St. 1901, p. 684.



cases in a circuit court the federal question must appear upon the face of the complaint, and if it so appear the court will have jurisdiction of all the issues involved in the case; while in the supreme court, on error to a state court, it is sufficient if the jurisdictional question was raised and determined at any stage of the proceedings, and decided adversely to the right claimed under the federal constitution or laws, but in such cases the appellate jurisdiction extends only to the federal question and no other. *Citizens' Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557; *Railroad Co. v. Bell*, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486; *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 167, 68 Fed. 2.

*Leslie v. Brown*, 32 C. C. A. 556, 90 Fed. 171, decided by the circuit court of appeals for the Sixth circuit, was also an action on an injunction bond, as in *Tulloch v. Mulvane*, supra, but was instituted originally in the federal court. The jurisdiction of the court was challenged, but Judge Taft, who delivered the opinion of the court, said:

"We have no doubt that an action at law in the federal court may be brought on such a bond, provided the necessary amount is involved, on the ground that the plaintiff is enforcing rights secured to him under the constitution and laws of the United States."

In the case at bar the construction and application of section 915, Rev. St.,<sup>6</sup> and the rules of this court adopting the attachment laws of the state of Arkansas, are directly involved. As stated by Judge Thayer, in delivering the opinion of the circuit court of appeals for the Eighth circuit in *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 167, 179, 68 Fed. 2, 14:

"If a case is commenced originally in the circuit court, and, by a fair construction of the complaint, it appears that the plaintiff predicates his right to relief on the meaning or effect of a law of the United States, and the claim is made in good faith, so that there is a real instead of a merely colorable controversy, then jurisdiction over the case exists, even though it may appear that the right to the same relief is asserted on another ground, that does not involve the consideration of a federal question."

This action is therefore clearly one arising under the laws of the United States, and as the amount involved exceeds \$2,000, exclusive of interest and costs, it is within the jurisdiction of this court.

2. But the jurisdiction of the court may be maintained upon another ground, that this action is merely ancillary to the original attachment suit. Under the attachment laws of the state of Arkansas, had the original suit against the plaintiff in this action not been dismissed, but brought to a trial, the court or jury trying the attachment could have assessed the damages sustained by the defendant by reason of the wrongful suing out of the attachment in the same proceeding and rendered judgment against the plaintiff and the sureties on the attachment bond. Section 362, Sand. & H. Dig. Ark., provides

"In all actions of attachment in which the defendant shall recover judgment for the discharge of the attachment, the court or jury trying said attachment shall assess the damages sustained by the defendant by reason of such attachment, and the court shall render judgment against the plaintiff and his sureties in the attachment bond for the amount of such damages and cost of the attachment."

<sup>6</sup> U. S. Comp. St. 1901, p. 684.

Nor would it have been necessary, under that statute, to serve notice or process on the sureties before the judgment against them was rendered, as by executing the bond the sureties became parties to the action. *Brugman v. McGuire*, 32 Ark. 733; *Fletcher v. Menken*, 37 Ark. 206.

This proceeding may therefore be properly treated as ancillary to the original attachment suit, and is clearly within the rule established in this circuit by Mr. Justice Brewer while circuit judge, in *Patterson v. Mather* (C. C.) 26 Fed. 31, where it was held that an action on a bond executed by a defendant in an action of replevin pending in a national court may be maintained in that court, upon the ground "that jurisdiction in these subordinate and ancillary proceedings rests upon the jurisdiction acquired in the original action."

In *Lamb v. Ewing*, 4 C. C. A. 320, 54 Fed. 269, the circuit court of appeals for the Eighth circuit held:

"The rule is well settled that where a court rightfully takes jurisdiction over the parties and the subject-matter of a controversy it has the right, not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment, and the original jurisdiction is a continuing one for that purpose; and, as corollaries to the general rule, it is also equally well settled that, where third parties have rights in or claims to property taken into the possession of the court under process issued against the original parties, such third parties may intervene in the proceedings for the protection of their rights; and, further, that, where the process of the court is wrongfully and illegally used to the injury of a third party, the latter may appeal to the court for proper redress. If the federal courts were deprived of the power to protect third parties against injuries resulting from the enforcement of process issuing from such courts by reason of the citizenship of the injured party, or because the amount of the injury was less than \$2,000, it would work great hardship upon the individual citizen, and be a most serious blot upon the system of federal jurisprudence. The power of the courts of the United States in these particulars is as ample as that of the courts of the states, and the technical question of jurisdiction is solved by the ruling that in all ancillary or auxiliary proceedings for the enforcement of judgments rendered, and in proceedings for the protection of the rights of third parties, the jurisdiction is supported by that of the original action or suit."

See, also, *Reilly v. Golding*, 10 Wall. 56, 19 L. Ed. 858.

The demurrer to the jurisdiction must therefore be overruled.

#### IN RE RABENAU.

(District Court, W. D. Missouri, S. D. October 30, 1902.)

#### 1. BANKRUPTCY—CONDITIONAL SALES OF GOODS TO BANKRUPT—CONSTRUCTION OF CONTRACT.

Where a consignee of goods from a wholesale house is at liberty to sell at any price and on any terms he pleases, accounting therefor at a fixed price to the consignor, and where he is required to pay the freight, taxes, and insurance on the goods, to be responsible for them in case of loss, and at a fixed time to pay for such as remain unsold, at the option of the consignor, he is not an agent or factor, but the transaction is one of conditional sale, whatever name may be given it by the contract; and, under the statute of Missouri, the attempted reservation of title in the

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¶ 1. See *Bankruptcy*, vol. 6, Cent. Dig. § 199.

consignor is void as against purchasers or creditors of the consignee, either past or subsequent, and it is also void as against his trustee in bankruptcy, who stands in the same position as the creditors, under such statute, and the consignor has only the rights of an ordinary creditor.

2. SAME.

The fact that the bankrupt, for purposes of his own, in making sales represented himself as merely the agent of the consignor, cannot affect the construction of the contract, nor enlarge the rights of the consignor thereunder as against other creditors.

In Bankruptcy. On questions certified by referee.

Allen & Rathbun, for claimant.

John S. Farrington, for objecting creditors.

PHILIPS, District Judge. This case has been certified to the court by the referee in bankruptcy, to determine the question as to whether the transaction in question was that of a mere bailment of goods sent by the consignor to the bankrupt as a factor, or whether or not the transaction in question was a conditional sale of goods, in contravention of section 3412, Rev. St. Mo. 1899.

The claimants, Bradley, Alderson & Co., wholesale merchants, selling agricultural implements and machinery at Kansas City, Mo., presented to the referee, for allowance as a preferred claim, a balance due for certain merchandise, consisting of farming implements, etc., amounting to \$496.85, for the amount of goods in the possession of the bankrupt at the time of the adjudication in bankruptcy. Other creditors of the estate objected to the allowance of this claim, and, the referee having allowed the same as a preferred claim, the objecting creditors had the question certified to this court for review.

The firm of Bradley, Alderson & Co. had printed and used in their business for making contracts with country merchants a pamphlet, in size about four by nine inches, yellow in color, containing the prices current of all goods, machinery, and the like, sold by them, with the discount and net prices, with blank places in the back part thereof, under printed heads, for the enumeration of articles ordered by such merchants. The form of the order to be sent into the house is printed on the same kind of paper, and as a part of the pamphlet, headed on the first page, "Wholesale Order Blank," beneath which are the words: "Delivery f. o. b. cars Kansas City unless otherwise specified. Prices subject to change without notice." On this page some blanks seem to have been filled up by the bankrupt. The following two pages contain the contract or order sent in by the bankrupt in the case in question, beginning as follows:

"Kansas City, Mo., 11/11, 1901.

"Bradley, Alderson & Co., Kansas City, Mo.: Please ship the following order for goods on or about Jan. 1st, 1902, sooner if possible, or as soon thereafter as possible, to H. Rabenau, Fordland, Mo. Ship via Gulf. For which I agree to pay according to prices and terms as stated in the list hereto attached. In consideration of the covenants herein mentioned, and the sum of one dollar, the receipt of which is hereby acknowledged, I agree as follows."

The substance thereof is: (1) He was to make settlement whenever required by Bradley, Alderson & Co. for all goods shipped on this contract, with exchange on Kansas City, and pay all notes

given in settlement at maturity, or, if cash terms were agreed upon, to remit promptly on receipt of invoice, with exchange on Kansas City. (2) He was to pay all freight and charges on goods shipped, and, when the goods were sold "delivered," the freight to be paid by him, and applied on the first payment, without cash discount. All prices were for delivery f. o. b. cars Kansas City, Mo., unless otherwise provided in the order. (3) The same provisions to apply to all subsequent orders for the same season's trade, prices being subject to change at the option of Bradley, Alderson & Co. (4) Any claims for shortage or damages to be made within five days after the receipt of the goods; and the consignee was to look to the transportation companies for all goods lost, short, or damaged, shipped under the contract, if receipted for in good order. (5) He was to be responsible for all goods shipped under the contract on account of loss or damages by fire or the elements. (6) Not to sell outside of the territory described. There seems to have been no limit as to the territory. (7) He was to pay 25 per cent. of the net amount of the order as liquidated damages in the event of countermanding his order before shipment. (8) "All goods shipped under this contract, and the proceeds of sale thereof, shall be and remain the property of Bradley, Alderson & Co., and subject to their order at any time, until the full amount of the purchase price of said goods, with interest thereon, or notes given for said purchase price, be entirely paid; also that in case of death, sale of business, or change of membership in the firm making this order, all accounts or notes for goods bought under this contract shall become immediately due and payable." The remaining provision of the contract was as to the character of the warranty made by Bradley, Alderson & Co., and notice of defects and time in which repairs were to be made by them. All accounts were to draw 8 per cent. interest after maturity. This contract was signed by Rabenau and by Bradley, Alderson & Co.

Then there is another contract between these parties, purporting to be of the same date, printed with blanks to be filled in with the character of the goods ordered, etc., for payments, on different colored or tinted paper, and pasted inside of said pamphlet, to the order aforesaid, with the heading "Consignment Contract," which is substantially as follows: This agreement, made and entered into this 11th day of November, 1901, by and between Bradley, Alderson & Co., a corporation, of Kansas City, Mo., party of the first part, and H. Rabenau, of Fordland, Mo., party of the second part. It then recites that in consideration of \$1, and other valuable considerations, Rabenau accepts the agency of certain lines of goods handled and sold by the party of the first part, and agrees to sell the same on consignment. He was to pay the freight on all goods shipped, on the basis of the contract, and house and protect them from the weather and elements, and to sell at retail as agent of the party of the first part; sales on time to be made only to good and responsible parties. He was to take up and pay in cash any and all notes pronounced unsafe or doubtful, upon request of the party of the first part. The list prices thereto attached were declared to be the prices at which said goods should be billed, and the same were not to be sold by said Rabenau for less than said

figures. All sums received by him for the sale of goods, over and above said prices, to be retained as his compensation and commission for the performance of the contract; and he was to remit to the party of the first part the proceeds of said goods at the invoice prices in settlement of any sales made, as follows: For goods sold for cash, he was to remit in cash at the time of the sale, less the cash discount as stated below; and on time sales he was to remit the purchasers' notes (evidently taken made payable to Rabenau), drawing 8 per cent. interest from date, with the time fixed for their payment on certain articles. He was to sell for one-third cash; and he was to indorse all purchasers' notes, and guaranty their payment at maturity, and was to make reports of sale and settlement and remittances on the 1st day of each month. And the mode of settlement, as to certain kinds of goods, was fixed until May 1, 1903, and on others November 1, 1902, with no cash discounts thereafter; and all goods of the specified kinds on hand at said dates he agreed to purchase and pay for on different specified articles July 1, 1903, certain others on January 1, 1903, and others on December 1, 1902, with 8 per cent. interest from maturity, "at option of party of the first part, or, if party of the first part so elects, said goods to remain in possession of party of the second part on the basis of this agreement, subject to settlement provided for goods as sales are made only. Any and all goods shipped on the basis of this contract to be and remain absolutely the property of the party of the first part, and subject to their order and removal at any time and all times." Rabenau was to be responsible for all damages for loss by fire or otherwise to any of the goods shipped. He was to pay all taxes and insurance thereon. This contract was signed by both parties.

The referee admits his embarrassment at trying to comprehend this duplex transaction. Counsel for claimant avoid any worry over the matter by basing their contention solely on the so-called consignment contract. If it were essential that the court should assign a reason for this doubling of contracts, it would say that this wholesale house sent out the printed pamphlet, containing the form printed therein, as a bait for country merchants, to sign and send in; and after they had filled, signed, and sent it, the "consignment contract" was held in reserve, and then presented for the signature of the merchant, whereby the seller, as he supposed, had cunningly evaded the provisions of the statute of the state which, in effect, declares to be void, as to all subsequent purchasers in good faith, and all creditors, both prior and subsequent, all conditional sales of personal property, unless the same is evidenced by writing, duly acknowledged and recorded, as in case of mortgages of personal property.

It is conceded by counsel herein that, if Rabenau was acting merely as a factor for the sale of the goods, the case was rightly decided by the referee; otherwise not. The ordinary definition of a "factor" is that he is a commercial agent employed by a principal to sell merchandise consigned to him for that purpose on behalf of the principal. He may hold them either in the name of his principal or in his own name, and he is to be remunerated by a fixed commission, either expressed or implied. He is intrusted with the possession thereof, and

authorized to sell and receive payment therefor from the purchaser. The text-books assert the general rule to be that if the goods are consigned to be sold for the consignor, "who is to regulate the price and terms of sale, the factor is an agent, and the contract one of bailment. If, however, the consignee is to sell upon terms fixed by himself, and is bound to pay to the consignor a fixed price, the contract is one of sale." So Newmark on Sales (section 23) says:

"But the relation of the parties is not that of principal and agent, if the consignee is at liberty, according to the contract between him and the consignor, to sell at any price he likes, and receive payment at any time he likes, though he is bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time."

So it is held in *Kellam v. Brown*, 112 N. C. 451, 17 S. E. 416, that:

"Where the goods are consigned for sale to one who is at liberty to sell at any price and on any terms he pleases, paying a fixed price to the owner, the consignee is not a factor, and the contract is one of sale."

This rule is announced in *Ex parte White*, 6 Ch. App. 397, as follows:

"If the consignee is at liberty to sell at any price he likes, and receive payment at any time he likes, but is bound if he sells the goods to pay the consignor for them at a fixed price and fixed time, whatever the parties may think, the relation is not that of principal and agent; \* \* \* and, in point of law, the alleged agent, in such case, is making on his own account a purchase from his alleged principal, and is again reselling."

The case of *Chickering v. Bastress*, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309, is in point, and, in its essential features, little different from the case under review, in which it is held that when the identical thing delivered is to be restored, or in its altered form of money—

"The contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to make a return, and the title to the property is changed,—it is a sale."

Quoting from Sir William Jones in his work on Bailments:

"It may also be proper to mention the distinction between an obligation to restore the specific things, and a power or necessity of returning others equal in value. In the first case it is a regular bailment; in the second, it becomes a debt."

The court then, commenting upon the facts of the case under review, said that under the contract—

"Pelton & Co. were vested with the power and right of discharging themselves from any further obligations, as respected all the pianos mentioned in any one invoice, by paying to the Chickering the negotiable promissory note given therefor, but which, for the purpose of disguising the real nature of the contract, is therein called an 'advance.' In our opinion, it was not a contract of bailment, and the provisions authorizing Pelton & Co. to determine solely for themselves at what prices they would sell the pianos from their store is almost conclusive that in reality they were not acting as the agents or factors of the Chickering, but that, with the further provision that they were to bear as their proper burden all the expenses of shipments, etc., the same precisely as purchasers, would leave no doubt that the contract was not one of bailment, or of principal and factor. The form of agreement was that of consignment for sale, but its real purpose was to cover up

a sale, and preserve a lien in the Chickering's for the price of the pianos. The invoices used are in perfect harmony with this view. They contained conditions which were to be considered as agreed to, and one of them was, 'The agents of this firm are its customers, who are engaged in selling its pianos in the territory allotted to them. Such customers are not agents in any sense known to the law,' etc. Then follows: 'It is agreed that the pianos specified in this bill are bought and sold upon the conditions herein set forth.' It is true that the word 'consigned' was written across the bill, but there is no magic in that word which can take from the transaction its real character."

In *Thompson v. Paret*, 94 Pa. 275, the court says:

"Whatever the form of the agreement, if its purpose was to cover up a sale, and preserve a lien in the vendors for the price of the goods, it was void, as respects creditors, whether the credit was given before or after the delivery of the goods. A consignment for such objects is no better than any other device."

The case of *Plow Co. v. Porter*, 82 Mo. 23, decided by the supreme court commission, in which I concurred, so much relied upon by the claimant as establishing that Rabenau was a mere commission merchant for the sale of these goods, is in exact accord with the foregoing distinction. It will be observed on reading the contract in that case that "the party of the first part further agrees to pay the party of the second part \$6.40 for selling each wood or iron beam cultivator," etc. The consignee had no other interest in the property than to sell at the fixed price; accounting, as a matter of course, to his principal for all sums received above that price. The same is true of the case of *Peet v. Spencer*, 90 Mo. 384, 2 S. W. 434. What the general and particular facts in that case were, the report does not advise us. It is again observable that in the instruction (1) asked by the plaintiffs, which the court held should have been given, it was expressly predicated of the fact that Fallis & Lichliter "were to sell the goods at a certain price to be fixed by the plaintiffs, and that Fallis & Lichliter upon all sales were to receive fifteen or twenty cents a box, according to the size of the box, whether sold by themselves or plaintiffs' agents." So that the case turned upon the fact that they were to sell at a fixed price,—no more and no less. Whereas, in the case under review here, it is perfectly evident that Rabenau was at liberty to sell the goods consigned to him at twice the price at which he was to account to Bradley, Alderson & Co., and he could pocket the entire profits,—a right utterly inconsistent with the relation of principal and agent, or that of principal and factor. On the other hand, the goods were shipped to him f. o. b. cars Kansas City, and from that instant on they were completely at his risk. He was to pay for the carriage; sustain all loss resulting from fire or the elements, or other cause; pay insurance; house, protect, and pay taxes thereon; and in any event he was to account to the claimant for the price fixed in the contract of sale, no matter what his loss might be. Under this contract the consignee could, if he had so desired and elected, have sent to Bradley, Alderson & Co. the cash for the goods at the price fixed in the schedule, and they would have been compelled to receive it, and the goods and all

profits arising therefrom would have been absolutely the property of Rabenau.

But it is said the contract provides that all goods on hand at given dates said party of the second part "agrees to purchase and to pay and settle for the same" at certain times, with 8 per cent. interest from maturity, at the option of the first party. This is nothing more than a time fixed when the claimant, as the seller, could compel the consignee to take and pay for the goods. It is entirely optional with "the party of the first part,"—an unheard-of provision in a contract between principal and factor.

Stripped of its names, "consignment contract," "parties to receive and sell the same on consignment," and "agent," and reduced to its last analysis, this contract is little different from an ordinary contract of sale. If a country merchant sends in an order to a wholesale house in Kansas City for goods to be shipped to him according to a price list furnished by the seller, the commission merchant usually delivers the goods f. o. b.; that is, free on the cars for shipment. If they are damaged in transit, burned up by fire, destroyed by the elements, or stolen, it is the loss of the purchaser. He stores them at his risk, and pays taxes and insurance thereon. He may pay for the goods at such times and on such terms as may be agreed upon. If he makes a profit, it is his. If he sustains a loss, it is his. These and like provisions in this contract are nothing more than a greater security for the seller, to insure him in getting his money at the stipulated price.

Furthermore there is urged in support of the finding of the referee (and that seems to have been what most influenced his judgment) the fact, which, against the objection of counsel, he permitted to be shown in pais, that Rabenau kept these agricultural implements, machinery, etc., in a separate warehouse, which was attached to his main store building, and that he put upon it a sign indicating that they were the goods of Bradley, Alderson & Co., and that he so sold them to customers. There was no occasion in law to resort to evidence aliunde as to the meaning of the contract in question. There being no latent ambiguity in the contract, parol evidence to aid in its construction and application was inadmissible. As said by the court in *Burress v. Blair*, 61 Mo. 133, 139:

"The question upon which the decision of this case must turn is whether the contract under consideration is capable of an intelligent construction, and its application to its subject-matter is not left in doubt from its own language, without any resort to extraneous evidence. If it was, then its construction devolved upon the court, as a matter of law, and it was improper to shift the responsibility on a jury."

But conceding the admissibility of this evidence, what significance should be attached to it? The putting up of signs or placards that the goods were from the Bradley-Alderson house was nothing more than a means of advertising the house and the quality of the goods. And be it conceded that Rabenau did, in selling the goods, say to purchasers that he was selling them for Bradley, Alderson & Co., it is quite apparent from the whole examination of the bankrupt that he resorted to this merely as a "trade trick," so that, when custom-



ers would try to "jew" him down, he would tell them the price was fixed by Bradley, Alderson & Co., and he was not at liberty to sell for less, when, as a matter of fact, he was selling at his own price, and not at the figures at which he bought. It hardly lies in his mouth, when the trustee comes to claim these goods for the benefit of the general creditors, that he should put forth this "trick of the trade" to alter the legal construction of his written contract. It is furthermore a well-settled rule of construction that where a person, like a merchant, frames and has printed contracts of this character, "the language of the instrument is to be construed against the person who proposes it, rather than against the person who is invited to accept it," for the reason "that men are supposed to take care of themselves, and that he who chooses the words by which a right is given ought to be held to the strict interpretation of them, rather than he who only accepts them." *Gillet v. Bank*, 160 N. Y. 549, 555, 55 N. E. 292, 294.

While not deemed of controlling effect, the court may advert to a third paper, found in the evidence in this case, in the form of an order by the bankrupt, of the same date as the others, addressed to Bradley, Alderson & Co., Kansas City, Mo., to ship to him at Fordland, Mo., "the following goods at the prices named below, for which we agree to make settlement according to the terms and conditions named below or attached hereto." Then follows the enumeration of the articles ordered. And at the close of the enumeration, in the handwriting of Rabenau, are the words: "Terms on Har. Ct. 11/11/01. On the balance of this order, 90 days; 2 per cent. discount 10 days. Fill this out of Atchison goods, if possible. Ship via Gulf R. R.,"—concluding with printed provisions to the effect that the goods are at Rabenau's risk while in transit, and the time when damages are to be claimed for shortage, and the like; limiting the right of countermand of the order; that no goods were to be returned to Bradley, Alderson & Co. without previous agreement; that actual freight and cost of handling may follow as back charges on all shipments from Kansas City, if sold at factory prices; that the goods ordered and the proceeds of sale are to remain the property of Bradley, Alderson & Co., and be subject to their order when they may deem themselves insecure, and until all the conditions of this order, and subsequent shipments under same, are complied with, including the final payment for the goods shipped; and agreeing to be responsible for all goods shipped under the contract, on account of loss or damage by fire or the elements; and in the event of his selling out or giving deeds of trust, and the like, then the goods shipped under the contract are to become immediately due and payable, at the election of Bradley, Alderson & Co. If such methods can be employed by wholesale merchants in disposing of their goods through the country, and be upheld on the ground of a mere bailment as between merchant and factor, the statute of the state to cure the abuses that grew up under conditional sales of personal property might as well be abolished.

Under the ruling in *Re Pekin Plow Co.*, 50 C. C. A. 257, 112 Fed. 308, and the ruling by this court in the case of *Plow Co. v. Spilman*,

117 Fed. 746, that the trustee in bankruptcy stands in the same position as the creditors of the estate pursuing the goods under legal process, the trustee is entitled to claim the goods as against the vendor under a conditional sale.

The exceptions to the ruling of the referee must be sustained, and the cause remanded, with directions to disallow the claim in question as a preferred claim.

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In re JENNINGS.

(Circuit Court, E. D. Missouri, in Chambers. November 12, 1902.)

1. UNITED STATES MARSHALS—DUTY IN EXECUTION OF CRIMINAL SENTENCE—SURRENDER OF PRISONER TO ANOTHER COURT.

A United States marshal who has been directed, by a judgment and sentence of the court imposing a term of imprisonment on a defendant convicted of crime, to convey such defendant to a penitentiary, and deliver him to the keeper, in execution of the sentence, has no authority to surrender the prisoner to the marshal of another district, to be tried for another offense, and his action in so doing is illegal.

2. CRIMINAL LAW—SENTENCE OF IMPRISONMENT—COMMENCEMENT OF TERM.

Where a marshal failed to obey the judgment of a federal court directing him to convey a prisoner to the penitentiary, and deliver him to the keeper to serve a term of imprisonment, in execution of the sentence imposed by such judgment, but, in violation of his duty, delivered the prisoner to the marshal of another district, where he was tried, sentenced, and imprisoned for a different offense, the term of imprisonment under the first sentence must be computed from the date of such sentence, when it would have commenced had the marshal performed his duty, it not being within the power of a ministerial officer, by any action of his, to suspend the operation of the sentence of a court so as to prevent it from expiring by lapse of time; and, under such circumstances, it must be presumed, in favor of the prisoner, that he would have earned the good time allowed him by law for good conduct.

On Petition of Alphonso J. Jennings for Writ of Habeas Corpus.  
Frank P. Sebree and S. C. Price, for petitioner.

THAYER, Circuit Judge. On September 25, 1902, on an application duly made to me at chambers in the city of St. Louis, Mo., a writ of habeas corpus was granted, directing Robert W. McClaughry, warden of the United States penitentiary at Ft. Leavenworth, Kan., to produce before me at chambers in the city of St. Louis, Mo., on October 18, 1902, the body of said Jennings, and show by what authority he held the petitioner in custody. At the time of issuing the writ a stipulation was indorsed thereon waiving the production of the body of the petitioner, and consenting that his right to be discharged might be tried and determined on the return made to the writ, with like effect as if the body of the petitioner was produced. On the day appointed for the hearing no return was filed by or on behalf of the warden, for which reason all the statements contained in the petition for the writ, and on the strength of which the writ was originally awarded, must be taken as confessed, and the petitioner's right to a discharge must be determined accordingly.

It appears from the petition and from the exhibits attached thereto

that Jennings was indicted and tried in the United States court for the Northern district of the Indian Territory for assault with intent to kill; that a verdict of guilty on such charge was returned against him on May 31, 1898, and that on June 4, 1898, he was duly sentenced, for the crime aforesaid, to be imprisoned in the United States penitentiary situated at Ft. Leavenworth, Kan., for the term of five years, at hard labor; and that the marshal of the court "receive, safely keep, and convey the body of said Al Jennings hence to said penitentiary, deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep said Al Jennings in said penitentiary, in execution of the sentence aforesaid, and in conformity with the same, for the full period of time aforesaid." It was further ordered that the clerk of the court furnish the marshal with two duly certified copies of the judgment and sentence, one of which was to be delivered to the keeper of the penitentiary, and the other returned with a full and true account of the execution of the same. Instead of obeying the foregoing order, the marshal, as it seems, delivered the prisoner to the United States marshal for the Southern district of the Indian Territory. He was detained in custody by the marshal of the Southern district of the Indian Territory in a jail at Ardmore in said territory until February, 1899, when he was put upon trial in the United States court for the Southern district of the Indian Territory upon an indictment charging him with robbery of the United States mails, and was found guilty of said offense, and on February 17, 1899, was sentenced by the last-named court to imprisonment in the Ohio state penitentiary, situated at Columbus, in the state of Ohio, for the term and period of his natural life, and in pursuance of such sentence was committed to the penitentiary last named shortly after the date on which the sentence was imposed. An appeal was taken to the United States court of appeals for the Indian Territory by the petitioner from the first sentence rendered against him by the United States court for the Northern district of the Indian Territory, but no bond was given in connection with the appeal, for the purpose of staying the execution of the sentence. The case was heard on appeal in the court of appeals for the Indian Territory, and the judgment and sentence of the lower court were affirmed on October 26, 1899 (*Jennings v. U. S.*, 53 S. W. 456), while the petitioner was incarcerated in the penitentiary at Columbus, Ohio. On June 23, 1900, the president of the United States commuted the sentence for life, which had been imposed by the United States court for the Southern district of the Indian Territory, "to imprisonment for five years, with all allowances for good conduct." In view of such commutation, and the allowance of time for good behavior, the petitioner's term of imprisonment in the penitentiary at Columbus, Ohio, would have expired on June 20, 1902; but a few days prior thereto he was taken from the Ohio penitentiary, without other authority, as it seems, than an order signed by the United States attorney for the Northern district of the Indian Territory, and was transported thence to Ft. Leavenworth, in the state of Kansas, and there delivered to the respondent, Robert W. McClaghry, and was by him confined in the United States penitentiary at Ft. Leavenworth, where he has ever since remained. The

warden, as it appears, is now holding him in virtue of no other authority than the judgment and sentence aforesaid, which was imposed by the United States court for the Northern district of the Indian Territory on June 4, 1898.

In view of the foregoing facts, it is obvious that the marshal for the Northern district of the Indian Territory acted without authority of law in surrendering the petitioner to the custody of the marshal of the Southern district of the Indian Territory after a judgment and sentence had been pronounced, committing him to prison in the United States penitentiary at Ft. Leavenworth for the term of five years for an assault with intent to kill. The judgment and sentence in question commanded the marshal to convey the prisoner to Ft. Leavenworth "without delay, and deliver him to the custody of the keeper of said penitentiary." From what source the marshal derived his authority to act differently, and to disobey the plain mandate of the court whose officer he was, is not disclosed; and such conduct on the part of a ministerial officer is so far subversive of judicial authority and at variance with the established course of judicial procedure as to warrant the belief that no authority or precedent can be found which would justify such action. The law contemplates that, after a prisoner has been tried and sentenced, he will be committed at once to the custody of the prison officials where the sentence is to be executed. He passes by virtue of the sentence into a custody different from that of the court before which he was convicted. This doctrine is enforced so rigidly in some jurisdictions, and possibly in all, that, after a sentence for a crime has been pronounced, the prisoner cannot be arraigned and tried for another offense, even in the same court by which he was sentenced, until the sentence is reversed by a higher tribunal, or he has served out his term of imprisonment. *Ex parte Meyers*, 44 Mo. 279, 281; *State v. Buck*, 120 Mo. 479, 496, 497, 25 S. W. 573, and cases there cited. If the marshal of the Northern district of the Indian Territory acted within the law in delivering the prisoner to the marshal of the Southern district of the territory, then no reason is perceived why he might not as well have delivered him to any other federal marshal for trial in any other federal district within the United States, thereby postponing the execution of the first sentence indefinitely, or until he had been tried in a dozen different districts for as many different offenses. This view of the marshal's authority is too unreasonable to be adopted, and it is therefore rejected.

As the marshal for the Northern district of the Indian Territory acted illegally and without warrant of law in surrendering the prisoner to a custody other than that of the warden of the penitentiary at Ft. Leavenworth, the inquiry arises whether such wrongful conduct on the part of the officer suspended the operation of the sentence, and prevented it from expiring by lapse of time. This question, in my judgment, should be answered in the negative. So far as the petitioner is concerned, his rights were unaffected by the illegal act of the officer, and the case must be treated precisely as if the marshal had discharged his duty according to law, by committing the prisoner to the proper custody. If the marshal had performed his duty, the body

of the petitioner would have been delivered without delay to the warden of the penitentiary at Ft. Leavenworth. The petitioner's term of imprisonment would in that event have been computed from the date of his sentence, June 4, 1898, inasmuch as the execution of the sentence was not stayed by the appeal; and deducting the allowance in his favor for good behavior at the rate of two months per year, as prescribed by the federal statutes (26 Stat. 840, c. 529, § 8 [U. S. Comp. St. 1901, p. 3727]), his term of imprisonment would have expired prior to the time when his application for the present writ was filed. In view of the circumstances of the case, it must be presumed, in favor of the prisoner, that he would have earned his allowance of time for good behavior. He has in fact been in actual custody, undergoing imprisonment, since June 4, 1898,—a part of the time in a jail at Ardmore, in the Indian Territory, a part of the time in the penitentiary at Columbus, Ohio, and a small portion of the time in the federal penitentiary at Ft. Leavenworth. It matters not that during a portion of the time during which he has been confined he has been held ostensibly for an offense other than that for which he was originally convicted. In the eye of the law, he has all the time been serving out the sentence that was imposed on him for an assault with intent to kill, because no ministerial officer, by disobeying the mandate of the court, and unlawfully surrendering him into another custody than that where he rightfully belonged, could suspend the running of the sentence for that offense.

It is unnecessary to express an opinion on the question whether the United States court for the Southern district of the Indian Territory could lawfully proceed to try the petitioner for robbery, so long as he was under a sentence lawfully imposed by another court; and no opinion will be expressed on that point. For present purposes, it is sufficient to decide that, in legal contemplation, the petitioner has been continuously serving out his first sentence since June 4, 1898, and that his term of imprisonment has expired. It will accordingly be ordered that the petitioner be discharged.

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UNITED STATES ex rel. SCHAUFFLER v. UNION SURETY & GUARANTY CO. et al.

(District Court, S. D. New York. November 17, 1902.)

1. BANKRUPTCY—ACTION ON BOND OF TRUSTEE—JURISDICTION OF DISTRICT COURT.

A district court of the United States has jurisdiction of an action brought by a trustee in bankruptcy in the name of the United States on the bond of a former trustee to recover the value of property for which he has failed to account.

Action on Bond of Trustee in Bankruptcy. On demurrer to complaint.

Creevey & Rogers, for plaintiff.

Van Schaick & Norton, for Union Surety & Guaranty Company.

ADAMS, District Judge. A bill of complaint to recover upon a defaulting trustee's bond was filed and duly served upon the defendant Surety Company, which appeared and demurred to the complaint upon the grounds that the court has not jurisdiction of the subject of the action and that the complaint does not state facts sufficient to constitute a cause of action.

The following is the complaint with a copy of the bond attached:

"United States District Court, Southern District of New York.

United States of America on relation of Frederick H. Schauffler as trustee in bankruptcy of George W. Moseley, Bankrupt, Plaintiff, against The Union Surety and Guaranty Co. and Lee A. Disbrow, Defendants.

Relator by Creevey & Rogers, his attorneys, complaining of the defendants, shows to this court and alleges as follows:—

I. That the defendant The Union Surety & Guaranty Company was at all of the times hereinafter mentioned a foreign corporation organized under and by virtue of the laws of the State of Pennsylvania, and having an office for the transacting of business in the Borough of Manhattan, New York City.

II. That heretofore and on or about the 16th day of April, 1900, George W. Moseley was in an involuntary proceeding declared a bankrupt. That thereafter the proceeding was referred to John J. Townsend, Esq., as referee.

That on or about the 5th day of May, 1900, the first meeting of creditors of said bankrupt was held at the office of said referee, No. 45 Cedar Street, in the City of New York, Borough of Manhattan, at which meeting Lee A. Disbrow was elected and duly appointed Trustee.

The bankrupt herein had, previous to his adjudication been conducting at Philmont, New York, a knitting mill, which had proved unsuccessful, resulting in a petition by various creditors to have him adjudged a bankrupt.

Pending final decision on the involuntary proceeding, said Lee A. Disbrow had been appointed by an order of this court temporary receiver. He had entered upon the discharge of his duties as such receiver, and was in possession of said knitting mill on the date above specified, to wit, May 5, 1900, when he was elected trustee by the creditors.

Said defendant Disbrow had not only solicited from the creditors of said bankrupt his appointment as receiver, but also solicited his appointment as trustee. He saw a large number of the creditors personally prior to the first meeting of creditors, urging upon them the desirability of electing him as trustee and giving him authority to continue the operation of the mill, representing to said creditors that he could conduct the same with great success and realize for the creditors a larger sum than would be realized by a closing down of the mill, and a sale of the then existing assets and a distribution of the estate forthwith.

Said trustee repeated the foregoing representation, at the first meeting of creditors above referred to, and after his election as trustee stating his desire as trustee, to continue the operation of said plant. The creditors agreed to said proposition upon condition that the personal assets of the estate, amounting to \$9,832.79 as disclosed by the inventory filed by the bankrupt, should not be hazarded in the enterprise. In order to carry into effect said agreement, a resolution was passed at said meeting of creditors, which said resolution was subsequently incorporated in identical words, in the order of the referee, copy of which is hereto annexed and made part hereof as Exhibit 'A'. Said resolution was as follows:—

'That the trustee of the estate of George Welles Moseley, Bankrupt, be authorized and empowered to conduct and operate the mill and manufacture goods, to purchase stock and necessary supplies for the purpose of manufacturing goods at said mill for a period not to exceed six months.

'That said trustee be authorized and allowed to borrow money or use his own funds for the purpose of material, stock and supplies and to pay the necessary expenses of operating said mill.

'From the proceeds of sales of the products of said mill said trustee be directed to first pay the employees of such mill and the necessary expenses of operating said mill and then to take out so much cash as he may have borrowed or used of his own funds, and all remaining profits to be distributed among the creditors of said Bankrupt according to law.

'Upon said trustee executing to the creditors of said Bankrupt a bond in a sum equal to the amount of the personal assets of said Bankrupt as appears by his schedules filed herein.

'Conditioned that said trustee will account and pay to said creditors such sum of money at least, as equals the amount of the personal assets as stated in said schedule amounting to \$9,832.79.'

III. That thereafter the trustee entered upon the discharge of his duties and pursuant to said resolution and orders referred to, executed and filed with the clerk of this Court a bond as principal, and the defendant Union Surety and Guaranty Company as surety in the sum of Ten Thousand Dollars (\$10,000) as in said resolution and orders provided, copy of which is hereto annexed and made part hereof as Exhibit 'B' (Said original resolution, orders and bond are, for greater certainty hereby referred to.)

Immediately on his appointment as trustee said Lee A. Disbrow commenced the operation of said mill and continued operating the same down to and including August 18th, 1900, or a period of a little over three months.

IV. That thereafter the creditors having failed, after repeated requests for information regarding the conduct of the said plant and of the said trust estate, on or about the 14th day of February, 1901, obtained from said referee an order requiring said trustee to file a full and complete report of his proceedings and acts as trustee. Up to and including said 14th day of February, 1901, said trustee had made no report of his proceedings and acts as trustee and had filed no account of any sort with this court or the said referee. Pursuant to said order and on the 18th day of February, 1901, said trustee filed with said referee a report. That said report is hereby referred to. That said report set forth that said trustee had no property whatever for distribution to the creditors except certain property the value of which said trustee has no knowledge. The accompanying said report was a request by said trustee for leave to sell said property belonging to said trust estate. The request of said trustee was as follows:—

'Your deponent further says that he believes owing expenditure of a sum equal to \$200 a month for watchman and fuel, he is of the opinion that he should be authorized in obtaining the approval of the referee and this court to advertise the property at public auction and dispose of the same on the best terms that can be obtained so as to preserve the amount remaining in his hands to be distributed among the creditors as otherwise the entire sum now remaining in his hands will be necessarily expended by your deponent for caretakers and fuel and nothing will be forthcoming to the creditors.'

That thereafter and pursuant to said request notices were sent to all creditors to attend a meeting of creditors to approve of the sale of the property remaining in the hands of the trustee and which appeared on his said report as undisposed of and which said trustee estimated in said report at the sum of Thirty-five hundred <sup>00</sup>/<sub>100</sub> Dollars.

V. That thereafter and on the 20th day of May, 1901, said meeting of creditors was terminated and an order was made by the referee permitting a sale of the property in the hands of the trustee at public auction and directing said trustee to file at once with the referee an accurate account of the property together with the price received therefor and to whom the same was sold.

Said trustee did not sell said property and wholly failed to comply with the provisions and directions of said order and allowed said property to go to waste and to become utterly valueless.

VI. That on or about the 18th day of March, 1902, upon the motion of several creditors of said George W. Moseley, bankrupt, said Lee A. Disbrow was by an order of this court, removed as trustee of the estate of said bankrupt for mismanagement of the trust estate and on other grounds, as appears by reference to the referee's report and to said order of removal, a

copy of which is hereto annexed and made part hereof and marked Exhibit 'C' and was directed by said order of said United States District Court, Southern District of New York, to hand over all the assets, property and effects of George W. Moseley and of his estate in bankruptcy to the trustee to be elected in his place.

VII. That thereafter your relator was on the 17th day of April, 1902, duly elected and appointed trustee of the estate of George W. Moseley, bankrupt, in the place and stead of said Lee A. Disbrow, removed. That your relator thereupon duly qualified as such trustee and has ever since been and now is the trustee of said bankrupt George Welles Moseley.

VIII. That your relator has duly demanded of said Lee A. Disbrow the delivery to him of all the assets, effects and property of said bankrupt's estate, but said Disbrow has neglected and refused to deliver to your relator any property whatsoever belonging to said bankrupt's estate.

IX. That said Lee A. Disbrow has wholly failed to comply with the condition contained in said bond and among other things has failed to pay to the creditors of said bankrupt as provided in said resolution the sum of \$9,832.79 or any sum or sums whatsoever.

X. That the claims of creditors filed in said proceedings and entitled to share in the property of said bankrupt largely exceed the sum of \$9,832.79.

XI. That under an order of this court in the matter of George Welles Moseley, bankrupt, and upon the application of Frederick H. Schauffler as trustee herein, said trustee was authorized and empowered to bring and continue this action and in the name and form as above set forth.

Wherefore relator demands judgment against the defendants and each of them for the sum of Nine thousand eight hundred and thirty-two and  $\frac{79}{100}$  (\$9,832.79) dollars, together with interest from the commencement of this action besides the costs and expenses of this action, and for such other and further relief in the premises as may be just, and prays that a summons issue out of this court as prescribed by law directed to said defendants, requiring them to answer the foregoing bill of complaint."

"In the District Court of the United States for the Southern District of New York.

In the Matter of George Welles Moseley, Bankrupt. In Bankruptcy.  
No. 2357.

Know All Men by These Presents, That we, Lee A. Disbrow, of Brooklyn, New York, as principal, and The Union Surety and Guaranty Company of Philadelphia, a corporation organized under the laws of the State of Pennsylvania, and having its principal office in the City of Philadelphia, and lawfully transacting business in the State of New York, and having an office at 290 Broadway, Borough of Manhattan, in the City of New York and State of New York, as Surety, are held and firmly bound unto the United States of America in the sum of Ten thousand and  $\frac{00}{100}$  Dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, the said Lee A. Disbrow binds himself, his heirs, executors and administrators, and said Surety Company binds itself, its successors and assigns, jointly and severally by these presents.

Signed and sealed this 15th day of June, A. D. 1900.

The condition of this obligation is such that whereas the above named Lee A. Disbrow on the 5th day of May, A. D. 1900, appointed trustee in the case pending in bankruptcy in said Court wherein George Welles Moseley is the bankrupt, and he, the said Lee A. Disbrow, accepted said trust with all the duties and obligations pertaining thereunto, including the continuance of the business as provided by such order, filed June 15th, 1900, as of May 5th, 1900.

Now, therefore, if the said Lee A. Disbrow will account and pay over to the said creditors such sum of money at least as equals the amount of the personal assets as stated in the schedules amounting to \$9,832.79 as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into his hands and



possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise to remain in full force and virtue.

Lee A. Disbrow. (L. S.)

Signed and sealed in presence of:

John M. Bliss.

The Union Surety and Guaranty Company,

By Eugene Van Schaick, Chairman.

Attest: J. J. Mason, Secretary."

Section 563 of the Revised Statutes [U. S. Comp. St. 1901, p. 455] outlines the limits of jurisdiction of District Courts, apart from the Bankruptcy Act. The fourth paragraph provides for jurisdiction of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue. Under this provision, it was held by Judge Benedict (*Platt v. Beach*, 2 Ben. 303, Fed. Cas. No. 11,215) that a receiver of a national bank, appointed under the National Banking Act, was an officer of the United States and entitled to maintain an action in a District Court to collect a claim due the bank which he represented. There is some similarity between the case of a trustee in bankruptcy and such a receiver. It is provided in the Bankruptcy Act (section 50, [U. S. Comp. St. 1901, p. 3439]) that trustees' bonds shall be filed in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions. A view that trustees in bankruptcy were intended by Congress to be regarded as officers of the United States is strengthened by the fact that provisions with respect to their bonds are practically the same as for referees' bonds and there can be no question that referees are officers of the United States. It would seem somewhat anomalous, under these provisions, if the District Courts should not have jurisdiction to enforce a defaulting trustee's bond at the instance of a succeeding trustee, and that resort must be had to another forum. Nevertheless, it is contended that the provisions of the Bankruptcy Act exclude such jurisdiction. The 23d section of the Act [U. S. Comp. St. 1901, p. 3431] provides, in effect, that the United States Circuit Courts and the State Courts shall have jurisdiction of all controversies at law and equity, as distinguished from proceedings in bankruptcy, between trustees and adverse claimants concerning property acquired or claimed by the trustee in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. In construing the Act, the Supreme Court has held (*Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175) that the District Courts can by a proposed defendant's consent but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the bankruptcy proceedings, but it has not held that District Courts are deficient in jurisdiction to enforce bonds given in the bankruptcy proceedings and which are necessarily a part thereof. In the *Bardes* Case, the question under consideration was one between the trustee in bankruptcy and a stranger to the bankruptcy proceedings and the decision proceeded upon that ground. Page 536,

178 U. S., page 1005, 20 Sup. Ct., and page 1181, 44 L. Ed. Here the question is one between the trustee and a party who has voluntarily assumed obligations to the United States in a pending bankruptcy proceeding. I hold that the court has jurisdiction and that the complaint states a cause of action.

Demurrer overruled with leave to the defendant to answer upon payment of costs.

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In re SEMMEL.

(District Court, M. D. Pennsylvania. November 29, 1902.)

No. 93.

1. BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY.

A bankrupt who, in the schedules accompanying his petition, declares he has no property, but later on, as part of his state exemption, claims certain property, is not on this account to be charged with concealing the property, so as to lose his right to a discharge.

2. SAME.

Nor is it a concealment that in so claiming a certain number of shares of stock he does not name the stock, and undervalues it, though this may be evidence on the question of concealment.

3. SAME—FALSE OATH.

A bankrupt who, in the schedules accompanying his petition, declares he has no property, but later on, as part of his state exemption, claims 5 shares of stock, not named, of the "nominal value of \$120," when a few days later he received 10 shares of stock, under a contract he then had, and till then expected he was to receive 20 shares, or \$1,000 worth, of the stock, will be held to have made a false representation with regard to his property, which, being sworn to by him in verifying his schedules, amounts to a false oath, which bars a discharge.

4. SAME.

The same is true with respect to a contract under which he was entitled to receive money; it not being mentioned, though it was nominally assigned to another, and was in fact assigned to the amount he owed the assignee; it otherwise being treated by him, the assignee, and the other party thereto, as his.

In Bankruptcy.

Frank Reeder, for bankrupt.

E. O. Nothstein and W. G. Freyman, for creditors.

ARCHBALD, District Judge. On December 14, 1901, Franklin P. Semmel filed a voluntary petition in this court, and was duly adjudged a bankrupt, and on January 23d following applied for his discharge. To this exception was taken on two grounds: (1) Because he had omitted from his schedules five shares of stock in the Montgomery Slate Company, of the par value of \$50 each, which, it was claimed, he fraudulently concealed, and thus made a false oath in swearing to his petition; and (2) because he also failed to include therein a claim of \$500 due him from the slate company. At the hearing before the referee a further exception was added: (3) That since filing his petition he had received \$300 from the slate com-

pany, which was due at the time, and fraudulently omitted from his schedules. The referee has sustained the exceptions and reported against a discharge, and the case is here on review of this decision. In addition to the testimony produced on the exceptions, it was agreed that that which had been taken on the proceedings to ascertain the assets should also be considered. By this agreement any objections which might otherwise have been made to its use were necessarily waived, and the ruling in *Re Wilcox*, 48 C. C. A. 567, 109 Fed. 628, does not, therefore, apply.

1. In the schedules which accompany his petition, the bankrupt declares that he has no stock in incorporated companies, nor in fact any property of any kind whatever, although later on, as part of his \$300 state exemption, he claims a horse, of the value of \$150; a carriage, \$30; harness, \$10; office furniture, \$15; and "five shares of stock," unnamed, of the "nominal value of \$120." This property ought to have been scheduled under the appropriate heads, but the bankrupt incurred no particular penalty because of the failure to do so; the actual possession of it being sufficiently indicated, although not in the proper place. Nor can he be charged with concealing the stock simply because he has undervalued it, the remedy for this being by exception to his exemption claimed. But the fact that it was undervalued, as well as unnamed, is a circumstance of more or less weight on the question of concealment, if there is further evidence which bears it out. The exceptants contend that the bankrupt had 10 shares at the time he filed his petition, and, having professed to have but half the number, there was therefore a concealment and consequent false oath as to the other 5. According to the certificate of incorporation of the Montgomery Slate Company, which bears date October 1, 1901, Mr. Semmel subscribed for 20 shares of the capital stock, which was to be at the par value of \$50 per share. He was one of the principal promoters of the company, and turned over to them an option on a slate quarry which he held in conjunction with a man named Seip, in consideration of which he was to receive \$1,500 in cash, and a certain amount of paid-up stock. According to his testimony, he supposed he was to get 20 shares, but when the time came he was only allowed half that number; and the other 10, for which he had subscribed, he thereupon turned over to his wife, who borrowed the money, \$500, and paid for them. I see nothing to warrant the conclusion of the referee that it was the bankrupt's money, and not that of his wife, that went into these shares. It is the direct and uncontradicted evidence that it was not, against which there is nothing but the mere circumstance that, about the time they were paid for, Mr. Semmel got \$500 from the slate company on his option, which he swears he turned over to Hauk on the assignment of the option which he held, and this must be accepted. But as to the other 10 shares, I see no reasonable escape from the conclusion that there was a fraudulent concealment. The bankrupt, as we have seen, discloses 5 shares, which he claimed as part of his exemption, putting a value of \$120 upon them. The explanation which he offers in his answer is that when he swore to his petition he in fact had but 5 shares, of the par value of \$50, worth, as he be-

lieves, about \$120; that since then, about December 19, 1901, the capital stock of the company, some \$30,000, was readjusted without his knowledge, whereby he was given 10 shares of inflated stock, instead of the 5, which he had when his petition was sworn to, worth \$13.50 a share, according to the value put upon them by the company, making \$131.50 for the 10 he had; and that these 10 shares represented the same value and no more than the 5 shares which constituted his whole interest in the concern. His oral testimony, however, is considerably different. "When I made the schedule of my assets," he says, "I knew at the time that there was \$7,500 paid in, and the company was capitalized at \$30,000, and I could not arrive at the figure; that I was to have \$500 worth of stock, and I valued it at one-fourth of \$500, or \$125, and I thought I would put it in my schedules at \$125, \* \* \* what I thought it was worth \* \* \*; but I did not think of the \$500 as ten shares of \$50 each." It is possible that the variance in the number of shares might be accounted for in the way suggested, but that a fair and honest value was put upon them collectively is more than doubtful. Two days later, according to what he would have us believe, his wife, by his advice, borrowed money to take the other 10 shares, which he could not, paying \$500 for what he had just sworn in his schedules were worth but \$120. "I thought it was a good stock," he says in his testimony, "and she invested in it." This is entirely inconsistent with the valuation of 24 cents on the dollar at which he claimed the stock as part of his exemption. Nor is his explanation of how he figured out the value satisfactory, by distributing the money paid in, \$7,500, over the whole authorized capital, \$30,000. It was not until afterwards that the stock was watered by the distribution of the unpaid capital among the other stockholders; and it is to be noticed that, in the answer to which I have referred, he assigned this "readjustment" of the stock, as he calls it, as the ground for the value which he gives; thereby setting up something after the fact to account for that which had preceded it. Furthermore, from Mr. Heberling's testimony, we find that, when the time came for Mr. Semmel to get his stock, he made a strenuous claim for 20 shares, contending that that was the agreement, but was reminded that he had said when the company was organized that he and Seip, who held the option on the quarry with him, would each put in \$500 in money, and take \$500 in stock for their trouble, and that was what he was finally held to. It seems very difficult to believe, if such was the case, that he could have so completely forgotten it, and supposed, as he says, that he was to have but 5 shares, of the insignificant value of \$120. Moreover, he swears himself that he expected to get \$1,000 worth of stock, and did not learn that he was to have but one-half that amount until the stock was distributed, December 16th or 19th, a few days after his petition. Putting all the facts together, they disclose to my satisfaction that, whatever the number of shares he had, he purposely minimized the value so as to retain the stock by means of his state exemption under which he claimed it. A willful undervaluation, covered up in the way this is, I cannot but regard as a false representation by the bankrupt with regard to his property;

and, being sworn to by him in verifying his schedules, it amounts to a false oath, which bars a discharge.

2. Nor has he made a much better showing with regard to the money coming from the slate company on his agreement with them. As already stated, he was to get \$1,500 in cash, and a certain amount of paid-up stock in the company. But after this arrangement was made, there was some hitch in the matter, and an attempt by the slate company to cut him out by dealing directly with the owners of the quarry on which he and Seip held the option. In this state of affairs, he went to his brother-in-law, Hauk, who had let him have money on the strength of the option, and assigned it to him; arranging with him to buy the property outright if necessary in order to hold the option and compel the slate company to carry out their agreement. The assignment to Hauk is dated July 30, 1901, and the consideration named in it is \$250 received July 17, 1901; \$350, July 22d; and a note of \$500 given in April, 1898, with \$60 interest added; making \$1,160 in all. The intervention of Hauk was effective. He did not have to buy the property, nor in fact do anything with regard to it, except to stand by Semmel, which he did. The parties met together at Allentown; Hauk, Semmel, the officers of the slate company, and Bossan, one of the owners of the property, being present. At this interview, Hauk declared that he was ready to pay over the money for Bossan's interest, and Bossan was induced to say that he would not give a deed to any one except as Semmel directed. This brought the slate company to terms, and a new agreement was accordingly entered into, which was subsequently embodied in a writing bearing date October 1st following. By it Semmel assigned to the slate company the option which he held, and released the owners from any claim for making sale of their property, in consideration of which he was to have the same as before,—\$1,500 in money and the amount of stock in the company which had been previously agreed upon. This agreement was subsequently, October 16th, transferred to Hauk by Semmel, by a writing indorsed on the back of it, and delivered over to him. Before that, however, Semmel was paid \$750 by the slate company, \$100 of which he gave to Bossan for standing by him at the Allentown meeting, and the other \$650 he turned over to Hauk, by virtue of the arrangement between them. So the matter stood when Semmel went into bankruptcy. Since then, on December 16th, he received and receipted for \$300 from the slate company, which he also turned over to Hauk; making \$950 which the latter has received, and leaving \$450 still due from the slate company on the contract. The question is whether this money belongs to Hauk or to Semmel, not only legally, but by the understanding and intention of the parties. Apparently, it belongs to the former, that being the legal effect of the assignment. But acts speak louder than words, and we have a right to look at the conduct of the parties, as well as the writings between them, to judge of their significance. Notwithstanding the fact that Semmel's option had been assigned to Hauk at the time of the Allentown meeting, Hauk attended that meeting, not to protect his own interest, but that of Semmel; thus recognizing that the latter had an

interest, regardless of the assignment. "I had the information," says Hauk, "to go down there and see that Mr. Semmel got his rights. If he did not, I was going to buy the property,—the Bossan portion." Semmel says: "I asked him to see me through, and offered him \$500. Q. To do what? A. To raise the money to bring them to terms; \* \* \* To buy from Bossan the one-half, so as to bring the slate company to terms." The result was a settlement, not between Hauk and the slate company, but between the slate company and Semmel, with whom, as we have seen, a new agreement was subsequently executed. This also was assigned to Hauk, but it was made in the name of Semmel, which is the significant part of it. The terms on which the assignment was given to Hauk are not stated, but we may assume that they were the same as in the one previous, the recited consideration of which is \$1,160. This we must regard as the whole of it, for, although Semmel does say that he offered Hauk \$500 "to see me through," yet, as this involved the raising of the money to buy out Bossan, which did not have to be done, it is to be taken as a mere offer, which went no further. But the most expressive thing of the whole transaction is that, notwithstanding the assignment, which, in terms, carried everything that was coming to Semmel under the agreement, including the shares of stock which were to be given him as part of the consideration, there is no claim that these shares ever belonged to Hauk, nor is there the first suggestion of it. How does it happen that they were not his, if the whole of Semmel's interest passed by the transfer? And what conclusion are we entitled to draw from this circumstance? The exercise of dominion over property is the highest indicia of ownership, and that, as it seems to me, is what may well guide us here. Through the whole transaction it is Semmel, and not Hauk, who acts and is recognized as the real owner by both. It was his rights that were to be protected when the parties met at Allentown, and it is with him that the settlement and subsequent writing are made. It is he who draws the money on the contract, although in the end, as he says, he turned it over to Hauk; and finally it is he who claims and receives in his own name, and for his own benefit, the shares of stock which the company allot to him, and it is with him that it is arranged how many these shall be. Assuming that Hauk advanced the money which it is said he did on the strength of the option,—\$250 at one time, and \$350 at another,—and also surrendered Semmel's note or duebill of \$500, with \$60 of interest, the only conclusion consistent with the evidence is that this was the measure of his interest in the option, and that the rest of it belonged to Semmel, and was held for his benefit. The shares of stock which it carried certainly were, and why not, also, the money, over and above what Hauk had in it? He has received \$650 from the first payment, of \$750,—\$100 having gone to Bossan,—and \$300, the next one. This leaves \$240 due him out of the \$450 still unpaid. The rest belongs to Semmel, and it does him no injustice to hold that he must have known it when he made up his schedules. If it was, he should have so stated; and, failing to do so, he made a willful misstatement and misrepresenta-

tion with regard to his assets, resulting in this respect, also, in a false verification of his schedules, which is a bar to his discharge.

3. The third objection is not sustained. It was filed before the referee at the hearing, and exception is taken to it on that ground. But without passing upon that question, I am satisfied that the assignment, as already indicated, was effective to the extent of the consideration named in it, which includes the \$300 received by Semmel on Hauk's account since his bankruptcy. To that extent the report of the referee is not sustained. But as to the rest, it is, and, in conformity with what is there recommended, a discharge is refused.

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**TWEEDIE TRADING CO. v. NEW YORK & B. DYEWOOD CO.**

(District Court, S. D. New York. November 7, 1902.)

**1. SHIPPING—CONSTRUCTION OF CHARTER PARTY—DEAD FREIGHT.**

A charter party for a steamer, fixing the port of loading, and requiring the carriage of a cargo of 2,000 tons, 10 per cent., more or less, at vessel's option, which gave her an advantage by enabling her to carry an unusually large coal supply, construed, and *held* not to render the charterer liable for dead freight because of its refusal, after the vessel had loaded 1,900 tons, having also on board 400 tons of coal, and had crossed a bar some miles from the port of loading, to lighter to her 300 tons additional on her demand.

**2. SAME—INABILITY TO LEAVE PORT WITH FULL CARGO—DUTY TO WAIT REASONABLE TIME.**

A chartered steamer loading at a river port during an unusual and temporary low stage of water cannot recover dead freight from the charterer because she was unable to cross a bar with the maximum cargo she was entitled to demand, and which the charterer was able and willing to furnish, where she did not wait a reasonable time before starting for the river to rise, which would probably have enabled her to take the full cargo.

In Admiralty. Action for breach of charter.

Wheeler & Cortis, for libellant.

Butler, Notman, Joline & Mynderse, for respondent.

ADAMS, District Judge. This is an action brought by the libellant to recover damages for an alleged breach of a charter party of the steamship Endsleigh, dated January 29, 1901, providing for the transportation of 2000 tons, 10% more or less at vessel's option, of Quebracho Wood from Colastine, Argentine Republic, to New York. The contract at first provided for 1500 tons, with the same option, but the quantity was afterwards increased to 2000 tons. The libellant claims a loss in dead freight on 300 tons, which it is alleged the respondent was required to furnish to complete the cargo under the contract. It appears that the vessel reached Colastine about the 15th of May, 1901, and after the loading progressed it was found that she could not take more than 1900 tons and pass over a bar a few miles below Colastine. After having called for the full cargo, which the respondent was able and willing to furnish at Colastine, she declined to receive more than the quantity loaded and having passed over the bar, she demanded that the balance of the cargo be light-

ered to her there. The respondent declined to comply with the demand and the vessel sailed with the partial load.

The contract provided, *inter alia*: "The cargo, or cargoes, to be received and delivered within reach of the ship's tackles, at ports of loading and discharging, *where steamer can always safely lie afloat; Lighterage if any to be at expense and risk of cargo,*" the underlined part being written at the end of a printed clause. The libellant contends that it was entitled to have the full quantity furnished, even though it became necessary to lighter a part. The respondent contends that it was under no liability to do otherwise than deliver the quantity provided for at Colastine and if any lighterage became necessary it should be at the vessel's expense.

There can be no doubt that if the contract provided for the selection of a loading port by the charterer and contained a provision which required the vessel to go to such port "or as near as she can safely go," a clause frequently included in charter parties, the respondent would have been liable for the dead freight in this case, because such a contract contemplates the ability of the vessel to leave the port when laden according to its terms, and the burden of responsibility for the absence of a sufficient draught of water would fall upon the charterer. *Bacon v. Ennis* (D. C.) 110 Fed. 404; *Id.* (C. C. A.) 114 Fed. 260. Where a loading port is not in mutual contemplation when the contract is made, a provision that the vessel shall only be required to go as near to a port selected by the charterer as safety permits naturally follows and the burden would then justly be upon the charterer to provide for any additional expense or loss consequent upon the ship being unable to depart from the selected port with the cargo provided for by the contract. Where the port is designated in the contract and there is a similar provision with respect to going near and the parties know, when making the contract, that a full cargo can not be loaded and get to sea, the rule is the same—*Shield v. Wilkins*, 5 Exch. 304—; and a guaranty by the charterer of a certain draught of water at the loading port is equivalent to a guaranty of such depth in leaving the port—*Shaw v. Hart*, 21 Fed. Cas. 1192, 1 Spr. 567—; but where the parties do not know when making the contract that a full cargo can not be carried out of the port and there is no provision that the vessel shall go as near the loading port as she safely can, the rule is not necessarily the same. The lack of common knowledge of the situation to be encountered and the omission of the provision for near approach seem to leave the matter to be determined by an ascertainment of the intention of the parties through such means as may be at command, primarily, of course, by the language of the instrument and if the intention still remains in doubt, by a resort to the circumstances surrounding the contract. The intention of the parties seemed to be so much in doubt from this instrument that, upon the first argument, I suggested to counsel that testimony be taken to show what occurred during the preliminary negotiations, with a view of obtaining some light which might tend to explain, though not vary, the written contract. Such testimony was taken and it appears that when negotiations were in progress for the additional 500 tons, information from outside parties,



familiar with the port, was obtained by the president of the libellant with respect to the water which could probably be depended upon at Colastine and he was apparently satisfied that the risk of undertaking to carry the additional quantity could be assumed by the vessel, as a substitute for the privilege of taking cargo from other places, which was provided for by the contract, without any guaranty from the charterer as to draught. The provision for lighterage remained the same as when 1500 tons were to constitute the cargo and it is clear that no difficulty would have arisen in the vessel getting safely out of the port with that quantity. The respondent urges that by the terms of the contract the lighterage clause only came into effect in case lightering was to be done in connection with the clause providing for the cargo to be received and delivered within reach of the ship's tackles at the port of discharging as well as of loading. Read in connection with the context, it is readily susceptible of the meaning that lighterage might be resorted to, at the expense of the charterer, in case a berth could not be provided where the vessel could load afloat. Such a construction seems more reasonable than one requiring the charterer to pay for lighterage at a point considerably distant from the loading port, especially in view of the margin of loading given to the vessel of 10% more or less, which entitled her to take anywhere from 1800 to 2200 tons and to regulate her supply of coal, within the limits mentioned, according to her own advantage. She had on board at Colastine some 400 tons of coal and it was advisable that she should have such a quantity to reach a cheap coaling place as compared with places in the vicinity of Colastine but it would hardly seem fair that she should be permitted to carry a heavy supply of coal for her own benefit and at the same time call upon the charterer to supply lighterage for cargo which she could not carry from the loading port, partly owing to such supply of coal. There is no provision in the contract with respect to the coal to be carried. The charter is made upon a sailing vessel form and only provides for stowage room for provisions, *sails* and cables. Of course, the steamer was entitled to carry coal but there is much persuasiveness in a contention that with the privilege of carrying a large supply and a corresponding reduction in cargo carrying capacity, the vessel, not the charterer, assumed the burden of the draught of water in leaving the loading port. Suppose that instead of 400 tons, the master of the vessel had put a still larger quantity in her bunkers at some place where it could be purchased at a low price and had come to the loading port so burdened with coal that she could only carry the minimum quantity of cargo provided for. It would seem under such circumstances that dead freight could not be collected from the charterer—*Shipping Co. v. Forbes* (D. C.) 99 Fed. 102, 105—yet the carriage of the larger quantity of coal might be reasonable from the vessel's point of view. I regard it as more consistent with the probable meaning of the contract that the vessel's 10% option on the quantity of cargo should be considered as intended to cover such a contingency than to hold that the full option continued to exist, notwithstanding the vessel voluntarily put it out of her power to avail herself of it. And there is another feature of the case which inclines me to decide it in

the respondent's favor. It appears that the river at Colastine was unusually low at the time of loading and by waiting, the full quantity of cargo could probably have been carried over the bar. It was the vessel's duty to wait a reasonable time. Scrutton, Charter Parties, (4th Ed.) 84-86. She did not wait at all but proceeded immediately, notwithstanding a temporary low state of water, with a partial cargo. The recovery of dead freight for the deficiency can not be allowed.

Libel dismissed.

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UNITED STATES v. WROBLENSKI.

(District Court, E. D. Wisconsin. November 5, 1902.)

1. OFFENSE AGAINST POSTAL LAWS—NONMAILABLE MATTER—OBSCENE LETTERS.

Under that provision of Rev. St. § 3893, as amended by 25 Stat. 496 [U. S. Comp. St. 1901, p. 2658], which makes it a penal offense to mail a private sealed letter containing obscene, lewd, and lascivious matter, there is no question of publication, and, to be within the statute, the letter must tend to corrupt the morals of the person to whom it is addressed, there being no presumption that it was intended to be or will be read by others, and such tendency is dependent upon circumstances, the import and presumed motive, and not upon the mere terms of the communication; a letter which might be in violation of the statute if sent to one person may not be when sent to another.

2. SAME.

The mailing of a private sealed letter, directed to and containing indecent charges against the mother of the writer, does not constitute the offense of mailing a letter containing obscene, lewd, and lascivious matter, under Rev. St. § 3893.

On motion to quash indictment under section 3893, as amended by 25 Stat. 496 [U. S. Comp. St. 1901, p. 2658], for mailing a letter "of an indecent character," alleged to be "obscene, lewd, and lascivious."

H. K. Butterfield, for prosecution.

A. J. Depp, for defendant.

SEAMAN, District Judge. The letter in question is directed to the mother of the defendant, refers to epithets applied by the former to the latter, and, in effect, charges the mother with adulterous intercourse with a son-in-law. It is atrocious in spirit, and indecent in the plain implications of the language. It is grossly defamatory, but the statute does not intend protection against libels of the person addressed. "The offense aimed at," as held in *Swearingen v. U. S.*, 161 U. S. 446, 450, 16 Sup. Ct. 562, 40 L. Ed. 765, "was the use of the mails to circulate or deliver matter to corrupt the morals of the people," and the terms used in the statute "signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel." The statute is highly penal, and "should not be held to embrace language unless it is fairly within its letter and spirit." *Id.*, 161 U. S. 451, 16 Sup. Ct. 563, 40 L. Ed. 765. In other words, the tendency must be to corrupt the recipient, and not merely to

¶ 1. Nonmailable matter, see note to *Timmons v. U. S.*, 30 C. C. A. 79.

offend or hurt, as the charge relates to a sealed letter, and is not within the provision concerning nonmailable matter on envelopes or postal cards. The original section (3893) did not in terms include a letter, and the decisions were conflicting whether a sealed letter was within its import, but by the amendment of 1888—25 Stat. 496 [U. S. Comp. St. 1901, p. 2658]—the omission was supplied, setting the question at rest. Of the numerous cases reported under this section, these further citations are deemed sufficient for its definition: *Dunlop v. U. S.*, 161 U. S. 486, 500, 17 Sup. Ct. 375, 41 L. Ed. 799; *U. S. v. Wrightman* (D. C.) 29 Fed. 636; *U. S. v. Clarke* (D. C.) 38 Fed. 732; *U. S. v. Martin* (D. C.) 50 Fed. 918; *U. S. v. Males* (D. C.) 51 Fed. 41, and cases reviewed; *U. S. v. Moore* (D. C.) 104 Fed. 78.

The case at bar involves alone the mailing of a "private sealed letter" directed to, and containing indecent charges against, the mother of the writer, and not a publication of the indecent matter. That the statute as amended is applicable to such letter is settled by the decision in *Andrews v. U. S.*, 162 U. S. 420, 423, 16 Sup. Ct. 798, 40 L. Ed. 1023, though previously left in doubt under a remark in *U. S. v. Chase*, 135 U. S. 255, 262, 10 Sup. Ct. 756, 34 L. Ed. 117. The subject-matter, however, must be "obscene, lewd, and lascivious," within the meaning of the statute as defined in the cases above cited, to sustain the indictment; and the test is whether it panders to lasciviousness, or states or "implies something tending to suggest libidinous thoughts or excite impure desires." *U. S. v. Wrightman*, supra. If it were a publication, or the matter were sent to a young person or a stranger, I am not sure that these definitions would exclude the language or suggestion of the letter. But I am of opinion that the general test is not applicable alike to publications and sealed private letters. In either case the question of violation of the statute rests upon the import and presumed motive, and not upon the mere terms of the communication. Thus its tendency depends upon circumstances, and unexceptionable language may convey vicious information within the statute. *Dunlap v. U. S.*, supra. In the case of a private letter (sealed) there is no publication (*U. S. v. Chase*, supra), and no presumption arises of intention to give publicity, or that it will be read by others than the addressee. The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee, and no such tendency can be imputed to this letter to the mother of the defendant.

The motion to quash the indictment must be sustained accordingly.

## ST. PAUL, M. &amp; M. RY. CO. v. WESTERN UNION TEL. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 3, 1902.)

No. 1,571.

**1. TELEGRAPHS—CONTRACTS BETWEEN RAILROAD AND TELEGRAPH COMPANIES—CONSTRUCTION.**

A railroad company, having 80 miles of its road under construction, with extensions projected, entered into a contract with certain persons by which the latter agreed to construct, maintain, and operate a telegraph line along the right of way for said 80 miles on stated terms and conditions, relating to the cost of construction and maintenance, its renewal, and its operation for the benefit of both parties. The contract contained no limitation as to time, and provided that as the railroad was extended the other parties should continue the line of telegraph along the line of road upon the same terms and conditions. It contained a further provision that the railroad company "does hereby grant to the said parties of the first part, for the uses and purposes of this contract, and to keep off competing lines, the exclusive right of way for the lines of the telegraph along and upon the lands of the party of the second part, as far as can be legally done; and it is hereby mutually agreed that this contract shall be binding upon the successors, representatives, and assigns of both parties hereto." *Held*, that such contract did not operate as a present grant of an estate or interest in the railroad right of way, to be held and enjoyed by the grantees for all time, independently of the provisions of the agreement, and which could be extinguished only by a reconveyance, but that the grant was intended to continue only so long as the contract, "for the uses and purposes" of which it was made, should continue in force, and that it was within the power of the parties or their successors to terminate the same by subsequent parol agreements.

**2. SAME—GRANT OF EASEMENT.**

In no event could such contract be construed to grant a present and vested right, in the nature of an easement, in any right of way which had not at the time been acquired or located by the railroad company; but it could, at most, create a mere equitable right to have the grant perfected when the property to which it related had been acquired, and until so perfected it could be relinquished by parol, or by acts in pais which clearly evidenced such an intention.

**3. SAME—MODIFICATION BY NEW CONTRACT.**

The individuals with whom the contract was made assigned the same to the Northwestern Telegraph Company, which, under such contract, and a subsequent agreement made with the receiver appointed for the property of the railroad company in foreclosure proceedings, built and operated several hundred miles of telegraph lines prior to the sale of the railroad in the foreclosure suit, at which complainant became the purchaser. Thereafter complainant and the Northwestern Company entered into a new contract, which was wholly executory in character, containing no reference to any prior agreement, or to rights previously acquired by either party. It bound the telegraph company to construct a line of telegraph along and upon the right of way of any railroad, then constructed or thereafter constructed, owned, leased, or operated by complainant, and, while it contained no limit as to duration, gave either party a right to a modification of its terms on an equitable basis after the expiration of 10 years, and at intervals of 5 years thereafter. *Held*, that such contract superseded all prior agreements between the predecessors in interest of the parties, and also placed all lines of telegraph theretofore constructed on a plane of equality, so far as the rights of the parties therein were concerned.

**4. SAME—ASSIGNMENT OF CONTRACTS—MERGER OF TELEGRAPH COMPANIES.**

After the execution of such contract the Northwestern Company transferred all its contracts and property to the Western Union Tele-

graph Company, under an agreement that it would not engage in the business of telegraphy, nor build, own or lease any lines of telegraph, for the term of 99 years, in consideration of which the Western Union Company agreed to pay the interest on its bonds, and a certain sum yearly to its stockholders as dividends, and to restore the property at the end of such term. No limitation was placed on its power to deal with the contracts assigned. *Held*, that in view of the long term during which the charter powers of the Northwestern Company were devolved on the Western Union Company, which amounted practically to its merger in such company, the latter had implied power to deal with all such contracts as it deemed best, and to either modify the same, or substitute others in their stead.

**5. SAME — CONTRACTS BETWEEN RAILROAD AND TELEGRAPH COMPANIES — RIGHTS OF PARTIES.**

Negotiations between complainant and the Western Union Company resulted in a contract between them which recited that they jointly owned the existing telegraph lines along complainant's road, then being operated under the contract between complainant and the Northwestern Company, which contract had been transferred to the Western Union Company; that complainant had extended its road, and desired telegraph lines constructed on such extensions; and that both parties desired and requested the modification and cancellation of such prior contract. It provided that it should supersede such prior contract, and all other agreements between the parties or their respective predecessors; that it should continue in force for 10 years, and during such time should extend to all roads then or thereafter owned or controlled by complainant. It further provided that the telegraph company should furnish all the material, labor, and tools necessary for the construction of new lines, and all the materials and tools necessary for the maintenance, repair, and reconstruction of existing lines, and for the reconstruction of lines along all extensions and leased and controlled railroads, and the labor for the stretching of additional wires upon existing lines; the railroad company agreeing to furnish free transportation over its lines to employes of the telegraph company when engaged in the performance of their duties and the labor for the maintenance, repair, and reconstruction, when necessary, of all existing telegraphic lines. The telegraph company was to furnish such telegraph service as required for the business of the railroad. At the time such contract was made, lines had been constructed along 853 miles of complainant's railroad, and, during the 10 years it was in force, extensions were made, both of railroad and telegraph lines, amounting to nearly 4,000 miles additional. *Held*, that under such contract the parties were equal joint owners of the 853 miles, to the cost of which they or their predecessors had contributed about equally, the recital of such joint ownership in the contract itself being binding on all parties in interest; that the telegraph company was the owner of the new lines constructed under such contract at its own cost, subject to a reasonable allowance to complainant for its services in distributing the materials; that on the termination of the contract the telegraph lines did not become the property of complainant, because attached to its right of way, nor did the telegraph company have a perpetual easement which entitled it to maintain its lines thereafter on such right of way without the payment of compensation, but that the interests of the respective parties were unaffected and unimpaired by such termination, the only effect of which was to require a readjustment of the terms and conditions on which the lines should be thereafter maintained and operated.

**6. SAME — RIGHTS ON TERMINATION OF CONTRACT.**

Where a telegraph company, vested with the power of eminent domain, constructed its lines upon the right of way of a railroad, with the consent of the owner, in such a manner that they did not interfere with the operation of the road, under an agreement that the lines of telegraph should form a part of its telegraphic system, which agreement further provided that it should remain in force for 10 years, but contained no

express provision requiring the telegraph company, at the expiration of 10 years, to remove its lines from the right of way, *held*, that it was competent for a court of equity, whose jurisdiction had been invoked by the railroad company to restrain the telegraph company, on the termination of the contract, from using the lines on the theory that they had become the property of the railroad company, to determine the amount of reasonable compensation which should be paid by the telegraph company for its continued use of the right of way, and to permit it to maintain and operate its lines thereon on payment of such compensation.

7. SAME.

The contract between complainant and the Western Union Company provided for the maintenance, operation, and extension of telegraph lines admitted therein to be the joint property of the contracting parties; and having stipulated the proportion of the cost and expense to be borne by each party, and the use to be made of the lines for the benefit of each, without making any distinction in either respect between the lines existing and those to be built, no inference can be drawn of an intention that the ownership of the new lines should be different from the old, or that either party should pay the other for services rendered in their construction, and, in the absence of express provision otherwise, the extensions became also the joint property of the parties. Per Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Minnesota.

For opinion below, see 106 Fed. 243.

This is a controversy between the St. Paul, Minneapolis & Manitoba Railway Company, the appellant, and the Western Union Telegraph Company and the Northwestern Telegraph Company, the appellees, concerning their respective rights and interests in lines of telegraph erected and now standing on the right of way of said railway company in the states of Minnesota, North Dakota, Montana, Idaho, Oregon, and Washington. For brevity, the appellant will be styled the Manitoba Company, while the appellees will be referred to, respectively, as the Western Union Company and the Northwestern Company.

The facts out of which the controversy arises are substantially these:

On September 21, 1863, the St. Paul & Pacific Railroad Company, which had succeeded to all the rights, privileges, franchises, and property of the Minnesota & Pacific Railroad Company, a land-grant company, was engaged in constructing a line of railroad from Stillwater, in the state of Minnesota, by way of St. Paul and St. Anthony, via Minneapolis, to Breckenridge, on the western border of the state, with a branch road, via Anoka, St. Cloud, and Crow Wing, to St. Vincent, in the northwestern portion of the state. Little, if any, of the road had at that time been built, but work was in progress on that part of the line between St. Paul and Watab, which latter place was near St. Cloud, on the projected branch line to St. Vincent, and was about 80 miles distant from St. Paul. At the date last aforesaid (September 21, 1863) the St. Paul & Pacific Railroad Company entered into a contract with A. B. Smith and Z. G. Simmons for the building of a line of telegraph on the railroad right of way from St. Paul to Watab. Omitting unimportant details, this contract provided that Smith & Simmons, for the sum of \$90 per mile to be paid by the railroad company, should build and keep in good repair a line of telegraph along the line of said railroad from St. Paul to Watab; that the employes of the railroad company should watch the line and mend it when they could, and that the railroad company should furnish convenient facilities to the telegraph company for repairing breaks in the line when it could do so without unnecessary expense; that Smith & Simmons should furnish all materials for repairing the line, and should renew the line, when necessary, at their own expense; that the railroad company should furnish rooms in its depots for telegraph offices free of charge; that Smith & Simmons should send messages of the railroad com-

pany relating to railroad business, free of charge, over all their lines of telegraph in the state of Minnesota; that they should be entitled to all money received on account of commercial and public business passing over the line, which was to be accounted for and paid over monthly; that the telegraph business of the railroad company should have the preference over commercial business; that, in case one wire proved insufficient to transact the business without delay, Smith & Simmons might string additional wires at their own expense; and that, if the railroad company wanted greater facilities, it might require Smith & Simmons to string additional wires, but in that event the expense should be borne by the railroad company.

The seventh and eleventh paragraphs of this contract, over which much controversy has arisen, are as follows:

"Seventh. And the said party of the second part does hereby grant to the said parties of the first part, for the uses and purposes of this contract, and to keep off competing lines, the exclusive right of way for the lines of the telegraph along and upon the lands of the said party of the second part, as far as can be legally done. And it is hereby mutually agreed that this contract shall be binding upon the successors, representatives, and assigns of both parties hereto."

"Eleventh. It is further agreed that, as the said Saint Paul and Pacific Railroad Company shall further construct and operate their said road, the parties of the first part may and shall continue the same line of telegraph along the line of said road upon the same terms and conditions as hereinbefore mentioned. Each agree to conform to all the requirements above mentioned."

On February 5, 1866, the St. Paul & Pacific Railroad Company, by legislative action, became segregated into two corporations, one of which was termed the First Division of the St. Paul & Pacific Railroad Company, and under that name succeeded to all the corporate rights, powers, and franchises of the St. Paul & Pacific Railroad Company, as respects the road which the latter company had been authorized to construct from St. Paul northwestwardly to Watab, and from St. Anthony westwardly across the state to Breckenridge, or, more accurately, to a point between the foot of the Big Stone Lake and the mouth of the Sioux Wood river. After the St. Paul & Pacific Railroad Company became subdivided into two corporations, mortgages were executed by the respective companies covering the line of road which became the property of the First Division Company from St. Paul to Watab and from St. Anthony to Breckenridge; also covering the branch line from St. Cloud to St. Vincent, which remained the property of the parent company. These mortgages were foreclosed by actions instituted in the state and federal courts for the state of Minnesota; the result being that in May, 1879, the appellant, the Manitoba Company, bought at foreclosure sale under a decree of the state court the line of road from St. Paul to Watab; and in June, 1879, at a like sale under a decree of the state court, the line from St. Anthony to Breckenridge; and in June, 1879, at a like sale under a decree of the federal court, the line of road, then partially unbuilt, between St. Cloud and St. Vincent. While this latter road was in the custody of a receiver appointed by the federal court in the foreclosure suit, the receiver, J. P. Farley, on April 16, 1878, entered into a contract with the Northwestern Company, one of the appellees, relative to the construction of telegraph lines along the roads in his custody. Long prior to the execution of this latter contract, to wit, on January 17, 1865, the Smith & Simmons contract with the St. Paul & Pacific Railroad Company had been assigned to the appellee the Northwestern Company by persons who assumed to be the owners thereof, viz., by Z. G. Simmons, one of the original contracting parties, and by O. S. Wood, acting "by E. Cobb, His Atty.," and by Emory Cobb. In what manner, if any, O. S. Wood and Emory Cobb acquired an interest in the Smith & Simmons contract, and in what manner E. Cobb acquired authority from O. S. Wood to assign his interest, is not disclosed by the record.

By the Farley contract it was provided, in substance, that the telegraph company should construct on the right of way of any railroad then or hereafter constructed, owned, leased, or operated by the St. Paul & Pacific

Railroad Company a telegraph line of one or more wires, as might be required, on poles of a certain size; that both contracting parties might establish telegraph stations at all points on the roads covered by the contract, the operators whereat should form a part of the telegraph corps, and be subject to the rules of the telegraph company; that reports should be made monthly of all commercial business transacted at the various stations, the proceeds of which should be paid to the telegraph company; that the railroad company should pay to the telegraph company one-half the cost of constructing said telegraph line; that the telegraph company should furnish all the materials necessary to repair and maintain the lines, and that the railroad company should do all the work necessary to keep them in good working order; that, wherever two wires were strung, each contracting party should have the exclusive right to the use of one wire; that either party might, at its own expense and for its exclusive use, have the right to place one or two additional wires upon the poles constituting the line; that when only one wire was strung the use thereof should be joint and mutual, but that important railroad business should have the preference. In addition to these provisions, the Farley contract contained the following stipulations, to which much importance is attached by counsel: That is to say, the receiver covenanted for and in behalf of the St. Paul & Pacific Railroad Company that the telegraph company should have the right of way on and along the railroads of the railroad company for the construction and use of telegraph lines for commercial or public uses and business, and that it would not transport men or material for the construction of a telegraph line in opposition to the Northwestern Company, except at the usual rate charged other persons, or distribute material for such opposing line, except at regular stations; that the provisions of the contract should extend to all railroads owned or controlled by the railroad company, or which might be owned operated, leased, or controlled by it; and that at periods of 10 years either party, on giving 30 days' notice, might call for a reconsideration and readjustment of the terms of the contract on an equitable basis, so as to secure to both parties the largest benefit.

While there is some controversy over the fact, and the proof is not clear, yet the evidence justifies the conclusion that a line of telegraph was built under the provisions of the Smith & Simmons contract from St. Paul to St. Cloud, a place near Watab, and from St. Anthony to Breckenridge; that such telegraph line was erected between St. Anthony and Breckenridge contemporaneously with the construction of the railroad between those points by the First Division Company; and that, as respects the branch road from St. Cloud to St. Vincent, a telegraph line was constructed either under the Smith & Simmons contract or under the Farley contract. A line of telegraph along such parts of the branch road as had not been built and put in operation when the Farley contract was executed was doubtless constructed under the provisions of the latter contract.

Shortly after the acquisition of the several roads as aforesaid by the Manitoba Company at the foreclosure sales, it entered into negotiations with the Northwestern Company for a new telegraph contract, embracing all the roads then owned by it, which resulted in the execution of a new agreement between said companies on October 15, 1879, which will be referred to hereafter as "Contract A." By contract A it was agreed that the telegraph company should construct upon the right of way of any railroad then or thereafter constructed, owned, leased, or operated by the railroad company, as fast as the road was built, a line of telegraph, with one or more wires, as might be required; that the telegraph company should furnish all the materials necessary to repair and maintain the lines, and that the railroad company should do all the work necessary to keep them in good working order; that the telegraph company should furnish the railroad company telegraphic service over any of its lines, wherever situated, to the value of \$2,000 per annum; that the railroad company should pay to the telegraph company one-half the cost of constructing the line; and that at the expiration of 10 years, and at the end of each 5-year period thereafter, either party, upon 30 days' notice, might call for an equitable readjustment of their rights under the contract. Both the Farley contract and contract A



contained a provision that the telegraph lines referred to therein should form a part of the general system of the telegraph company, and that, as respects commercial and public business, they should be regulated and controlled by it. In all other respects the two contracts, save as to the parties, were substantially alike, but no reference was made in contract A to any prior contract.

On May 7, 1881, the Northwestern Company was practically absorbed by the Western Union Company, and shortly thereafter the Northwestern Company ceased to transact a telegraph business. All of its lines and property of every description were transferred to, and passed into the custody and control of, the Western Union Company. All of its telegraph contracts, including contract A, were assigned to the Western Union Company. Of the agreement between the two telegraph companies by virtue of which the merger took place, it will suffice to say at present that the Northwestern Company covenanted that during the period of 99 years covered by the agreement it would "not \* \* \* engage in the business of telegraphy, nor build nor own any lines of telegraph, or hold the same by lease or otherwise"; that, in exchange for what it acquired under the agreement, the Western Union Company engaged to pay the interest on outstanding bonds of the Northwestern Company to the amount of \$1,180,000, or on other bonds that might be issued in exchange therefor; also to pay \$100,000 per year, with a pro rata increase of that sum each year until July 1, 1896, when the sum then and thereafter to be paid annually during the life of the agreement should be \$150,000; that it would also pay \$2,500 yearly for 14 years, to cover the expense of keeping up the corporate organization of the Northwestern Company. The annual payments aforesaid of \$150,000 per year, by the terms of the agreement, were to be made directly to the stockholders of the Northwestern Company, as a dividend on their stock, the total amount of which was guaranteed to be \$2,500,000. The Northwestern Company reserved to itself the right to terminate the agreement in case the Western Union Company failed to make the aforesaid payments for as much as three months after they severally became due. The agreement also contained a provision binding the Western Union Company to restore the property which it had acquired thereunder to the Northwestern Company in as good condition as when received, at the expiration of 99 years.

On August 23, 1882, a new telegraphic agreement was executed by and between the Manitoba Company and the Western Union Company, which will be referred to hereafter as "Contract B." This latter contract was the result of a controversy which appears to have arisen between the contracting parties subsequent to the merger of the business of the two telegraph companies under the agreement of May 7, 1881. The Manitoba Company, as it seems, claimed that the assignment of contract A by the Northwestern Company to the Western Union Company terminated that contract, so far as the Manitoba Company was concerned; also that contract A was ultra vires the Manitoba Company, because it had the right under its charter to operate a telegraph as well as a railroad, which telegraphic franchise it had attempted to transfer indefinitely to the Northwestern Company by contract A. The Manitoba Company, in the course of the controversy, doubtless expressed a desire, in some of the interviews, to own and operate telegraph lines of its own on its right of way. The controversy, whatever it may have been, ended, however, with the execution of contract B. This contract began with a recital that the parties thereto, to wit, the Manitoba Company and the Western Union Company, "jointly own certain lines of telegraph along various railroads of the railway company, being the existing lines of telegraph now in operation along the railway company's lines of railroad. \* \* \* now operated under the provisions of a contract dated October 15, 1879," the same being contract A; that this latter contract had been duly transferred by the Northwestern Company to the Western Union Company; that the railway company had extended its road, upon which extensions it desired telegraph lines to be erected, and that both parties desired and requested "the modification and cancellation" of contract A. It is unnecessary to state the provisions of contract B, following the aforesaid recitals, except in so far as they differ from the provisions of contract A, heretofore

stated. The telegraph company agreed to furnish at its own expense all the materials and tools necessary for the maintenance, repair, and reconstruction, when necessary, of existing lines of telegraph along the railway company's road, and for the construction, maintenance, repair, and reconstruction of such additional wires or lines of poles and wires along said railroads, and along all branches, extensions, leased and controlled lines thereof as the telegraph company might require for its own business, and as might be required for the railroad business of the railway company. The railway company, on the other hand, agreed to furnish at its own expense the necessary labor for the maintenance, repair, and reconstruction of existing lines of poles and wires, as well as for the maintenance, repair, and reconstruction of such additional wires or lines of poles and wires as might be required either on existing roads of the railway company, or on branches and extensions thereof; also on roads that it might lease or control, where there was no telegraph. The telegraph company agreed to furnish at its own expense the labor for the construction of new lines of telegraph on extensions and branches of the railway company's road, as well as on roads leased and controlled by it on which there was no telegraph line; also to furnish at its own expense the labor for stretching additional wires upon existing lines of poles, and upon extensions and branches of the railway company's road, and to furnish and pay the wages of a foreman to take charge of the work of reconstruction, and to direct the laborers that were hired by the railway company. The telegraph company agreed to furnish the railway company, free of charge, and for its exclusive use, enough wires on all of its roads to transact the railway business; but it was provided that only one of such exclusive wires should be called for at one time, and that an exclusive wire should be demanded only when it was actually necessary to accommodate the railroad business. The telegraph company agreed to transmit for the railway company, without charge, over all of its lines of telegraph in the United States, messages, originating at or destined to points on its telegraph lines, and relating strictly to railroad business, the value of which service should aggregate \$750 per month, when the railroad company had 1,000 miles of road in operation, and to increase this allowance of free telegraphic service \$6 per annum for each additional mile of railroad that might be constructed by the railway company. By the twelfth paragraph of contract B it was declared that it should "supersede said contract hereinbefore mentioned [meaning contract A], and all other agreements between the parties hereto, or their respective predecessors, and shall extend to all roads now or hereafter owned or controlled by the railway company while this contract remains in force, and to all branches and extensions thereof, \* \* \* where the telegraph company \* \* \* may not be prohibited \* \* \* from constructing lines of telegraph." It was further provided (and to this clause important consequences are attached by counsel) that the contract should take effect July 1, 1882, and continue in force 10 years, unless sooner terminated by mutual consent.

After the execution of contract B, the parties hereto acted under it continuously for 10 years, and during that period the Manitoba Company extended its railroad from a point in North Dakota to the Pacific Ocean. As the railroad was extended, a new line of telegraph was constructed by the telegraph company on the railroad right of way pursuant to the provisions of contract B; the result being that by October, 1891, telegraph poles had been erected on over 2,000 miles of the railroad's right of way, and over 6,400 miles of new wire had been strung, at a cost to the telegraph company exceeding \$300,000. In addition to erecting the new lines of telegraph, the telegraph company also discharged its obligation under contract B to repair, maintain, and reconstruct existing lines, which at the date of that contract embraced 853 miles of poles, and 1,537 miles of wire. Altogether since the execution of contract B the Manitoba Company has constructed about 2,770 miles of railroad, and the Great Northern Railroad Company, its lessee, has constructed over 1,000 miles of railroad along which lines of telegraph have been erected.

Shortly prior to the expiration of contract B, the Manitoba Company preferred a claim that when that contract expired all the lines of telegraph

standing on its right of way, and erected in the manner and under the circumstances aforesaid, would become its exclusive property, by virtue of the provisions of contract B. This claim was controverted by the Western Union Company, and gave rise to the present action. The Manitoba Company, as complainant, exhibited its bill against the Western Union Company on January 16, 1893, in the circuit court of the United States for the district of Minnesota, alleging many of the facts heretofore recited, and praying that it be decreed to be the owner of the telegraph lines in controversy; that the Western Union Company had no interest therein, save such interest as it might have as a joint owner; that it be decreed that contract A was annulled by contract B; and that the Western Union Company might be enjoined from asserting any claim to the line. Subsequently the bill was amended by making the Northwestern Company a party defendant, and thereupon both of the defendants answered, and filed cross-bills, in which many of the facts heretofore stated were recited at length. It will suffice to say generally that by their answers the defendants asserted that they were the owners of the telegraph lines in controversy; the Northwestern Company claiming them as lessor, and the Western Union Company as its lessee. They also asserted the right to maintain and operate the lines of telegraph perpetually on the railroad right of way. By their cross-bills, however, they prayed that the court would fix the compensation to be paid for maintaining the lines on the railroad right of way, provided it found, as respects any part of the right of way, that they were not entitled to further occupy it without paying for its use.

The case reached a final decree in the circuit court at the January term, 1901, which was favorable to the telegraph company. From that decree the Manitoba Company prosecuted an appeal to this court.

M. D. Grover and George B. Young, for appellant.

Rush Taggart and John F. Dillon (C. M. Ferguson and George H. Fearons, on the brief), for Western Union Tel. Co.

George C. Ripley (Burt F. Lum, on the brief), for Northwestern Tel. Co.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The circuit court decided, in substance, that the seventh and eleventh paragraphs of the Smith & Simmons contract, quoted above in the statement, when considered together, granted to Smith & Simmons "a perpetual easement or right to establish, construct, and continue in the operation of a line of telegraph along the line [of railroad] specified in the contract [to wit, from St. Paul to Watab, Minn.], and along such further lines of railroad as should be constructed by the St. Paul & Pacific Railroad Company, and that it became a vested property right" from the date of that contract or grant, which could not be extinguished save by a reconveyance; that the grant of the easement aforesaid was "a then present and vested grant, covering not only the line particularly described" in the Smith & Simmons contract, "but equally the right of way along railways thereafter built by" the St. Paul & Pacific Railroad Company and its successors in interest, although such rights of way had not then been acquired, and their location was at the time unknown; that this perpetual easement, so termed, was undisturbed and continued to exist, notwithstanding the execution of the three subsequent telegraphic contracts mentioned in the foregoing statement; that these subse-

quent agreements, to wit, the Farley contract and contracts A and B, contained a further assurance of the right or easement theretofore granted; and that, at most, such subsequent contracts only abrogated those executory provisions of the Smith & Simmons contract which determined how the lines of telegraph, as between the telegraph company and the railroad company, should be operated and maintained. The circuit court further held that the easement thus imposed upon the right of way of the St. Paul & Pacific Railroad Company by the Smith & Simmons contract was not extinguished by the foreclosure of the mortgages under which the Manitoba Company, the present appellant, acquired the property, rights, and franchises of the St. Paul & Pacific Railroad Company, but that the property in question passed into the custody of the appellant burdened with the easement, which easement also became attached to all the lines of railroad subsequently constructed or acquired by the Manitoba Company. The decree from which the appeal is taken rests upon these fundamental propositions, which were decided by the learned judge of the trial court; and it depends mainly upon the proposition that the Smith & Simmons contract granted a perpetual easement of the kind above described, which could not be released or extinguished save by a formal written conveyance. In view of the important consequences deduced from this premise, it is the first proposition which deserves consideration.

It will be seen that the stipulations contained in the Smith & Simmons contract are generally of an executory character, and that they consist principally of personal covenants on the part of the contracting parties, all of which they could modify or discharge at their mere pleasure by an oral agreement to that effect, or by making another contract covering the same subject-matter, or by acts in pais clearly evidencing an intent to modify or discharge them. The only provision found within the four corners of the instrument which lends any color to the claim that the St. Paul & Pacific Railroad Company intended to grant a perpetual easement to erect and maintain lines of telegraph on rights of way which it then owned or might thereafter at any time acquire is found in the seventh paragraph, where it is said:

"The said party of the second part [the railroad company] does hereby grant to the said parties of the first part [Smith & Simmons], for the uses and purposes of this contract, and to keep off competing lines, the exclusive right of way for the lines of the telegraph along and upon the lands of the said party of the second part, as far as can be legally done."

It will be observed that there is here an express declaration that the right of way in question is granted for the uses and purposes of the contract, and to keep off competing lines, which, when fairly interpreted, means, we think, that the right granted was to be exercised during the existence of the contract, and would terminate whenever the contract was terminated by express agreement of the parties or otherwise. It was not intended, apparently, as a present grant of an interest or estate in the railroad right of way, to be held and enjoyed by the grantees for all time, independently of the provisions of the agreement, for, if such had been its purpose, it is not probable

that language would have been employed which qualifies the grant, and clearly implies that it was to be limited in its duration by the life of the contract in aid of which it was made. It seems most probable that this seventh paragraph was framed, not with a view of granting an estate in the right of way, which could not be extinguished save by a reconveyance, but, rather, with a view of preventing competing lines of telegraph from occupying it, and insuring to Smith & Simmons, as far as could be legally done, an exclusive right of occupancy for telegraphic purposes during the existence of the contract, and no longer. This was the dominant thought in the mind of the draftsman, and, such being the object which the contracting parties seem to have had in view, the provision in question is entitled to no greater force or effect than an agreement on the part of the railroad company that no other lines of telegraph should be erected on its right of way during the existence of the contract.

The foregoing view concerning the nature and purpose of the provision in question is confirmed by the subsequent acts of the parties in interest, and especially by the conduct of the Northwestern Company, in whose behalf the Smith & Simmons contract seems to have been negotiated, which are wholly inconsistent with the theory that the contract was intended to be a grant, or that it was supposed to contain a grant, of such an easement in the railroad right of way as is now asserted. The agreement which the Northwestern Company subsequently made with J. P. Farley in his capacity as receiver contains no reference to the Smith & Simmons contract, or to any interest in the right of way that had been thereby acquired. The same remark is true as respects contract A, which was subsequently entered into by the Northwestern Company with the Manitoba Company. The relations of the two companies were fully and carefully considered on the latter occasion, and an agreement was signed covering the manner of constructing and reconstructing lines of telegraph and the mode of operation, and granting permission to occupy the right of way, without a reference to any prior agreement, or an intimation that the Northwestern Company had before that time acquired any rights therein. Moreover, when the Northwestern Company transferred its lines of telegraph to the Western Union Company, on May 7, 1881, and professed to schedule and assign to the latter company all of its telegraphic contracts then in force, it did not schedule or otherwise refer to the Smith & Simmons contract as an existing agreement, upon which any rights could at that time be predicated. It is furthermore noteworthy that the last-mentioned contract was not pleaded in the answer of either of the defendants, or invoked as a defense or as the foundation of any right, in any form, until seven years after this action was instituted, when it was pleaded and attached as an exhibit to an amended cross-bill of the Northwestern Company. The Smith & Simmons contract appears to have been treated as *functus officio* by all persons and corporations concerned in the erection and maintenance of the telegraph lines now in controversy for many years before this action was instituted, and it is inconceivable that a contract of such moment could have been so effectually forgotten and so long ignored if the parties immediately

concerned in its execution, or if the Northwestern Company, ever supposed that it was intended as a present grant of such extensive rights in the railroad right of way as are now claimed by virtue of its provisions. When the Smith & Simmons contract was executed, it was doubtless assumed by the parties thereto that it conferred no rights as respects the railroad right of way, except such as could be released or modified by parol; that all the agreements contained therein were of an executory character, which could be annulled at the pleasure of the contracting parties; and that the contract would cease to have any vitality whenever a new contract was entered into, covering the same subject-matter, and containing other and different stipulations regulating the rights of the parties. We are of opinion that this is a correct view of the nature and effect of the Smith & Simmons contract; that it did not, on its delivery, burden the railroad right of way—even the one therein particularly described, between St. Paul and Watab—with an easement which could only be discharged by a formal conveyance, and that, notwithstanding the provisions contained in the seventh paragraph of the contract, the parties thereto and their successors in interest retained the power to otherwise define, settle, and establish their respective rights and interests in the telegraph line, and in the right of way upon which it was erected, by such future parol agreements on the subject as they saw fit to make.

It should be observed in this connection that the further proposition which appears to have been affirmed by the trial court, namely, that the Smith & Simmons contract granted a present and vested right, in the nature of an easement, in those rights of way which had not at the time been acquired by the St. Paul & Pacific Railroad Company, and had not even been located, has much less weight than the claim that such was the effect of the contract as respects the right of way between St. Paul and Watab, that had been located. The grant of an easement, if such a grant had been intended, as respects property which had not at the time been acquired by the grantor, and whose location was at the time unknown, had nothing to operate upon, and could not, in any event, have greater effect than an agreement to convey when the property was located and acquired. It created, at most, a mere equitable right to have the grant perfected when the property to which it appertained had been acquired, but until that time it was a right which could be relinquished orally or by acts in pais. *Holroyd v. Marshall*, 10 H. L. Cas. 191, 210, 211. Any equitable right is susceptible of extinguishment by an oral agreement unless the agreement runs counter to the statute of frauds. It is manifest, therefore, that the Smith & Simmons contract, whatever may have been its purpose, created no present estate or vested interest in rights of way that had not been acquired, which was of such a nature that it could not be released or extinguished save by a formal conveyance. Until such rights of way were located and acquired, and the alleged grant with respect thereto was perfected, it was competent for the parties to the contract, or their successors in interest, by an oral agreement, to relinquish whatever rights they had secured. We are likewise of the opinion, as already stated, that, while the claim to an

easement in the right of way between St. Paul and Watab may rest upon a somewhat better foundation, yet it cannot be sustained, and that such rights therein as were acquired by the Smith & Simmons contract were susceptible of relinquishment by the agreements which were subsequently made, although they were not, in form, conveyances.

Without stopping to inquire whether the Smith & Simmons contract was ever legally assigned to the Northwestern Company (a question that has been somewhat discussed), and assuming, without deciding, that the evidence relied upon to establish an assignment was adequate for that purpose, we pass to a consideration of the subsequent telegraphic contracts,—especially contracts A and B. The Farley contract of 1878 has little bearing, we think, on the present controversy, except as it forms a part of the history of the transaction; and any discussion of the questions which have also been mooted—whether that contract was one which Farley, as receiver, could lawfully make, and whether it was ever authorized or approved by the court which appointed the receiver—seems to be unnecessary.

Contract A deserves greater attention. That contract was entered into after the Manitoba Company had acquired all the property and franchises of the St. Paul & Pacific Railroad Company at the various foreclosure sales, and was the first agreement concerning telegraphic lines along its right of way to which it gave its express assent. The stipulations contained in that contract are plainly of an executory character, and no provision is found which can be construed as a grant of a common-law easement. It is a significant fact, already mentioned, that this contract contains no allusion to any prior agreement, or to rights previously acquired by either party. It deals with the relations thereafter to exist between the contracting parties, and with their rights and liabilities as a new subject-matter, upon the manifest assumption that neither party was embarrassed by prior agreements, and that the contract which was being made would necessarily displace and supersede all prior agreements between their predecessors in interest, if there were any. This contract was not limited as to its duration, but the twelfth and concluding paragraph secured to each party the right to a reconsideration and modification of its provisions upon an equitable basis after the expiration of 10 years, and at intervals of 5 years thereafter. It also, in express terms, bound the Northwestern Company to construct a line of telegraph "along and upon the right of way of any railroad now constructed or \* \* \* hereafter \* \* \* constructed, owned, leased, or operated by the railroad company." But in view of the fact that lines of telegraph then existed along most, if not all, of the roads then constructed, some of which had been erected recently, it would doubtless be a reasonable and proper interpretation of this clause, and it is an interpretation to which we incline, that it only required the Northwestern Company to go over the existing lines of telegraph, and make them as good as new, without constructing absolutely new lines where they were not needed. We conclude, however, that contract A superseded all prior agreements between the predecessors in interest of the contracting parties, as they evidently intended that it should do. We also think that it

placed all the lines of telegraph theretofore constructed upon a plane of equality, so far as the rights of the parties therein or thereto were concerned, and that from the date of the execution and delivery of contract A, and until it was changed or modified, it became the measure of their rights and liabilities under and subject to those general rules of law in the light of which it must be considered and construed.

Turning next to contract B, which, though executed on August 23, 1882, was to take effect as of July 1, 1882, it will be seen that it differs from contract A, in that it not only recites a desire on the part of the contracting parties to cancel contract A, but expressly provides that it shall supersede that contract, "and all other agreements between the parties hereto or their respective predecessors"; thereby making plain a purpose which was left to be deduced by inference by the earlier agreement. In this contract, also, the attention of the contracting parties was directed to the ownership of the existing lines of telegraph then standing on the right of way of the railway company, and at the very commencement of the contract it was recited, in substance, that the parties (that is to say, the Manitoba Company and the Western Union Company), jointly owned all the lines of telegraph then in operation that were being operated under contract A. This seems to us to have been a very just and equitable view of their respective property rights in the lines of telegraph in question, in view of the manner in which they and their predecessors in interest had severally contributed to the erection and maintenance of said lines, and most likely it is the conclusion to which a court of justice would have arrived if it had been called upon at that time to determine the question of ownership. But be this as it may, the recital so made in contract B, forming, as it does, the basis and a part of the consideration for the other stipulations contained in that agreement, plainly estops the Manitoba Company and the Western Union Company from controverting the fact so recited and admitted. This proposition is so obvious that learned counsel for the Western Union Company, in the course of the oral argument, admitted that the Manitoba Company had a proprietary interest in, and was a joint owner of, all the lines of telegraph that had been erected, when contract B was executed, on the 853 miles of right of way then owned by the railway company.

It is urged, however, by the Northwestern Company, that the agreement entered into by itself with the Western Union Company on May 7, 1881, referred to in the foregoing statement, by virtue of which the Western Union Company acquired the possession and control of all the then existing lines of telegraph, did not empower the Western Union Company to put an end to contract A, and to substitute contract B in its place; or, to state its contention more accurately, it says that, while it had no interest in any modifications of contract A which might be made, yet that the Western Union Company had no power to consent to alterations therein "such as should affect its [the Northwestern Company's] vested rights." The Western Union Company joins in this contention, although it exercised, without any apparent doubt of its authority to do so, the right to negotiate and execute contract B, and recited in that contract that contract A had been "duly transferred" to it, and that its interest in the lines of telegraph to



which the agreement related was that of a joint owner with the Manitoba Company, on whose right of way they were erected.

The first observation to be made concerning this contention is that no provision found in the agreement of May 7, 1881, between the two telegraph companies, expressly conferred upon the Western Union Company the power to make any change in contract A without the consent of the Northwestern Company. The concession which is in effect made, therefore, that the Western Union Company could modify it if it thought proper to do so, is an admission that this power of modification was conferred by a clear implication from other provisions of the agreement. And this admission, we think, is a necessary one, when it is considered that by the eighth article of the agreement of May 7, 1881, the Northwestern Company covenanted that for 99 years it would not "engage in the business of telegraphy, nor build nor own any lines of telegraph, or hold the same by lease or otherwise." This was a covenant to suspend the exercise of all its vital functions, and to devolve upon the Western Union Company the performance of all the duties which, by the acceptance of its charter, it had engaged to perform. It must have been foreseen when it transferred all of its visible property and assigned all of its telegraphic contracts to the Western Union Company that in the course of a century it would be necessary to make repeated changes in these contracts; that it would likewise be found expedient in some instances, at least, to exchange certain contractual rights for others of greater value and importance; and as some of the contracts mentioned in the schedule of telegraphic contracts, which is attached to the agreement of May 7, 1881, expired by express limitation before the lapse of 99 years, it was known, of course, that, in the natural order of events, new contracts would have to be negotiated to take the place of those that had expired. In view of these considerations, and the fact that no limitation was placed upon the power of the Western Union Company to deal with these assigned contracts, or provision made requiring the assent of the Northwestern Company to proposed modifications, it must be inferred, we think, that it was the intention to leave the Western Union Company at full liberty to deal with them as it thought best. If it be conceded, as we think it is and must be, that the Western Union Company had the power to agree upon alterations in contract A and in the other assigned contracts, the inquiry arises, naturally, where is there any limitation upon the power in this respect? Why could it not consent to the cancellation of a particular contract, and the substitution of another in its place, as well as to a modification of one or more of its provisions? It is obvious that any change in the provisions of one of these contracts altered to that extent some right which the Northwestern Company had thereby secured when it was executed, and we are unable to draw any distinction between the rights so secured, or to say that one is any more sacred or vested than another. All of them were rights growing out of personal covenants made by the respective parties, which, as we have heretofore held, were capable of modification or extinguishment by parol. In other words, none of the contracts—not even the Smith & Simmons contract—contained a

present grant of an interest in the railroad right of way, which could only be relinquished by a conveyance.

There are other considerations which lead us to conclude that the Western Union Company had power to supersede contract A by contract B. By the agreement between the telegraph companies, the Northwestern Company, as before stated, abandoned the exercise of all its corporate functions for the long period of 99 years. It reserved to itself no power to resume the possession of its property and to re-engage in the business of telegraphy for any breach of the agreement between itself and the Western Union Company, save for a failure of the latter company to pay the taxes on the property which it had acquired, the interest on the bonds of the Northwestern Company, and the promised dividends to the stockholders of that company. Even these promised dividends were not to be paid to the Northwestern Company for distribution by it in the ordinary way, but were to be paid directly to the individual stockholders; and, since the agreement was entered into, the Northwestern Company, according to the evidence, has not kept a record of the transfers of its own stock, but has intrusted that duty to the Western Union Company, and, as it seems, does not know at the present time who are its shareholders, except as it may be advised by the last-named company. Obviously, therefore, it was understood by both of the contracting parties that the Northwestern Company should remain in a comatose condition during the life of the agreement, and the fact that it was left in this condition by the express provisions of that instrument may account for the alleged fact, if it be a fact, that it was not consulted when contract B was executed, and remained ignorant of its provisions until the commencement of the present litigation. In view of considerations such as these, we are constrained to believe that the provision contained in the agreement of May 7, 1881, whereby the Western Union Company covenanted to restore the lines of telegraph to the Northwestern Company at the expiration of 99 years, affords no evidence of an intention to so restore them, or of an expectation on the part of either company that they would be restored, and that the Northwestern Company would at that remote period resume the exercise of its corporate functions. This provision, we think, was merely colorable; the real purpose of the agreement being to effect a merger of the business of the two companies, and to place it under the sole direction and control of the Western Union Company. The purpose so apparent on the face of the instrument, of effecting a practical consolidation of telegraph lines by means of an agreement which has some resemblance to a lease, although neither the word "lease" nor the word "demise" is found therein, is of much importance, and entitled to great weight in determining what power was intended to be devolved upon the Western Union Company with respect to dealing with the assigned telegraphic contracts. It has sufficient weight, we think, to justify the conclusion that it was the intention of both of the telegraph companies to vest the Western Union Company with authority to modify the assigned contracts, or to supplant them by new agreements,—in other words, to deal with them as it thought best. The Northwestern Company intended, we think, to intrust the protection of its interest

in the matter of the negotiation of new contracts with railroad companies to the Western Union Company, upon the assumption, no doubt, that the interests of the two companies in this respect were practically identical. And this seems to have been the view which was prevalent about the time the agreement of May 7, 1881, was made. For in a letter written by the assistant general manager of the Manitoba Company to the President of the Northwestern Company on September 9, 1881, the agreement in question is spoken of as a "sale" of the Northwestern Company's interest, while in a letter written by the president of the Northwestern Company to the Manitoba Company on March 13, 1882, he informed the Manitoba Company that he was advised that the Western Union Company was ready to meet it in the negotiation of a "new contract," if it so desired; evidently believing that it was within the power of the Western Union Company to make a new contract if it thought proper to do so.

Relative to this branch of the case, it should be further observed that by contract A the Northwestern Company undertook the performance of certain active and continuous duties,—such, for example, as the construction of new lines of telegraph as the Manitoba Company extended its lines of railroad or acquired other roads. These duties it has not discharged since August 23, 1882, when contract B was executed, but has been in default for years, unless what has been done by the Western Union Company under the latter contract be accepted as a performance by the Northwestern Company of the acts which it engaged to do and perform. The Northwestern Company insists at this time that it is not, and never has been, in default, and that what has been done under contract B inures to its benefit as a full performance of its obligations under contract A. It also lays claim to all the new lines of telegraph that have been erected since August 23, 1882, irrespective of the fact that these lines were built by the Western Union Company in pursuance of the provisions of contract B, which it executed in its own name and behalf, representing itself at the time to be a joint owner of the then existing lines. Now, as one cannot adopt and claim the benefit of acts done by another in his own name, and ostensibly on his own account, unless he has previously given that other authority to do the acts in question (*Hamlin v. Sears*, 82 N. Y. 327, 330; *Railroad Co. v. Gazzam*, 32 Pa. 340, 347, 348; *Mitchell v. Association*, 48 Minn. 278, 284, 51 N. W. 608; *Mechem*, Ag. § 127), it may be that the Northwestern Company, by claiming the benefit of all that has been done by the Western Union Company under contract B, and by asserting its ownership of the new lines constructed in pursuance of its provisions, should be held to have thereby admitted the power of the Western Union Company to enter into that contract. Without reference, however, to the position so assumed by the Northwestern Company, and to the claim which it makes in the respect last mentioned, we are of opinion, for the reasons above stated, that the Western Union Company acted within the scope of its authority in consenting to the cancellation of contract A, and the substitution of contract B in its place, and that the provisions of this latter contract are binding alike upon both telegraph companies. Such, unquestionably, was the understanding of both con-

tracting parties when contract B was executed, and they have acted on that understanding for years, ignoring the provisions of all prior agreements.

This brings us to a consideration of the question, to whom do the lines of telegraph now in controversy belong? As respects the lines that had been constructed on July 1, 1882, this question was answered by the parties themselves, by the recital contained in contract B; the recital being, in substance, that they were owned jointly by the Western Union Company and the Manitoba Company, which we understand to be an admission that they were equal joint owners, inasmuch as they and their predecessors in interest had contributed about equally to their erection and maintenance. And as neither of the contracting parties undertook by that agreement, or manifested an intent, to transfer or relinquish its proprietary interest in said lines to the opposite party, it must be true, we think, that they continued to remain the joint property of the two companies at least until contract B expired by limitation.

The lines that were erected after July 1, 1882, under the provisions of contract B, were constructed at the sole cost of the Western Union Company for the labor, superintendence, tools, and materials which were employed and used in their erection. The Manitoba Company made no contribution to the erection of these lines, in the shape of money, labor, or materials, save that it distributed the materials therefor free of charge, when said materials had been delivered at any of its stations, and also transported the employes of the telegraph company, when engaged in its business, free of charge. The new lines erected after July 1, 1882, were in reality created by the Western Union Company; being almost exclusively the product of its money, time, labor, and skill. In view of this fact, and the further circumstance that the lines in question were erected by consent on the railroad right of way, and on the express understanding, as evidenced by the terms of contract B, that they should "form a part of the general [telegraphic] system of the telegraph company," we are of opinion that the lines (meaning by that the poles, wires, batteries, etc.) belonged, when completed, to the company whose money and labor had erected them, and that they remained its property at least until the expiration of contract B. *W. U. Tel. Co. v. Burlington & S. W. R. Co.* (C. C.) 11 Fed. 1, 5. It has been held by the highest authority that the track of a railroad company, when laid on the land of another with his consent, does not necessarily become a part of the land, and the property of the owner of the fee, although the ties are imbedded in the soil. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 142 U. S. 396, 415, 12 Sup. Ct. 188, 35 L. Ed. 1055. And no reason is perceived why a telegraph line, when erected, necessarily becomes a part of the realty because the poles are set in the earth. Whether the poles and wires lose their character as personality, and become the property of the owner of the fee, depends in a great measure upon whether the one who erected them and strung the wires thereon intended such a result. *Railway v. Dunlap*, 47 Mich. 456, 465, 11 N. W. 271; *Navigation Co. v. Mosier*, 14 Or. 519, 13 Pac. 300, 58 Am. St. Rep. 321. Besides, the parties to contract B assumed when they executed it that the ex-

isting lines of telegraph had not become realty by attachment to the soil, or at least that the principles of natural justice required them to concede as much, for by that agreement they freely admitted that as they had contributed about equally to the erection of the then existing lines, and had constructed them for their mutual benefit and advantage, they were joint owners thereof, notwithstanding the fact that the poles stood on the railroad right of way. We but apply the same doctrine when we decide that the lines which were erected after July 1, 1882, at the sole cost of the Western Union Company, after their erection remained its property.

It is suggested, however, by the Manitoba Company, that when contract B expired by limitation on July 1, 1892, all the lines of telegraph in controversy became its property, irrespective of the question of ownership prior thereto, because they stood at the time on its right of way, and were not removed during the life of the contract. By this contention the appellant invokes in its favor the application of a rule of law which applies as between a landlord and his tenant, and between an owner of land and one who without permission permanently attaches some structure thereto, but it does not seem to us to be a rule which is at all applicable to the case in hand. No such relation as that of landlord and tenant existed between the railway company and the telegraph company, nor were the lines of telegraph now claimed by the former as its exclusive property erected upon its right of way without permission. On the contrary, they were placed there with its express sanction, and not for its accommodation only, but also for the benefit and advantage of the Western Union Company. They were also placed there upon the express understanding that the telegraph company intended to make the lines, when erected, an integral part of a great and ever-growing telegraphic system. Again, the parties between whom the agreement for the erection of the telegraph lines was made were quasi public corporations, both of whom were engaged in interstate commerce, and both of whom were equally bound to render important public services without interruption. Neither of these companies were endowed with the large powers and franchises which they possess with the intent that they should be exercised solely or mainly for the benefit of the shareholders, but all such powers and franchises were granted upon the implied understanding that they should be exercised in a manner which would be most conducive to the public welfare and convenience. Aside from these considerations, it appears that when contract B was entered into the railway company had already extended its road into North Dakota, and had in contemplation at that time a further extension of its main line, as well as the construction of branch lines,—such an extension, in fact, as would enable it to keep pace with the development of the country and the progress of civilization. In this situation the parties entered into a contract which bound the Western Union Company to construct a substantial line of telegraph along the railroad right of way as fast as any new road was projected and built, and as new lines were acquired, and to do so substantially at its own expense. During the life of the contract the railway company carried out its purpose of extending its road from its original terminus, and actually

extended it to the Pacific Ocean; thereby imposing on the telegraph company the duty, which it faithfully performed, of constructing two or three thousand miles of telegraph line, over five hundred miles of which was built during the last three years of the contract period.

In view of these considerations, it is obvious, we think, that neither the railway company nor the telegraph company, when they entered into contract B, expected that the lines of telegraph to which the agreement related would be removed from the railroad right of way on the expiration of the agreement, or desired them to be so removed. Very likely, it would have been physically impossible to have effected a removal of the lines on the day the contract expired, if the parties had so desired, and until the very end of the contract period the right existed to maintain the lines on the right of way. Besides, as the Manitoba Company laid claim to all the lines, and asserted that it was the sole owner thereof by reason of their being on its right of way, and would doubtless have resisted the removal by legal process if the attempt had been made, it cannot at this time found any lawful claim to the telegraph lines, based upon the ground that they were not removed from its premises during the contract period. In other words, the telegraph company cannot be said to have been in default, or to have lost any of its rights as respects the lines in question, because it failed to do what the railway company asserted at the time that it had no legal right to do, and would have resisted if the act had been attempted. So long as a controversy existed as to the ownership of the lines, it had the right to wait until that controversy was determined, and did not sacrifice any of its rights by so doing.

In view of the considerations aforesaid, it is likewise manifest, we think, that the Western Union Company did not enter into contract B with the understanding that the clause found in the twelfth paragraph, declaring that it should "continue in force for the term of ten years," would have the effect of transferring to the railway company, at the end of the contract period, all the lines,—those already existing, of which it was then a joint owner, as well as those which it might subsequently erect at its sole cost and expense. That view of the effect of the contract, involving, as it did, the relinquishment on its part of its interest in the lines jointly owned, and in other lines of telegraph, erected at its own expense, which might be two or three thousand miles in length, and involving, as well, the disruption pro tanto of its telegraphic system, renders it altogether too unreasonable, not to say unconscionable and absurd, to warrant a court of justice in presuming for a moment that the telegraph company intended to enter into such an agreement, or supposed that it had done so. It is a general rule for the interpretation of contracts, as well as for the interpretation of statutes, that they should not be so construed as to lead to injustice, oppression, or absurd consequences, if such a result can be avoided. *U. S. v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278; *Lau Ow Baw v. U. S.*, 144 U. S. 47, 59, 12 Sup. Ct. 517, 36 L. Ed. 340; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 461, 12 Sup. Ct. 511, 36 L. Ed. 226. Some other interpretation of the provisions of contract B, which is more reasonable, must accordingly be adopted, if the language of the instrument and the environment of the parties

will permit. Looking at the situation and relations of the parties at the time contract B was executed, we think that it is entirely reasonable to infer that the clause declaring that the contract should continue in force for 10 years has reference to the terms upon which lines of telegraph should be constructed, maintained, and operated during that period, and that it was not intended to have any effect upon the ownership of the lines,—either those that were then standing, which belonged to the parties jointly, or those which might be afterwards constructed. If it had been the mutual understanding of the contracting parties that the lines were to become the sole property of the Manitoba Company at the end of the contract period, then it is wholly unaccountable that a stipulation to that effect, covering such an important subject-matter, was not inserted in the contract. And the fact that no such provision is found in the agreement raises a strong presumption that such a result was not within the contemplation of either party. They foresaw that after the expiration of 10 years it might be inexpedient and inequitable, owing to altered conditions, to further construct, maintain, and operate lines of telegraph on the railroad right of way on the terms specified in contract B. They accordingly agreed that the arrangement as made should continue in force 10 years, leaving the parties at full liberty after that time to enter into other and different arrangements if they thought proper. They did not intend, however, by this clause, to extinguish the telegraph company's interest in the lines of telegraph at the end of the contract period, nor would it be either just or reasonable to deduce the conclusion that such was the necessary legal effect of the clause in question, or the necessary effect of any other provision of the agreement.

In conclusion, on this branch of the case, it is proper to add that we entertain no doubt that the railway company was aware when it executed contract B that the telegraph company did not construe that agreement as having the effect now contended for by the railway company,—that is to say, as amounting to a relinquishment by the telegraph company, at the end of 10 years, of all its interest in the existing lines, and of its interest in such new lines as it might construct in the meantime. It knew very well, we think, that the telegraph company viewed the contract in a different light, and believed that its property rights would not be impaired by any of its provisions. It matters not, therefore, that the railway company may have interpreted the contract differently, or that it may have entertained a secret purpose of claiming the lines as its sole property when the contract expired by limitation, for a party to an agreement will be deemed to have assented to it in the sense which he knew the opposite party intended it to have when the latter executed it, provided the language employed is fairly susceptible of the meaning which the opposite party imputed to it. *Aluminum Co. v. Lowrey*, 24 C. C. A. 616, 628, 79 Fed. 331.

The result is that we reach the following conclusions: First, that the Manitoba Company and the Western Union Company on July 1, 1882, were equal joint owners of all the lines of telegraph that had been erected on the railroad right of way prior thereto, and that their interests therein remain unchanged at the present time; second, that the Western Union Company is the owner of the lines erected since

the latter date at its own cost and expense, subject, however, to a reasonable allowance to the railway company for its services in distributing the materials for their erection; and, third, that their respective interests as aforesaid were unaffected and unimpaired by the termination of contract B. These conclusions are announced, however, without prejudice to the rights of the two telegraph companies inter sese; leaving them at full liberty to litigate concerning those rights as they may be advised.

The railway company does not pray in its bill of complaint for the removal of any of the lines of telegraph from its right of way, and obviously does not desire them to be removed. It asserts, rather, that it is the sole owner of the lines, and asks that its ownership may be established by judicial decree, and that the telegraph company be enjoined from interfering with its possession and entering upon its premises for the purpose of maintaining and operating the lines. This, then, is the substantial relief which the railway company seeks, and the only relief which could be accorded to it. On the other hand, as has appeared heretofore, the telegraph companies assert that they are the sole owners of the lines, and that they have the right to maintain them perpetually on the railroad right of way. In their cross-bills, however, the telegraph companies pray, in substance, that if the court rejects the claim to a perpetual easement, and is of opinion that the lines of telegraph are erected upon any portion of the right of way which they no longer have the right to occupy for telegraphic purposes without making due compensation, it will fix the amount of compensation to be paid, and the terms upon which the lines shall be maintained and operated in future, and that upon payment of the sum so ascertained it will decree that the lines be allowed to remain where they now are. It would seem, therefore, that the substantial controversy between the parties is that concerning the ownership of the lines, and the existence of a perpetual easement, which controversy has already been determined. These questions having been decided, there is a strong probability that the parties will be able to come to an agreement relative to the future maintenance and operation of the lines upon the premises where they now stand, since neither party seems to desire their removal. A stay of further proceedings in the case for the period of six months, or more if counsel so desire, should, in any event, be ordered, to enable the parties to effect such an agreement if they are so disposed.

We are of opinion that it is competent for a court of equity, in the situation which confronts us in this case, to fix the compensation to be paid to the railway company for the use of its right of way for the future support and maintenance of the telegraphic lines which were erected thereon subsequent to July 1, 1882, under the provisions of contract B, and that this power should be exercised if it so happens that no agreement can be reached by the parties themselves with respect thereto, and the railway company shall insist in future upon their being removed from its premises. Telegraph companies are recognized everywhere as common carriers of information, and such important factors in the transaction of interstate commerce as to bring them within the protection of the federal government, and subject them



to its regulation and control. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, 9, 24 L. Ed. 708. So important are the public functions which they perform, that an act of congress passed on July 24, 1866 (Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579]), gave to telegraph companies who accepted the provisions of the act, in broad terms, the right to construct and maintain their lines "over any portion of the public domain of the United States, \* \* \* and along any of the military or post roads of the United States which [had] been or [might thereafter] be declared such by law," provided they were so constructed as not to interfere with travel on such military or post roads. A subsequent act of congress (Rev. St. § 3964 [U. S. Comp. St. 1901, p. 2707]) declared all railroads then or thereafter in operation to be post roads; and while the construction placed on the former act has been that it does not give to a foreign telegraph company in any state the right to enter upon private property and set its poles without the owner's consent (*Pensacola Tel. Co. v. W. U. Tel. Co.*, supra; *Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 243, 20 Sup. Ct. 867, 44 L. Ed. 1052), yet, if a telegraph company erects its poles on a railroad right of way with the consent of the owner, as in the present instance, and its poles and wires in no wise interfere with travel or the operation of the railroad, no reason is perceived why a court of equity should compel it to remove its lines from the right of way, if the telegraph company is willing to pay a reasonable compensation for its use, especially where it appears that no express agreement was made that they should be removed, when the lines were erected. Furthermore, the statutes of the state of North Dakota (Rev. Code 1899, § 5956) expressly confer upon telegraph companies the right to exercise the power of eminent domain for the location of their lines, and we presume that similar statutes have been adopted in some, if not all, of the states where other portions of the lines in controversy are located. This power, of course, cannot be exercised for the condemnation of rights of way over property already devoted to a public use, if the new use would materially interfere with the old; but it is not apparent that the existence of a telegraph line on a railroad right of way, where such lines are usually erected, would materially interfere with the operation of any railroad, and in the present instance it is conceded that there would be no such interference.

It has been held, and the proposition seems to be well established by authority, that where a corporation which has the right to acquire property by an exercise of the power of eminent domain has taken possession of property, and has erected or is engaged in the erection of structures thereon, but has not complied with some condition precedent necessary to render its acts in all respects lawful (such, for instance, as a failure on its part to pay some person the damages necessarily incident to the maintenance of the structure), and such person appeals to a court of equity for an injunction to restrain the maintenance or to compel the removal of the structure, the court to which such appeal is made has the power to determine the amount of the unpaid damages, and to withhold an injunction, and direct that the structure be permitted to remain and be operated, provided the

assessed damages are paid. Courts of equity will, as it seems, the more readily pursue such a course when important public interests are at stake, and a contrary course would be productive of much public inconvenience and annoyance. *City of New York v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; *Pappenheim v. Railway Co.*, 128 N. Y. 436, 444, 28 N. E. 518, 13 L. R. A. 401, 26 Am. St. Rep. 486; *Shepard v. Railway Co.*, 117 N. Y. 442, 448, 23 N. E. 30, and cases there cited. See, also, *Osborn v. Missouri Pac. R. Co.*, 147 U. S. 248, 259, 13 Sup. Ct. 299, 37 L. Ed. 155; *Joy v. City of St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; *McElroy v. Kansas City (C. C.)* 21 Fed. 257.

We think, therefore, that the decree should contain a provision authorizing the Western Union Company, if it fails to come to an agreement with the railway company, and the latter company shall insist upon a removal of the lines, to apply to the court at the expiration of the aforesaid stay of proceedings for the appointment of a master and two commissioners to assess such reasonable compensation as they think ought to be paid by the Western Union Company for the privilege of maintaining the lines of telegraph erected since July 1, 1882, where they now are, and the compensation to be paid for the distribution of material when the lines were built. The lines erected prior to that day do not stand on the same footing. They are the joint property of the railway company and the telegraph company, and were placed on the former's right of way by mutual consent of the joint owners, where they have ever since remained; and, as this is not a proceeding in partition for the severance of their joint interests, the lines in question should remain where they are, subject to joint user until the joint ownership is extinguished by agreement or by a suit instituted for that purpose.

As it may happen that the court will have no occasion in future to fix the compensation to be paid by the telegraph company for the use of the aforesaid right of way, it is not deemed necessary at this time to consider the question whether any part of the right of way on which lines of telegraph were erected subsequent to July 1, 1882, was acquired by the railway company under such circumstances as entitle the telegraph company to use it without the payment of any compensation. This question may properly be deferred until the occasion arises for its determination.

The decree below is accordingly reversed, and the case is remanded to the circuit court, with directions to vacate its former decree, and in lieu thereof to enter a decree embodying the foregoing conclusions, and containing, among others, the following provisions: That is to say, establishing the ownership of the lines of telegraph as herein-before adjudicated; directing a stay of all further proceedings in the cause for the period of six months or more from the date of entering the decree, as may be agreed by counsel, and providing that in the meantime the lines of telegraph shall be maintained, operated, and used in all respects as heretofore, unless the parties shall otherwise mutually agree; also granting permission to the Western Union Company, as heretofore more particularly explained, to apply for the appointment of a master and two commissioners to fix the compen-

sation to be paid by the telegraph company for the use of the right of way and the distribution of materials; such application to be made on 60 days' notice to the appellant, and reserving to the court, should such an application be made, full power and authority, on the coming in of the report of said commission, to determine, with respect to any part of the right of way, whether it was acquired by the railway company under such circumstances that the telegraph company should be permitted to use it without compensation. The costs in this court will be divided equally between the contending parties.

SANBORN, Circuit Judge (dissenting). While I agree in the main with the views expressed and the results reached in the opinion of the court, there is a single conclusion there announced to which I am unable to subscribe. I concur in the view that the telegraph company acquired no right of way over the property of the railway company after the expiration of the term of the contract of 1882 and that the two corporations are the joint and equal owners of the lines of telegraph constructed prior to the commencement of the term of that contract. But the facts and considerations which lead to these results seem to me to impel with equal cogency to the conclusion that the lines of telegraph constructed under the contract of 1882 are also the joint property of the two corporations that erected and used them. The rights of these two corporations in these lines rest upon and are fixed by the contract of 1882, and are determinable by a proper construction of its terms. The decree in this suit must be founded upon that contract, and can lawfully go no further than to practically enforce its specific performance. The majority of the court finds in that contract an agreement by the telegraph company to pay the railway company for the distribution of the materials which were used in the construction of the lines erected after July 1, 1882, and an agreement of the railway company that the telegraph company is the sole owner of these lines, and directs a decree to that effect. Careful and repeated perusals of the contract have failed to disclose to my mind any agreement, or any intention to make an agreement, that either of the parties to this contract should become the sole owner of any of these lines, or that either of these parties should ever pay to the other any compensation whatever for the things done or furnished in the construction or maintenance of the wires or poles. I have been unable to find any agreement in this contract that the railway company should pay the telegraph company for the materials the latter furnished for the construction or maintenance of the property, or that the telegraph company should pay the railway company for the distribution of any of the materials furnished by the telegraph company, or for the labor which the railway company bestowed upon the maintenance and repair of the lines. On the other hand, the agreement, in its first and second paragraphs, expressly provides that the telegraph company shall furnish the materials and labor for the stretching of new wires, and the materials for the construction and repair of all wires, "at its own expense," and, in its seventh paragraph, that the railway company shall distribute these materials (those furnished for construction, as well as those furnished for reconstruc-

tion, repair, and maintenance) "free of charge"; and the entire contract seems to me to contemplate the prosecution of a joint enterprise; to evidence a joint ownership of all the property of which it treats,—of that to be produced under it, as well as of that already in existence; and to set forth the specification of those things which each owner should contribute toward the construction and maintenance of the joint property, together with the extent of the use of it which each owner should enjoy. My mind has been forced to this conclusion by the following considerations:

1. The parties to the contract were joint owners of the lines of telegraph along 853 miles of the railroad, and this was an agreement between them for the repair and extension of these lines. The contract provided that the parties were joint owners of the existing lines; provided what should be contributed by each to the reconstruction and maintenance of the lines in existence, to the erection of additional wires upon them, and to the construction, reconstruction, and maintenance of their extensions; and specified the limits of the use which each corporation should enjoy of the lines already in existence and of those which were to be erected. The facts that this was a contract for the reconstruction and extension of property jointly owned, and that the agreement recited this joint ownership, and provided for no other, persuasively argue that it was the intention of the parties, and the effect of the contract, to vest in each of them the same title and interest in the additions to and extensions of their joint property that they already had in the property itself. When joint owners of property agree to add to or to extend it, stipulate the amounts which each shall contribute to the additions or extensions, and make no stipulation that the title of the additions or extensions shall differ from that of the existing property, the natural inference is that the title and ownership of the additions or extensions is the same as that of the property to which these additions or extensions are made. If an additional wire was stretched, under the second paragraph of this contract, along the 853 miles of railroad by the side of which the telegraph lines were already constructed when this agreement was made, that wire became the joint property of the two parties to this contract. The contributions of the two parties to the stretching of this wire were the same as were their contributions to the erection of the extensions of the lines. If this additional wire or any other wire or line was extended beyond the 853 miles under this identical contract, it seems to me that its ownership must be the same as that of the original wire or line.

2. The contract contains no provision that either party shall compensate the other for any materials furnished or services rendered by the other in the construction, repair, or maintenance of any of the lines or wires. When one party renders services or furnishes materials to produce or preserve the property of another, the latter usually pays or agrees to pay him for his materials or labor. But when joint owners furnish materials or render services to produce, extend, or preserve their joint property, or when one constructs or maintains his own property, no compensation or stipulation for compensation is ordinarily made, because the ownership of the property produced

itself compensates for the labor or material. The fact that each of these parties agreed to contribute and did contribute certain materials and labor specified in the contract, to the additions and extensions to the joint property in existence, without any agreement that either should compensate the other therefor, strongly indicates their joint ownership of the new wires and lines, and that their joint title to them constituted the inducement and the compensation for their contributions.

3. The contract requires the parties, respectively, to furnish the same materials and to render the same services in the construction, reconstruction, repair, and maintenance of wires and poles on the lines already in existence when the contract was made, and which it declares were jointly owned, that it does in the construction, reconstruction, repair, and maintenance of the wires and poles to be subsequently erected under it. The broad terms of the agreement are that the telegraph company shall furnish the materials and the labor for every new wire stretched; that it shall furnish the materials and tools for the reconstruction, repair, and maintenance of all lines; that the railway company shall distribute the materials and furnish all labor for the reconstruction, repair, and maintenance of all the wires and poles. These terms apply uniformly and with the same force and effect to the lines constructed prior to July 1, 1882, and to those which were erected after that date. Thus the first paragraph of the contract provides that the telegraph company shall furnish all the materials and tools for the maintenance, repair, and reconstruction of the lines previously erected. But it also provides that it shall furnish all the materials and tools for the maintenance, repair, and reconstruction of all the wires and lines that shall be subsequently constructed under the agreement. The second paragraph provides that the railway company shall furnish all the labor for the maintenance, repair, and reconstruction of the lines subsequently constructed. But it also provides that it shall furnish all the labor for the maintenance, repair, and reconstruction of the lines previously erected. The same paragraph provides that the telegraph company shall furnish all the labor for the erection of the new wires on the lines to be constructed. But it also provides that it shall furnish all the labor for the stretching of all new or additional wires on the lines previously built. The seventh paragraph requires the railway company to transport and distribute free of charge all materials for the construction, maintenance, operation, repair, or reconstruction of the extended lines. But it also provides that it shall transport and distribute in the same way all the materials for the reconstruction and repair of existing lines, and for the stretching of additional wires thereon. The fact that the contract requires the same contributions from each of the parties to the construction, repair, and maintenance of the wires and poles upon the extensions that it requires of them for the construction, reconstruction, repair, and maintenance of the wires and poles along the lines which were already in existence, and which were jointly owned, is very persuasive evidence that the ownership of the extensions and additions was the same as that of the lines to which these extensions and additions were made.

4. The contract provides that the respective parties shall have the same measure of use of the lines constructed after the commencement of its term that they shall have of those erected previous to that date. It requires the telegraph company to stretch and set apart for the exclusive use of the railway company, on the existing as well as on the contemplated lines, as many wires as shall be necessary to transact its railway business, and it requires the railway company to maintain them. It calls upon the telegraph company to furnish instruments, local and main batteries, on the same terms for the operation of the old as for the operation of the new lines. Indeed, there is no provision of the contract relative to the operation and use of the wires and lines which does not apply with equal force and pertinency to the lines constructed before and to those erected after the 1st of July, 1882.

The situation and relations of the parties when they made this contract of 1882, and the terms of this agreement to which reference has now been briefly made, seem to me to point unerringly to the conclusion that the parties to it became joint owners of the new lines constructed under it, as they were of the old lines which were in existence when the contract was made, and to which the new lines were mere additions or extensions. The joint ownership of the existing lines when the contract was made; the joint nature of the enterprise of which the contract treats, and of the contemplated undertaking, to wit, the extension of telegraph lines jointly owned along the extending railroad on which they were stretched; the provisions of the contract that the parties should make their respective stipulated contributions to the construction, reconstruction, and maintenance of the lines free of charge, as they would naturally contribute to the production or extension of their joint property; the fact that the contract requires the respective parties to make the same contributions to the stretching of additional wires along the constructed lines as to the stretching of new wires along the extensions, and the same contributions to the reconstruction, repair, and maintenance of the new lines as to the reconstruction, repair, and maintenance of the existing lines which were jointly owned; the fact that the contract secured to each party, upon the same terms, the same measure of use of the lines constructed prior to the commencement of its term which were jointly owned as of those subsequently constructed,—all these facts and considerations converge with compelling force to prove that the parties to this contract became joint owners of all the wires stretched and lines of telegraph constructed under it, as they were of those to which these wires and lines were additions and extensions. In my opinion, this court should direct the entry of a decree that the wires stretched and lines of telegraph constructed under this contract became the joint property of the telegraph company and the railway company, instead of the directions regarding these lines contained in the opinion of the majority, and should leave them in that condition until the joint ownership is extinguished by agreement or by subsequent proceedings in the court below in this or some other suit for that purpose.

## WATKINS et al. v. KING.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1902.)

No. 365.

## CIRCUIT COURT OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTION.

The fact that a question as to the construction or application of the constitution of the United States arises incidentally in the trial of an action in a circuit court, as upon objection to the admission in evidence of an act of a state legislature as a muniment of title, on the ground that it was in contravention of the constitution, does not deprive the circuit court of appeals of jurisdiction to review the whole case on a writ of error.

## 2. BOUNDARIES—LOCATION OF LINES—QUESTION FOR JURY.

The question of the location of a boundary line is one of fact, and where the evidence is contradictory, or where reasonable minds might draw different conclusions from undisputed facts shown, such question should be submitted to the jury.

## 3. SAME—EVIDENCE TO RELOCATE SURVEY—CONFLICTING CALLS.

Under the settled rule that calls in a survey for natural objects must control both course and distance, it is error for a court to charge a jury to ignore such calls, as having been made through ignorance or mistake, and to be governed by courses and distances, because the objects called for are not found on the courses or at the distances called for, where there is evidence tending to show that the objects exist, and to identify them sufficiently to justify a finding that they were those seen and called for by the surveyor, however much they may be at variance with the courses and distances called for; nor is such charge justified by the further fact that such a finding would make the quantity of land embraced within the survey much smaller than that stated.

In Error to the Circuit Court of the United States for the Western District of Virginia.

R. R. Henry, Z. T. Vinson, and William E. Burns (John A. Shepard, Maurice Belknap, and J. Randolph Henry, on the brief), for plaintiffs in error.

Maynard F. Stiles and S. L. Flournoy, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

GOFF, Circuit Judge. In August, 1894, the defendant in error instituted an action of ejectment in the circuit court of the United States for the Western district of Virginia against the plaintiffs in error and sundry other defendants,—73 in number,—which was tried in September, 1899, as to these plaintiffs in error and one Eli Hurley, who severed from the other defendants, the result being a verdict and judgment for the plaintiff below. 98 Fed. 913. The land described in the declaration is alleged to be that portion of a tract of 500,000 acres now located in the state of Virginia, granted by the commonwealth of Virginia to Robert Morris by patent dated June 23, 1795, described in the grant as lying in the counties of Wythe and Rus-

¶ 1. Federal jurisdiction in cases involving federal questions, see note to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co. v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7.

¶ 3. See *Boundaries*, vol. 8, Cent. Dig. § 12.

sell, and now claimed by the defendant in error to be located in the counties of Buchanan, in Virginia, Logan, Mingo, Wyoming, and McDowell, in the state of West Virginia, and Pike, in the state of Kentucky. The plaintiffs in error claim portions of the land under junior patents issued by the commonwealth of Virginia. During the trial the defendants reserved many exceptions to the ruling of the court, which were made the basis of a large number of assignments of error. Some of these objections go to the defendant in error's title, but principally they refer to the instructions, either given or refused, and to the testimony relating to the location of the boundaries of the Morris patent.

Robert Morris on the 16th of November, 1795, conveyed the land so granted to him to one James Swan. In 1815 the title became vested in the "literary fund" of the state of Virginia, because of taxes thereon delinquent for the years 1812 to 1815, charged against said land in the name of Swan. The legislature of Virginia, by an act passed March 15, 1838, vested the title to said forfeited land in John Peter Dumas, trustee, in trust for the benefit of the creditors of Swan, with power to sell. Such trustee died without having closed the business of the Swan estate relating to said land, and on the 1st day of June, 1855, by an order entered in the chancery cause of Dumas v. Mosignon, then pending in the circuit court of Kanawha county, in the state of Virginia, one Josiah Randall was appointed trustee in lieu of Dumas, and a commissioner was appointed to convey to him such title as had passed to Dumas' heirs by his death, which was accordingly done. In the year 1866, Josiah Randall died, and thereafter, on October 3, 1866, in the last-mentioned chancery cause, an order was entered appointing Robert E. Randall as trustee in the place of Josiah Randall, deceased. By a decree entered in the circuit court of Kanawha county in said cause, the heirs of Josiah Randall were required to convey to Robert E. Randall, trustee, such title to the trust estate as descended to them upon the death of Josiah Randall; and a commissioner was appointed to make such transfer, which was accordingly done. Thereafter Samuel L. M. Barlow, who had intervened in said cause, duly removed the same to the United States district court for the district of West Virginia,—that court then exercising circuit court powers; and thereafter, Robert E. Randall having resigned as such trustee, John R. Reed was appointed his successor by order duly entered in that cause; and, he thereafter having sold the land to one David W. Armstrong, another order was entered on August 20, 1891, approving such sale, after which Armstrong assigned his purchase to John V. Le Moyne; and subsequently thereto Reed, as such trustee, and Armstrong, as such purchaser, by deed dated September 29, 1891, conveyed the land to Le Moyne, who, by deed of December 27, 1893, conveyed it to the plaintiff below. The title as thus described was duly offered in evidence by said plaintiff, when all of it except the patent was objected to upon various grounds by the defendants, which objections were overruled, on which action of the court many of the exceptions taken by the defendants below were founded.

The plaintiff below, after offering in evidence the grant for the 500,-

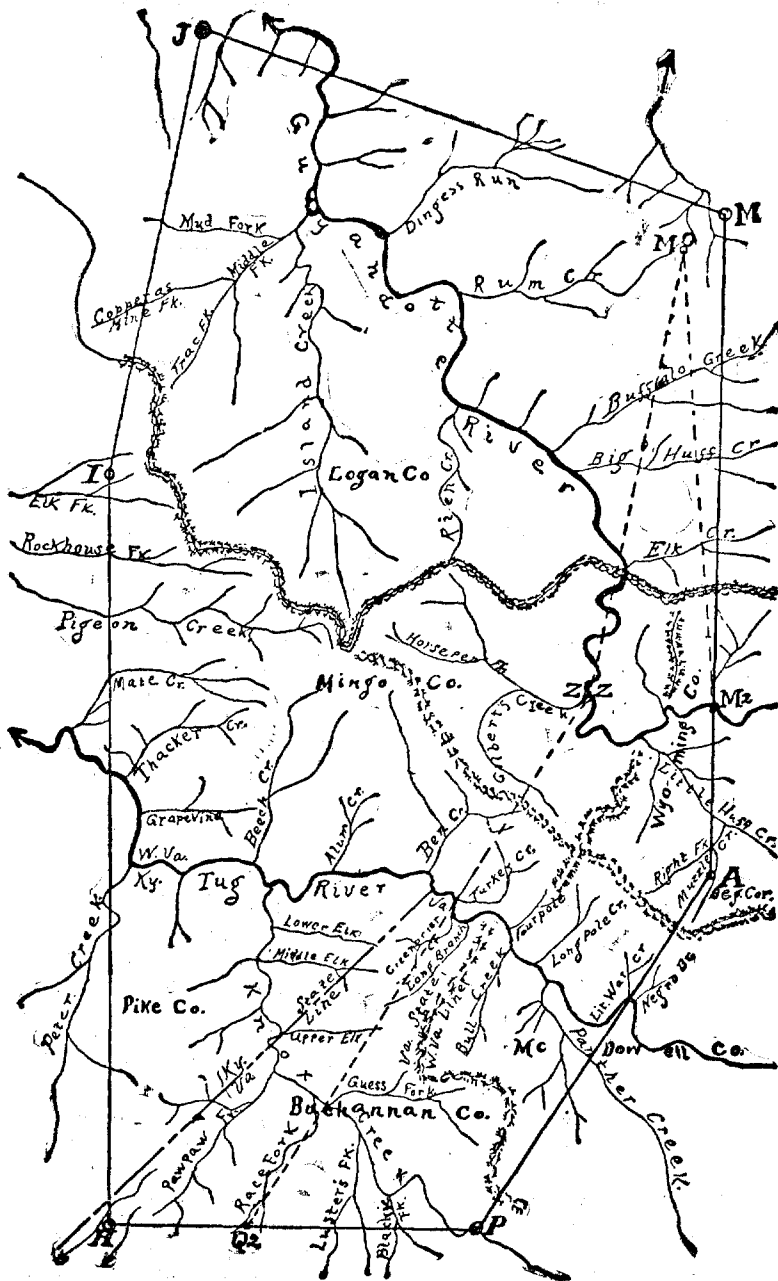


ooo-acre tract, also introduced, as explanatory of the same, copies of the survey and plat upon which it purported to have been made, and of the entries upon which it was based, and also copies of the patents, surveys, and entries of two earlier grants for 320,000 acres and 480,000 acres, respectively, lying to the eastward thereof, and called for as two of the boundaries of the grant under which he claimed. The following map, made by the official surveyor, is said to represent the locality of the grant according to an actual survey, the plaintiff insisting that the Morris grant should be located as shown by the exterior lines, A, P, H, I, J, M, A; and the defendants claiming that, if A and P are established as corners of the same, then the true location will be represented by the letters A, P, Q2, ZZ, MO, M2, and A.

The grant under which the plaintiff below claimed title to the land in controversy reads as follows:

"Robert Brooke, Esq., Governor of the Commonwealth of Virginia.

"To All to Whom These Presents shall Come, Greeting: Knew ye, that by virtue of eleven land office treasury warrants, Nos. 652, 653, 654, 655, 658, 659, 643, 645, 647, 648, and issued the 28th day of August, one thousand seven hundred and ninety-four, and No. 619, and issued 18th September, 1794, there is granted by the said commonwealth unto Robert Morris, assignee of Wilson Cary Nicholas, a certain tract or parcel of land, containing 500,000 acres, by survey, bearing date the 28th day of October, 1794, lying and being in the counties of Wythe and Russell, the greater part thereof in the former, on Sandy and Guyandotte rivers, and the waters thereof, and is bounded as follows, to wit: Beginning at two poplars and two chestnut trees on a branch of Guyandotte river, and about six miles from the mouth of Little War creek, a branch of Sandy river, being a corner of a survey of the said Nicholas of 480,000 acres, and a survey of 320,000 acres made for said Nicholas and Jacob Kenney, and with a line of the latter, S. 33 degrees W., 6,720 poles, crossing a dividing ridge, and down War creek to the mouth, crossing Sandy river at six miles, crossing Panther creek at nine miles, and crossing several ridges to four white oaks on the northwest bank of Knox creek, and thence leaving said survey, W. 3,840 poles, crossing a creek and some of the branches thereof, and along the spurs of the ridge dividing the waters of the said creek and Peters creek, a branch of Sandy river, to three poplars and a sugar tree by a small branch of Knox creek; thence N. 8,000 poles, crossing Knox creek at about four miles, Sandy river at twelve miles, the mouth of Turkey creek, and up said creek and the northwest forks of the same, crossing Buffalo creek and Pigeon creek, and the dividing ridge between Sandy and Guyandotte rivers, and Gilbert creek twice, a branch of Guyandotte, to three sugar trees in a bottom of said river, and about 20 poles below the mouth of Gilbert's creek, and thence N., 10 degrees, E., 4,450 poles, crossing Guyandotte river, several branches and some ridges, to pointers; then E., 6,620 poles, crossing Guyandotte river and several branches thereof to three sugar trees and buckeye by a small branch of the same, being the northwest corner of a survey of said Nicholas of 480,000 acres; thence with the same S. 6,800 poles, crossing Huff's or Cain creek, to the beginning. But it is always to be understood that the survey upon which this grant is founded includes 4,000 acres, which having a preference by law to the warrants and rights upon which Robert Morris survey is founded, liberty is reserved that the said 4,000 shall be firm and valid, and shall have the same effect, and may be carried into grant or grants; and this grant shall be no bar, either in law or equity, to the confirmation of the title before mentioned and reserved, with its appurtenances. To have and to hold, the said tract or parcel of land, with its appurtenances, to the said Robert Morris and his heirs, forever. In witness whereof, the said Robert Brooke, Esq., governor of the commonwealth of Virginia, hath hereunto set his hand, and caused the lesser



seal of the said commonwealth to be affixed, at Richmond, on the 23rd day of June in the year of our Lord 1795, and of the commonwealth the 19th.

"Book 31, page 613.

"[Seal.]

Robert Brooke,

"Land Office, Richmond, Va."

The plaintiff below, by the witness W. D. Sells, offered testimony tending to prove that at the beginning corner, A, he found the corner trees called for in the three grants referred to, marked to correspond with the lines of the 320,000-acre grant; that he ran the first call of the Morris grant (which is coincident with a line of the 320,000-acre grant on its course to the point P on the map) to the locality on the northwest bank of Knox creek, where the trees called for as the common corner of the 500,000 and the 320,000 acre tracts were alleged to have stood; that from said point he ran the next line west 3,840 poles to the course and distance called for in the grant, with proper variations, to the point on the map designated H; that he then returned to the point A, and from it ran the eighth line of the 480,000-acre tract, the same being the last line of the 500,000-acre tract, north 6,800 poles to M on the map, a distance of  $24\frac{1}{4}$  miles; that he projected the third line of the grant from the point H, through Pike county, Ky., to where it struck Tug river, picking up the line at that point, and extending it, by actual survey, upon the course and for the distance called for in the grant from H, north 8,000 poles, to I, from which point he ran the next call of the grant north 10 degrees, east 4,450 poles, to J; and that he then ran the next line with such variations as to make it close at the point M, which was the northwest corner of the 480,000-acre grant. The lines thus run, and concerning which said witness so testified, are said by the defendant in error to be the boundaries of the 500,000-acre grant under which he claims. The plaintiff below also introduced the evidence of Daniel Harman, a surveyor, who testified that he had known the 320,000-acre tract since the year 1842; that he had surveyed it two or three times; his evidence tending to prove that some of the corner trees called for at the points A and P on the map, as well as the marks thereon, had been found as called for in the 320,000-acre grant. The 500,000-acre grant mentioned certain creeks as being located along the boundary lines thereof, but they were not found on such lines as they were run by Surveyor Sells; and the plaintiff below, for the purpose of showing that the creeks called for in the grant as "Turkey" and "Gilbert" are not the streams now known by such names, introduced several witnesses whose testimony tended to show that, according to tradition, the creek shown on the trial map as "Turkey Creek" received that name after the date of the Morris grant, and that Thacker creek had been called "Turkey Creek" in early days; also that Gilbert creek had been known by the name of "War Creek" in former times, both before and since the date of said grant, and that Island creek had formerly been called "Gilbert Creek." On this point the defendants below introduced witnesses in contradiction of such reputation and tradition, and also for the purpose of impeaching the reputation for truth and veracity of the witnesses testifying in that regard in behalf of the plaintiff below.

The defendants below offered testimony tending to prove that the first line of the Morris grant should run from the point A on said map to the point P; that the line north 6,800 poles from A should stop south of the Guyandotte river at the point M2 on the map, instead of running the patent distance to the point M; that if the point A is the true beginning corner, and the point P an established corner of said Morris grant, then the second line of said grant, to wit, west 3,840 poles, should end at the point Q2, by a small branch of Knox creek, and not be extended to the point H, as contended for by the plaintiff below; that the third line would then be found by running from the point Q2 through the mouth of Turkey creek to the point ZZ at the mouth of Gilbert creek; that the fourth line would then run its patent course and distance from ZZ to MO; and that the survey should then be closed by running south  $13\frac{1}{2}$  east to M2, the line called for in the grant as east 6,620 poles. The defendants below also introduced as a witness N. L. Reynolds, a surveyor, who in 1884 had surveyed the lines represented on the trial map by the letters A to M2, A to P, P to a point between Q2 and H, ZZ to MO, and part of the line between ZZ and Q2, as also a portion of Turkey creek. They then introduced a surveyor, T. J. Mathews, who had run the lines from A north to the Guyandotte river, from A to P, from P westward on the line PQ2, and a line from ZZ, the mouth of Gilbert creek, to the mouth of Turkey creek. The defendants also offered the testimony of three surveyors, namely, Sells, Reynolds, and Mathews, tending to prove that James Taylor, who made the survey of the Morris 500,000-acre tract in 1794, had actually located the corner called for on a branch of Knox creek, and that he had also marked as a corner the mouth of Gilbert creek, near the point ZZ, fixing the line by the call for the mouth of Turkey creek; that he had located the corner called for on a branch of Knox creek at the point Q2, and that the fact that he, in his survey, had called for certain timber at the end of the line west from P, would indicate that he was at that point; that on the third line of the survey, on the location contended for by the plaintiff below, the only monuments called for by Taylor that were found were Sandy river and Pigeon creek, while on the line Q2, ZZ, the following monuments called for in the original survey and in the grant were found, to wit: Knox creek, Sandy river, the mouth of Turkey creek, the Northwestern Fork of Turkey creek, the dividing ridge between Sandy and Guyandotte rivers, Gilbert creek, the mouth of Gilbert creek, and Guyandotte river, and three marked sugar trees about 20 poles below the mouth of Gilbert creek; that the fact that Taylor, in his survey, called for three sugar trees, 20 poles below the mouth of Gilbert creek, in a bottom, would indicate that Taylor was also at that point, which is ZZ on the map; that the designation of special trees would also indicate that he was at the point MT, and that Taylor knew the location of those points; that, in his opinion as a surveyor, Taylor was in fact at the corner on Gilbert creek; that he was on Turkey creek, and also on Knox creek; that the course called for by Taylor from the different corners of his survey was generally correct, looking from the corner designated; that the land embraced in the Morris grant was located

in Wythe and Russell counties, Va., and that no part of the same was supposed to be in the state of Kentucky, in which state about 25,000 acres must be sought for, if the lines of the grant as contended for by the plaintiff below should be established; that the surveys made by Taylor, exceeding in the aggregate a million acres of land in the locality of the Morris grant, were generally incorrect, so far as course and distance were concerned, the lines falling short in some instances from one-third to one-half, thereby reducing greatly the acreage involved; that T. J. Mathews, who surveyed the Morris grant under the direction of the United States circuit court for the district of West Virginia, and N. L. Reynolds, who surveyed it for Robert E. Randall, trustee, under whom the plaintiff below claims, both located the boundary lines thereof, as shown by the points A, P, Q2, ZZ, MO, OM2, and M2A, and that the official surveyor, Sells, in running the line from A, stopped at the point P at the instance and request of plaintiff's counsel; that he extended the line PH to the point H also at their request; and that other points, such as I, J, and N, were located by him, not by course and distance or monuments, but by direction of the plaintiff's counsel.

Considerable testimony was offered by the defendants tending to show title in them to the land in controversy, as also their possession and occupancy of portions of the same; but a full statement of such testimony will not be necessary to either the proper disposition or understanding of the case, as we find it our duty to dispose of the questions involved by remanding the cause for errors found in the court's instruction to the jury relating to the boundary of the plaintiff's grant.

At the conclusion of the evidence, the court gave to the jury, on behalf of the plaintiff, five instructions, to the first four of which the defendants objected and excepted. The defendants requested the court to instruct the jury in their behalf in thirty-eight instructions, the first six of which the court gave. The rest were refused, to which action of the court the defendants excepted. The first instruction given on behalf of the plaintiff below was a peremptory direction as to the location of the Morris grant, and was in effect a direction to the jury to return a verdict against the defendants. Thereupon the jury found a verdict for the plaintiff. The defendants moved for a new trial, which was refused, when a judgment was duly entered in accordance with said verdict. This writ of error was allowed March 29, 1900.

The defendant in error on the 26th day of November, 1900, filed a motion to dismiss the writ of error for the reason that it appears upon the record of this case that the law of a state, to wit, the act of the legislature of Virginia passed March 15, 1838, is in contravention of the constitution of the United States, and that therefore the case involves the construction and application of the constitution of the United States, the effect of which would be to deprive this court of jurisdiction, so far as the questions raised by this writ of error are concerned. This motion is first to be disposed of.

The plaintiff below offered in evidence, as a part of his chain of title, a statute of the state of Virginia vesting the title to the land in

Dumas, trustee, under whose successor in trust he claims, when the defendants below objected to the reception of that legislation as evidence for the reason that "said act is in contravention of the constitution of the United States"; that it "is class legislation, granting special privileges to said trustee not conferred or granted to others"; and also because it "undertakes to deprive persons of property without due process of law." It is now insisted that these objections involve the construction or application of the constitution of the United States, which prohibits class legislation, and prevents a state from depriving a person of his property without due process of law, and that therefore the supreme court of the United States is the only tribunal that can dispose of this controversy. The claim is now made that, under the act of congress creating and defining the jurisdiction of the circuit courts of appeals, all questions involving the construction or application of the constitution of the United States, and any case in which the constitution or law of a state is said to be in contravention of the constitution of the United States, shall be removed from the circuit or district courts, by appeal or writ of error, to the supreme court of the United States.

In the case of *Green v. Mills*, 16 C. C. A. 521, 69 Fed. 852, 30 L. R. A. 90, this court, speaking through Chief Justice Fuller, said:

"It was early held, in *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893, that the act gave to a party to a suit in the circuit court, where the question of the jurisdiction of the court over the parties or subject-matter was raised and put in issue upon the record at the proper time and in the proper way, the right to a review by the supreme court, after final judgment or decree against him, of the decision upon that question only, or by the circuit court of appeals on the whole case. *Maynard v. Hecht*, 151 U. S. 324, 14 Sup. Ct. 353, 38 L. Ed. 179. And in *Carey v. Railway Co.*, 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041, it was ruled that, in order to hold an appeal maintainable under the second of the above-named classes, the construction or application of the constitution of the United States must be involved as controlling, although on appeal or error all other questions would be open to determination if the inquiry were not rendered unnecessary by the ruling on that arising under the constitution. *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266. In *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87, the supreme court decided that if the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment or decree on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified, and come direct to the supreme court, or to carry the whole case to the circuit court of appeals, where the question of jurisdiction can be certified by that court."

In the case of *Railroad Co. v. Meyers*, 10 C. C. A. 485, 62 Fed. 367, the circuit court of appeals for the Seventh circuit (Jenkins, Circuit Judge, delivering the opinion) said:

"The statute organizing this court (26 Stat. 826, c. 517 [U. S. Comp. St 1901, p. 547]) provides for appeals or writs of error to the supreme court from the circuit court in any case in which the jurisdiction of the court is in issue, and that in such case the question of jurisdiction shall alone be certified to the supreme court from the court below. The circuit courts of appeals have appellate jurisdiction to review the final decisions of the lower courts in all cases other than those authorized to be removed into the supreme court. In *McLish v. Roff*, 141 U. S. 661-668, 12 Sup. Ct. 118, 35 L. Ed. 893, the supreme court construe this provision of the statute, and assert that the defeated party must elect whether he will take a writ of error, or appeal to the supreme court on the question of jurisdiction alone,

or to the circuit court of appeals upon the whole case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court.' Notwithstanding our recent ruling in *Manufacturing Co. v. Barber*, 9 C. C. A. 79, 60 Fed. 463, that when the sole question presented by the record goes to the jurisdiction of the court below we are without authority to determine the question, we do not doubt, in view of the recent decision of the supreme court in *Maynard v. Hecht*, 151 U. S. 324, 14 Sup. Ct. 353, 38 L. Ed. 179, that when, as in this case, other questions are involved, we are authorized to determine that question as well as the others. In the case referred to, the court said: 'The act did not contemplate several appeals in the same suit at the same time, but gave to a party in the suit in the circuit court, where the question of the jurisdiction of the court over the parties or subject-matter was raised and put in issue upon the record at the proper time and in the proper way, the right to a review by this court, after final judgment or decree against him, of the decision upon that question only, or by the circuit courts of appeals on the whole case.' And even were this otherwise, we cannot doubt that we may consider the question of jurisdiction, so far as necessary to satisfy ourselves whether, in the exercise of the discretion lodged with us, the question of jurisdiction involved is sufficiently grave to warrant its submission to the supreme court upon proper certificate, as required by the ruling in *Maynard v. Hecht*, supra."

The contention of the defendant in error, so far as this question is concerned, is also clearly demonstrated to be without merit by the following cases decided by the supreme court of the United States: *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861; *Railroad Co. v. Thiebald*, 177 U. S. 615, 20 Sup. Ct. 822, 44 L. Ed. 911; *American Sugar Refining Co. v. City of New Orleans*, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859.

We do not find it necessary to consider the questions raised by the four instructions given at the request of the plaintiff below relating to the statute of limitations, because of the conclusion we reach concerning the first instruction given, which reads as follows:

"The court instructs the jury that the plaintiff contends for one location of the Nicholas 500,000-acre survey, and the defendants contend for another location thereof, but the first and second corners, known as the 'Muzzle corner' and the 'four white oaks corner,' represented upon the trial map by the letters A and P, respectively, are common to both locations, and therefore said two corners and the line A-P are to be considered and treated as established and undisputed; and there being no evidence, other than the plat and certificate of survey, introduced by any party, tending to show either the present or former situation or the actual existence of the trees called for at the southwest corner or northeast corner of said survey, and the evidence introduced on the part of both plaintiff and defendants, tending to show that James Taylor, the assistant county surveyor of Wythe county, who originally laid off the said tract, and returned the plat and certificate of survey thereof, did not actually survey and run out upon the ground any of the other lines of said survey than the line A-P, either as lines thereof, or of the Nicholas 480,000-acre tract, with which it calls to run, and there being no evidence introduced by any party tending to show an actual running and survey of any of such other lines, and all the evidence upon that point, on the part of both plaintiff and defendants, tending to show that in mentioning certain creeks, rivers, and other natural objects as upon the lines of said survey, which in fact do not exist, or are not found upon the ground according to the courses and distances of the said lines as given in said survey, the said Taylor called for such objects through ignorance or mistake as to the existence or the true location of such objects relatively to each other, and to the lines, corners, and other parts of said survey, such natural objects ought to yield to the said courses and distances in determining what land is embraced within said survey, and must be regarded as false and mistaken description, and said survey must be located by fol-

lowing the courses and distances given in the survey from the said second corner, represented on the trial map by the point P, with such variation of the fifth line as is necessary to close at the northwest corner of the said 480,000-acre survey, ascertained by running the eighth call of that survey its full course and distance from the point A to the point M on the trial map, bounding said grant by the letters A, P, H, I, J, M, A."

The action of the court below in giving this instruction will be, on the hearing of this writ of error, governed by the same principles that apply to cases where a verdict was directed by the court. The idea entertained by the court below, evidently, was that the only conclusion which could be properly reached from the evidence offered to the jury concerning the location of the land mentioned in the declaration was in favor of the contention of the plaintiff below. In this light we will therefore consider the questions raised by the plaintiffs in error, and relied upon by their counsel in their arguments submitted to this court. The giving of this instruction to the jury necessitated the rejection of the large number of instructions offered by the defendants below relating to the location of the land in controversy, as the one given is the antithesis of those rejected.

Where a verdict is directed in favor of either party, the only question respecting the judge's charge that it is necessary for an appellate court to consider is whether or not such direction, in the light of the pleadings and of all the evidence, was right. Reaching the conclusion we do,—that the court below erred in giving said instruction,—it follows that it will not be necessary to consider the instructions that were refused, nor to pass upon other questions raised by exceptions to the court's charge.

The plaintiffs in error insist that in giving such instruction the court below invaded the province of the jury. The defendant in error contends that it is the duty of the jury to find the facts only when there is a dispute concerning them, and where there is evidence sufficient to warrant their submission for the jury's finding, but that when the controlling facts are undisputed there is nothing left but to apply the law, which should be done by the direction of the court. A careful study of all the testimony, and its proper application to the questions involved, impels us to the conclusion that the defendant in error is mistaken in claiming that the controlling facts in the case, as they were presented to the jury in the court below, are undisputed. We think that, if the jury had been permitted to find from the evidence before them the propositions of fact stated in the instruction, they would have been warranted in reaching a conclusion, from the evidence tending to prove that result, other than that stated in the instruction, and that, had they so found, it would not have been proper for the court to have disturbed such finding. If the jury had been permitted to consider the case, and had found the facts to be as contended for by the plaintiff below, in which contention the trial judge evidently concurred, then most undoubtedly the verdict should have been as it was returned; but if there was evidence tending to prove the claim of the defendants, contradictory to and inconsistent with that offered by the plaintiff, from which the jury would have been authorized to find in favor of the defendants, then a direction by the court in favor of either party would have been improper, and should be reversed on writ of error.



It is quite clear that the effect of this instruction was to withdraw from the consideration of the jury much important and pertinent testimony relating to the location of the boundary lines of the plaintiff's grant, and that it therefore is in conflict with that rule of law applicable to all land controversies,—that, while boundary is a question of law, the location of boundary lines is a matter of fact, to be found by the jury from all the evidence before them. An inspection of the record in this case convinces this court that the evidence before the jury was of that character that reasonable men might honestly have differed in the conclusion reached by them on the facts submitted for their consideration; and, such being the case, it follows that this is peculiarly a controversy the determination of which should have been left to the jury, and not have been reached by the direction of the court. The true rule is that, whether the facts are disputed or undisputed, if different minds can draw different conclusions from them, the case should properly be left to the jury.

From the evidence it may be conceded that the court was justified in telling the jury, in substance, that the beginning corner of the grant was at the point designated on the map as A, but it is not at all clear either that the "four white oaks corner," represented on the map by P, or that the line A-P, is "established and undisputed," as the jury were advised by the court they were. Those were matters of fact concerning which there was a controversy, the solution of which it would have been better to have submitted to the finding of the jury. While the witness Harman speaks of seeing three white oaks on the northwest side of Knox creek, near the mouth of a small branch, there is no testimony that any person ever saw the four white oaks called for in the grant, nor were either of the three spoken of by Harman ever blocked or identified as a corner of the Morris grant; and, in addition, Sells, the court's surveyor, testifies that the distance called for in the grant would have taken the corner to a point seven miles further from A than the point P is. The jury might have been warranted, after fully considering all the evidence, in finding the line A-P to be a line of the grant, and the point P to be a corner thereof; but it does not follow from that that the court was justified in telling the jury that the line and the corner were "established and undisputed."

Again, we are constrained to say that the court below should not have told the jury that the plat and the certificate of survey were the only evidence before them tending to show "either the present or former situation or the actual existence of the trees called for on the southwest corner or northeast corner of said survey." At the southwest corner the call is for "three poplars and a sugar tree by a small branch of Knox creek," and at the northeast corner the call is for "three sugar trees and a buckeye by a small branch of" the Guyandotte river. The contention of the plaintiffs in error is that the grant, as well as the plat and survey, tended to prove the existence and the location of the trees called for at said two corners, and that, while the court's instruction virtually admitted that the plat and the survey tended to prove such existence, nevertheless the jury were directed by the court to find to the contrary, so far as the contention of the said plaintiffs in error was concerned. The surveyors, who were

examined as experts, testified that the fact that the surveyor in the original survey called for certain timber at the end of a line would indicate that he was at that point wherever the timber might be located; and they also testified that the fact that the surveyor called for "three sugar trees, twenty poles below the mouth of Gilbert creek, in a bottom," would indicate that the surveyor was also at that point which is ZZ on the map. The court had permitted these surveyors, after their careful examination of the original surveyor's work,—as to the manner and method of his surveying,—to give their testimony as experts; and we are impressed with the idea that such testimony was proper, and of real value, as tending to establish the lines and corners of the survey as they had been originally located. Mr. Sells, one of the surveyors, states:

"He [meaning Taylor, the original surveyor] would mark the corner, take the supposed course to the next line, and arrive at the next corner." "Mr. Taylor's way of locating a survey was leaving the corner he had located and marked, and making his way by the most convenient route to the next corner he had marked."

Mr. Reynolds, another surveyor, testifies that he thinks Taylor located the corner called for on a branch of Knox creek (this is the point Q2); and he also states:

"He [Taylor] marked the corner on some branch of Knox creek, head of the branch, and then marked the mouth of Gilbert's creek in the vicinity of ZZ."

We therefore think it is quite apparent that the court was mistaken when he said that there was no evidence other than the plat and certificate of survey tending to show the existence of the trees called for at the corners before mentioned; and we are also of the opinion that the jury should have been permitted to take into consideration all the testimony relating to said corners, as well as to the other corners and lines of the grant, for it was for them to say, in the light of all of the evidence, whether any of the trees or other objects called for had been located, and whether any of them were corners of said grant.

The court, in another portion of said instruction, tells the jury that:

"In mentioning certain creeks, rivers, and other natural objects, as upon the lines of said survey, which in fact do not exist, or are not found upon the ground, according to the courses and distances of said lines as given in said survey, that said Taylor called for such objects through ignorance or mistake as to the existence or the true location of such objects, relatively to each other, and to the lines, corners, and other parts of said survey."

We find from the record that there was testimony before the jury tending to prove that nearly all of the creeks, rivers, and other natural objects called for upon the lines of said survey, and mentioned in the grant under which the defendant in error claims, were actually found upon the ground as called for in the survey; and especially is this true concerning the line from Q2 to ZZ, running from a branch of Knox creek to the mouth of Gilbert creek. The testimony relating to this line certainly tends to prove the existence of Knox creek; the existence of Sandy river; the existence of the mouth of Turkey creek; the existence of the Northwest Forks of Turkey creek; the existence of the dividing ridge between Sandy and the Guyandotte rivers; the existence of a creek called "Gilbert Creek," and that such

creek empties into the Guyandotte river; the existence of bottom land on the Guyandotte river below the mouth of Gilbert creek; the existence at one time of three marked sugar trees about 20 poles below the mouth of Gilbert creek. The testimony of the three surveyors, Sells, Mathews, and Reynolds, tended to prove that but few of the natural monuments called for along this line were missing, and that Turkey creek emptied into Sandy river at the point where this line is described as crossing that river. Two objects called for on this line, to wit, Buffalo and Pigeon creeks, are not found, though the evidence tends to prove that two streams were crossed at the points indicated, corresponding to the calls for Buffalo and Pigeon creeks. The testimony relating to these natural objects so found, as well as that relating to those not found, should have been considered by the jury, in connection with all the other evidence, for the purpose of enabling them to correctly locate the lines of the grant; and it was error, we think, to advise the jury that said monuments did not exist or were not found as called for, and that therefore they were called for through ignorance or mistake. This part of the instruction is applicable to all the lines of the survey, and tended to mislead the jury; and, besides, it is a mistake to say that "all the evidence upon the point, on the part of both plaintiff and defendants," tended to show that the monuments called for were mentioned through ignorance or by mistake. Some of the testimony was offered for the purpose of proving the contrary, and has that tendency.

With evidence tending to prove the existence of the natural monuments as called for in the grant, the court below, under the impression that such objects had been mentioned by mistake and in ignorance of their true location, and most likely under a misapprehension of the true weight of that part of the testimony, instructed the jury, in substance, to disregard such objects, and to locate the grant by course and distance. The instruction as given by the court below means that, unless the natural objects called for are in accord with course and distance, then such natural objects must be disregarded, and the line located by course and distance. In this the court was in error. It is quite well established, and is now, we think, the universal rule, that a call for a natural object, such as a river, a creek, the mouth of a stream, a hill, a dividing ridge between designated localities, a marked tree, shall control both course and distance. The reason for such a rule is quite apparent. The natural monuments referred to are objects indicating the boundary of the land, are generally easily found, and are, with few exceptions, indestructible. Course and distance are usually descriptive of the designated monuments, depending for their accuracy upon the skill and experience of the surveyor. In *Newsom v. Pryor*, 7 Wheat. 7, 10, 5 L. Ed. 382, Chief Justice Marshall used this language:

"The most material and most certain calls shall control those which are less material and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance."

In locating the lines of surveys and grants, the following rules, applied in the order named, have generally been observed by our courts

of last resort: First, natural monuments; second, artificial marks; third, adjacent boundaries; fourth, course and distance. *Hutch. Land Tit.* 530; *Dogan v. Seekright*, 4 *Hen. & M.* 125; *Doe v. Payne*, 11 *N. C.* 64, 15 *Am. Dec.* 507; *McIver v. Walker*, 9 *Cranch*, 173, 3 *L. Ed.* 694; *Elliott v. Horton*, 28 *Grat.* 766; *Trust Co. v. Foster*, 78 *Va.* 413. In *Higueras v. U. S.*, 5 *Wall.* 827-835, 18 *L. Ed.* 469, Mr. Justice Clifford said:

"But ordinarily surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land. Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings."

*Washb. Real Prop.* (2d Ed.) 673; *Preston v. Bowmar*, 6 *Wheat.* 582, 5 *L. Ed.* 336; *Marshall v. Currie*, 4 *Cranch*, 176, 2 *L. Ed.* 585; *Purinton v. Sedgley*, 4 *Me.* 286; *Howe v. Bass*, 2 *Mass.* 380, 3 *Am. Dec.* 59; *Bosworth v. Sturtevant*, 2 *Cush.* 392; *Jackson v. Ives*, 9 *Cow.* 661; *Newsom v. Pryor*, 7 *Wheat.* 10, 5 *L. Ed.* 382; *Ricks v. Johnson*, 5 *N. H.* 542.

The defendant in error claims that the facts as disclosed by the testimony make this case an exception to the general rule that monuments shall prevail over course and distance, and the insistence is that the surrounding and connecting circumstances relating to the survey and the intention of the parties render it apparent that the courses and distances called for are more reliable and certain guides to the true location of the grant than are the natural objects mentioned in it. We do not think so. We do not find anything in the description of the land which shows that the courses and distances are right in themselves. On the contrary, all of the surveyors who testified advise us that they are not correct. Nor do we find that the evidence conclusively shows that the original surveyor was mistaken as to the location of the monuments called for, or ignorant of the geography of the territory in which he was surveying. He seems to have located his natural monuments as correctly as was customary in the day in which he lived, and the researches made by his successors of the present day rather tend to demonstrate that he was not deficient in geographical information. He seems to have made a mistake in his mathematics, and to have run the boundary lines of his survey so as not to have included the area intended; but that is immaterial, if it is made to appear that the natural objects called for were really in existence at the time of the survey, that their location was known to the surveyor, or that he was at them during the time of the survey, and marked them or called for them as lines or corners thereof. It should in this particular be remembered that quantity is the least reliable, and the last to be resorted to of all the descriptive portions of a deed or grant. It is only in cases where there is a lack of description, because of the want of course and distance, or where monuments are not called for or are not found, that quantity becomes essential in determining the identity of the premises in controversy. A statement in a grant of the quantity of land supposed to be in-

cluded in the boundaries thereof, inserted by way of description, must yield to the description by metes and bounds, rivers, mountains, and other monuments.

The cases cited by counsel for defendant in error, showing that the general rule to which we have referred—that course and distance must yield to natural objects called for—is not inflexible, are not, in our judgment, applicable to the facts of the case we are now disposing of; and therefore it will not be profitable to discuss them, or to consider them further than we have in effect done by determining the questions of law involved in the court's instruction before referred to.

The case must go back to the court below for a new trial. Other questions raised by the assignments of error it will not be necessary for us to refer to, as we have found error in the court's charge directing a verdict, because of which the judgment rendered in the court below must be reversed.

Let the judgment complained of be reversed, and let the verdict returned be set aside, in order that a new trial may be had on the issue joined. Reversed.

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#### CHING v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1902.)

No. 429.

#### 1. CONSPIRACY—SUFFICIENCY OF INDICTMENT.

An indictment for conspiracy to commit an offense against the United States, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], need not describe the offense which was committed or intended to be committed, as the result of the conspiracy, as fully as would be required in an indictment in which it was the substantive crime charged.

#### 2. CENSUS—FALSE RETURNS—SUPPLEMENTAL RETURNS.

Act March 3, 1899 [U. S. Comp. St. 1901, p. 1346], providing for the twelfth census, authorized a supervisor, acting on advice that names had been erroneously omitted by an enumerator from his schedules, to return such schedules for correction after the expiration of the 30 days prescribed for making the enumeration; and, in making such corrections or any additions to his schedules after their return, the enumerator acted in his official capacity, and subject to the penalties prescribed by section 21 of the act for making false returns.

#### 3. CRIMINAL LAW—INSTRUCTIONS—STATING OPINION AS TO WEIGHT OF EVIDENCE.

The action of a judge, in a trial for conspiracy, in expressing an opinion to the jury as to the weight of the evidence, and in intimating what the verdict should be, was not error, where he subsequently charged them that it was not his province to say whether certain evidence was sufficient to prove conspiracy, but that "it always remains finally for the jury to determine whether, by testimony of witnesses, or letters or circumstances, they are satisfied that the combination or conspiracy charged existed."

In Error to the District Court of the United States for the District of Maryland.

Wm. L. Marbury and Adrian Posey, for plaintiff in error.

Morris A. Soper, Asst. U. S. Atty. (John C. Rose, U. S. Atty., on the brief).

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The plaintiff in error was indicted, under the provisions of section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676], charged with conspiring to commit an offense against the United States, with Charles H. Guyther and others, who prior to the alleged conspiracy had been census enumerators, appointed as such by virtue of the act of congress approved March 3, 1899, providing for the twelfth census of the United States. The specific offense charged was the making of a fictitious census return, in violation of section 21 of said act, which reads as follows:

"That any supervisor, supervisor's clerk, enumerator, interpreter, special agent or other employé, who, having taken and subscribed the oath of office required by this act, shall, without justifiable cause, neglect or refuse to perform the duties enjoined on him by this act, or shall, without the authority of the director of the census, communicate to any person not authorized to receive the same any information gained by him in the performance of his duties, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars; or if he shall wilfully and knowingly swear or affirm falsely, he shall be deemed guilty of perjury, and upon conviction thereof shall be imprisoned not exceeding three years and be fined not exceeding eight hundred dollars; or if he shall wilfully and knowingly make a false certificate or a fictitious return, he shall be guilty of a misdemeanor, and, upon conviction of either of the last named offences he shall be fined not exceeding five thousand dollars and be imprisoned not exceeding two years." 30 Stat. 1020, c. 419 [U. S. Comp. St. 1901, p. 1346].

The indictment contained a number of counts, the first of which was abandoned by the prosecution; and the plaintiff in error, together with the others who were tried with him, was acquitted of all the other counts, except the fourth, so that only that count is involved in his writ of error. In such fourth count the plaintiff in error is charged with having conspired with said Charles H. Guyther to have him as enumerator make a fictitious return; and it is alleged that, in furtherance of the same, he (said enumerator) entered upon certain schedules which had been furnished him by the supervisor of the census the names of various persons as being residents of his enumeration district on the 1st day of June, 1900, when such persons were not such residents at that time, which was then and there well known to him, which said willful acts on his part were in violation of the statute mentioned. The plaintiff in error demurred to the indictment, assigning as reason therefor that it failed to state that at the time of entering into the alleged conspiracy, and at the time of doing the alleged unlawful acts in pursuance thereof, the enumerator, Guyther, was still holding such official position under his commission of employment. The demurrer was overruled, the defendants then pleaded not guilty, except Guyther, who entered a plea of guilty. A trial was had, and the plaintiff in error was convicted. The court below, in passing judgment on such finding of the jury, sentenced the plaintiff in error to pay a fine of \$1,000, and to be imprisoned in the Baltimore city jail for the period of two years.

The assignments of error are numerous, but the disposition of a

few will, in effect, dispose of all of them. They relate—First, to the sufficiency of the indictment; second, as to whether the defendant Guyther, with whom the plaintiff in error was charged with conspiring, was at the time of the alleged conspiracy, as well as at the time of the doing of the overt act relating thereto, still an enumerator, under the provisions of the census act, or whether he had ceased to be such, and was therefore incapable of committing the alleged crime; third, as to the charge of the judge to the jury on the day following that on which the case was submitted to their consideration.

As to the sufficiency of the indictment, it must be first noted that the gist of the offense charged is that of conspiracy, which we think is properly pleaded. In such cases the offense which is intended to be committed as the result of the conspiracy need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime. This indictment alleges that, prior to the commission of the crime charged, the defendant Guyther had been duly commissioned as an enumerator, and that he had regularly taken the oath of office. It also charges that the purpose of the conspiracy between the defendants was to have Guyther, as such enumerator, forward fictitious returns relating to the residents of his district to the census bureau. We think it clearly appears from the indictment itself that the defendants were fully advised of the nature of the offense charged, and of the means by which it was to be effected. Keeping in view the allegations that Guyther had been regularly appointed and qualified as an enumerator before the conspiracy was entered into, and that the purpose of such conspiracy was to have him, as such enumerator, make certain fictitious returns, which are fully set forth, we are of the opinion that all of the defendants were fully advised of the charge which they had to meet, and that it sufficiently appears that Guyther was an enumerator at the time the conspiracy is charged to have been entered into.

Other objections to the indictment have even less of merit than those we have referred to, and were properly overruled. The indictment was well drawn, and the court below did not err in its disposition of the demurrer thereto.

The plaintiff in error insists that there was error in refusing to grant the instructions to the jury as prayed for by him during the trial in the court below,—especially those relating to the contention that at the time of the alleged unlawful agreement to forward the fictitious return to the supervisor, as well as at the time the fictitious entries were made upon the census schedule by Guyther, he was no longer an enumerator, and hence incapable of violating the census act by making a fictitious return as such official, and that therefore the conspiracy alleged was not in violation of any law of the United States. Such instructions were based upon the following facts: That the time prescribed by the census act for making the enumeration required was the 30 days from June 1st to June 30th, inclusive, which period had elapsed before the conspiracy was formed; that the evidence given to the jury disclosed that Guyther had completed his enumeration before the conspiracy was formed, had for-

warded his schedules to the supervisor, and had sent in his bill for such services, together with his certificate that he had finished his enumeration; that an examination of the schedules so returned demonstrated that the enumeration shown by them was practically correct, and that no discrepancies or deficiencies appeared on the face of such schedules; that the commission to said Guyther as such enumerator terminated his appointment on the completion of the duty for which he was designated. The claim now is that such facts made it the duty of the court below to hold that Guyther's duties as enumerator having been completed, and his term of office ended, the supervisor had no lawful right to send him additional schedules, with instructions to again go over his district for the purpose of placing thereon the names of residents said to have been left off of the first enumeration, and that Guyther could not thereafter make entries or forward schedules as enumerator. This involves the proper construction of the entire census act,—not only of the sections authorizing the appointment of enumerators and defining their duties, but, as well, those describing the work to be performed by the supervisors, the director, and other officials, and showing the object desired and the purposes intended to be accomplished by said legislation. An analytical discussion of said act is not necessary to the decision of this case, other than to say that we think it fully authorized the supervisor, if he had reliable information tending to show that omissions had been made of the names of bona fide residents from the schedules returned by Guyther, to treat the same as the inaccuracies contemplated by the statute, and that therefore it was his duty to return such schedules for correction, even after the expiration of the 30 days in which it was expected that the work would have been accomplished. The court below evidently took this view of the census act, and in that conclusion we concur.

The only remaining error assigned is that relating to the second charge given by the court to the jury. The words complained of are the following:

**"Gentlemen of the Jury: It is a matter of great surprise to me that you should have difficulty in arriving at a verdict. The facts do not rest upon the testimony of single witnesses, as to whose credibility you might have doubts. There have been produced so many witnesses to establish the material facts in the case, and undisputed letters and hundreds of witnesses, that it is surprising to me to find that you are perplexed as to the weight of the testimony. You have taken an oath as jurors to find your verdict according to the evidence, and it will be a dereliction from your duty to allow any political bias or prejudice to turn your minds from the evidence to the consideration of outside personal preferences. You should candidly and fairly give the same weight to the evidence as you would if this was a case of alleged combination to defraud an individual citizen, and not allow political or personal affiliations to sway you in the least. All men should stand equal before the law, and should not be either favored or oppressed by mere whims of jurors. If this were a case where I thought the testimony was difficult to reconcile, and there were disturbing conflicts among the witnesses, I might accept your statement that you had exhausted all effort to agree. But I do not think so. This is an important case, which has been very thoroughly presented to you; and I feel satisfied that if you consider all the testimony candidly and fairly, and take all the facts and circumstances into consideration impartially, you can come to an agreement. I must therefore refuse to discharge you."**



It appears from the record that, after the judge had so charged, the jury retired for consultation, and, having remained in their room for about two hours, sent to the court the following communication, signed by its foreman:

"Are we to infer from your remarks made to the jury this morning that the letters referred to by you were the ones written by Ching to Guyther, through Bean, advising him to beware of the census enumerators? And were these letters sufficient to prove conspiracy?"

To which the judge presiding replied as follows:

"To the Jury: I did not refer to the above-mentioned letters alone, but to all the letters which had any tendency to throw light upon the acts and motives of the parties charged. I cannot say to you whether the above-mentioned letters are sufficient to prove the conspiracy. That would be going beyond my province as judge. It always remains finally for the jury to determine, whether by testimony of witnesses, or letters or circumstances, they are satisfied that the combination or conspiracy charged existed."

The plaintiff in error contends that the trial judge erred, in that, at the time he gave said charge, he did not accompany it with a reminder to the jury that it was their ultimate right to be the judges of the facts, and of the sufficiency of the evidence to convict, regardless of the views expressed by him. The judge had, in his charge to the jury before they first retired to consider the case, fully instructed them as to the presumption of innocence, also telling them that, if they could reconcile the evidence with any reasonable hypothesis consistent with innocence, it was their duty to do so, and that the finding of facts and the weight to be given to the testimony were solely for the jury, who were to exercise their prerogative of determining the weight of the evidence for themselves, and not to be governed by any intimations from the court as to such weight, but that they were to be governed by the court's instructions only as to the law. There can be no question of the right of the learned judge who conducted the trial in the court below to have expressed his opinion to the jury as to the weight and effect of the evidence, and it is equally as clear that it was his duty to have clearly informed the jury that they were the sole judges of all questions of fact. Naturally, an expression of opinion from the judge will have great weight with a jury, will often influence their deliberations, and not infrequently will change the opinions of individual jurors. Hence the necessity for the rule that requires the judge, when expressing an opinion, to also inform the jury that they are nevertheless the sole and final judges of the facts, independently of the views of the court. An opinion from the intelligent and impartial judge who presided below, as to the weight of the evidence in any case, would most undoubtedly control the judgment of a juror in doubt, and, were he under the impression that the views of the court should prevail, might result in the rendition of a verdict otherwise not possible, and in some instances unjust. This matter is most happily expressed in the opinion of the supreme court, rendered by the chief justice, in *Starr v. U. S.*, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841, as follows:

"As the jurors are the triors of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruc-

tion is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts, to which they should give no more weight than it was entitled to. \* \* \* It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

It is established by a long line of decisions that an expression of opinion by the court upon the facts is not reviewable on error, if no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury. It may be admitted that the court below not only expressed an opinion as to the weight of the evidence, but that he also intimated what the verdict should be; and still he was even then not in error, if he ultimately submitted to the finding of the jury all questions of fact involved in the trial. From the decisions of the supreme court relating to this matter, we have stated the rule established, almost as it is claimed to be by the plaintiff in error; and still, from the record before us, our judgment must be against him, for we find that the judge, some hours before the verdict was rendered, told the jury that:

"I cannot say to you whether the above-mentioned letters are sufficient to prove the conspiracy. That would be going beyond my province as judge. It always remains finally for the jury to determine whether, by testimony of witnesses, or letters or circumstances, they are satisfied that the combination or conspiracy charged existed."

In the absence of this statement, there would have been error. With it before the jury, they were fully advised that they ultimately were the final judges of the weight of the testimony, and of all the facts that had been presented for their consideration.

In the case of *Simmons v. U. S.*, 142 U. S. 149, 12 Sup. Ct. 171, 35 L. Ed. 968, the jury had reported to the court their inability to agree, and had asked to be discharged; but the judge there, as here, in the court below, refused to grant their request, remarking to them as he returned them to their room that he "regarded the testimony as convincing." This was afterwards, on the rendition of a verdict of guilty, assigned as error, but the supreme court held that it was proper, as he had told them that the facts were to be decided by them, and not by the court.

We find no error, and so the judgment complained of is affirmed.

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### FULLER v. VENABLE et al.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1902.)

No. 433.

#### 1. CORPORATIONS—REORGANIZATION AGREEMENT BETWEEN BONDHOLDERS—ENFORCEMENT IN EQUITY.

A committee, authorized thereto by holders of bonds of an insolvent corporation, on which the interest was in default, formulated and carried out a plan of reorganization by a foreclosure and purchase of the property, using in payment therefor bonds and matured coupons deposited by the holders participating, who received certificates exchangeable for bonds of the new company when organized. Complainant alone, of those who joined in the reorganization agreement, before depositing his bonds, de-

tached the matured coupons therefrom, and received payment of the same from the proceeds of the sale. *Held*, that he was subject to and affected by all the equities arising out of the agreement, and that a court of equity would not enforce such agreement for his benefit, by requiring the committee to deliver to him the bonds of the new company, until he placed himself on an equality with the other bondholders, by returning the money collected on the coupons.

2. RES JUDICATA—MATTERS CONCLUDED BY JUDGMENT.

The action of the court in the foreclosure suit in decreeing payment in full of complainant's coupons, which, by the terms of the mortgage, were given precedence over the principal of the bonds, was not an adjudication of the rights of the bondholders, as between themselves, under the reorganization agreement.

Appeal from the Circuit Court of the United States for the District of Maryland.

For opinion below, see 108 Fed. 126.

Thomas W. Miller, for appellant.

Edwin G. Baetjer and Charles McH. Howard, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and KELLER, District Judge.

GOFF, Circuit Judge. The Roanoke Street Railway Company, a corporation organized under the laws of the state of Virginia, had the following capitalization: Common stock, \$300,000; preferred stock, \$150,000; and first mortgage 6 per cent. bonds, \$350,000. Of the first mortgage bonds, \$192,300 had been sold and issued by the company, and the residue, \$157,700, had been issued as collateral security for certain debts of the railway company, as well as for the debts of another corporation, called the Roanoke Electric Light & Power Company. The two corporations mentioned were closely allied with each other, and, when overtaken by financial disaster, were reorganized together; the properties of both being purchased by a reorganization committee, and conveyed to a new company. On May 1, 1897, the railway company made default in the payment of all of its interest coupons then maturing. A number of the bondholders and stockholders of the railway company, together with those interested in the power company, made an effort to reorganize the railway company without resorting to a foreclosure suit. A plan of reorganization, dated October 11, 1897, was formulated, and an effort was made to obtain the assent thereto of all the bondholders and stockholders of the two companies mentioned. By the terms of this plan, all of the bonds and stock of the subscribers thereto were to be deposited with the Mercantile Trust & Deposit Company of Baltimore, and a new corporation was then to be organized, in which the properties of the two companies were to be vested. The plan of reorganization proposed the following capitalization for the new company: First mortgage 5 per cent. bonds, not exceeding \$180,000; second mortgage 4 per cent. income bonds, not exceeding \$192,000; and stock, \$180,000. The bonds and stock were to have been issued in the following manner: The first mortgage bonds were to be sold, and the proceeds used only for the purpose of paying off the indebtedness secured by the pledge of the bonds that had been issued

as collateral security; also in discharging a deed of trust given by the power company, and in paying the costs of reorganization. The income bonds were to be substituted for those bonds of the railway company not held as collateral security. Of the stock, \$150,000 was to be divided among the preferred stockholders of the railway company, and the remaining \$30,000 was to be distributed among the purchasers of the first mortgage bonds. On account of certain litigation which had been instituted against the railway company, reorganization without foreclosure became impracticable; and a meeting of the bondholders of the railway company was held on December 22, 1897, at which Richard M. Venable, Charles R. Spence, and S. Hamilton Graes were appointed a committee of such bondholders as might become parties to the agreement then formulated, by which said committee were given authority to represent the bondholders in all proceedings for the collection of their bonds, and they were also directed to secure the organization of the two companies, with instructions to carry out, "as far as practicable," the plan originally outlined in the agreement of October 11, 1897. Each bondholder who signed said agreement obligated himself to deposit with the Mercantile Trust & Deposit Company of Baltimore the number of bonds set opposite his signature. A greater part of the security holders of the two companies assented to this agreement. For the purpose of effecting the reorganization so proposed, the committee were authorized to purchase the property of the two companies at foreclosure sale on behalf of the depositing bondholders, and to use their bonds, with the coupons attached, for the purpose of making payments therefor. Alford M. Fuller, the appellant, was the holder of 42 of the first mortgage bonds of the railway company, for \$500 each, upon which the company had defaulted in interest on May 1, 1897.<sup>a</sup> The appellant on May 9, 1898, caused his bonds to be deposited with the trust company, and the plan of reorganization to be signed for him, but he at the same time retained in his own possession the three coupons upon each of his bonds maturing May 1, 1897, November 1, 1897, and May 1, 1898. The fact that he so retained said coupons was noted by the trust company in the receipt given by it for the bonds.

The trustee named in the mortgage caused suit to be duly instituted to foreclose the same in the circuit court of the United States for the Western district of Virginia, and a decree was passed May 1, 1899, appointing commissioners, and directing them to sell the mortgaged property. The commissioners were directed to apply the proceeds of sale to the payment of the costs and certain preferred claims, then to pay the coupons past due (the mortgage having specially provided that, in case of sale thereunder, the coupons should be preferred to the principal of the bonds), and then to apply the residue of the proceeds of sale to the bonds ratably. As provided for by the decree, the sale was duly made, and the defendants, as such committee, purchased the property of the railway company for \$150,000, and of the power company for \$31,000; using in their settlement with the commissioners of sale the bonds deposited with the trust company, as well as the coupons deposited therewith, in-

cluding the bonds of the appellant. It appears from the record that, after the confirmation of the sale by the court, the appellees were for the first time advised of the fact that the coupons due May 1, 1897, November 1, 1897, and May 1, 1898, had not been deposited with the appellant's bonds, and that he was then notified by the appellees that no provision had been made by the plan of reorganization for payment to depositing bondholders of any of the coupons due on and after May 1, 1897, and that therefore the appellant would not be permitted to share equally with the other depositing bondholders in the issue of the income bonds of the new company until he had deposited with the committee the coupons retained by him, or accounted for such money as he might collect because of them, out of the proceeds of sale, thereby placing himself on an equality with the other bondholders. The appellant, refusing to acquiesce in the contention of the appellees, proceeded to collect from the commissioners of sale the sum of \$2,115.96, as due to him from the proceeds of sale on account of the coupons he had so retained. The appellees then offered to return to the appellant the bonds and coupons he had deposited, and take up the receipt which had been issued for them by the trust company, but this proposition was also declined by him. After the sale a meeting of the depositing bondholders and of others interested in the reorganization of the two companies was duly called and held; the object being to modify in certain particulars the plan of reorganization, in which meeting the appellant participated. The final plan of adjustment and reorganization was then agreed to and promulgated; the same containing certain changes from the original agreement not material to be fully set forth, so far as the matters we are now to dispose of are concerned. The appellees, as such committee, organized the new corporation, and caused to be conveyed to it the properties of the two old companies, and also issued the securities of the new corporation to the amounts provided, applying them as they were directed to do by the final agreement of the parties interested therein. The appellant was the only one of the depositing bondholders who failed to deposit for the use of the committee all of the unpaid coupons held by them, and he was the only bondholder to whom the committee declined to issue the new income bonds in exchange for his bonds and the coupons maturing May 1, 1897, and subsequently. The appellees, as such committee, being unable to adjust the controversy with the appellant, deposited with the Mercantile Trust & Deposit Company of Baltimore 42 of the income bonds of the new company, covering bonds held by the appellant, and notified him that said trust company would deliver the same to him whenever he would refund the amount theretofore collected by him upon his retained coupons, together with the interest due thereon. But the appellant refused to make such refund, and demanded the unconditional delivery to him of said income bonds, which being refused, he filed his bill in equity against the appellees, the object of which was to enforce the delivery to him of the income bonds so held by the committee with the trust company.

The appellees duly answered the bill, denying the appellant's right to demand the delivery of said bonds to him, and charging that he

was endeavoring to acquire an undue advantage over his co-bondholders, which should not be permitted in a court of equity; that they, as such committee, were trustees, and that they would not permit one bondholder to acquire a preference over the others out of the subject-matter of their trust; that the appellant's claim was inequitable and unjust, and that he should be required either to participate equally with the other bondholders in the reorganization, or to renounce all benefits of participation therein, and receive the dividend which was collected on the bonds deposited by him, from the proceeds of sale. The case, having been duly matured, came on to be finally heard, when the court below decreed against the contention of the appellant, and ordered that he should, within 30 days after said decree, pay to the defendants, as such committee, the sum of \$2,115.96, the amount collected by him upon said coupons maturing May 1, 1897, November 1, 1897, and May 1, 1898, with interest thereon from the 28th day of October, 1899, when said sum was so paid him, or that he should deposit said sum, with interest aforesaid, with the Mercantile Trust & Deposit Company of Baltimore, subject to the order of the defendants as such committee, or that, in default thereof, the appellant should be forever debarred from participating in the reorganization mentioned, or from claiming any of the benefits and advantages thereof, and should surrender to the appellees the receipt of the Mercantile Trust & Deposit Company for the bonds he had deposited, upon receiving from them the sum of \$5,096.28, the dividend collected on the bonds and coupons of the appellant, and upon also receiving from the appellees, as such committee, the 42 bonds and coupons of the old company; said bonds and coupons to have indorsed upon them a memorandum of the dividends paid thereon. From this decree the appeal we are now considering was granted.

The appellant claims a contractual right to the benefits of the reorganization agreement, and his suit is for the express purpose of obtaining specific performance of its provisions. It is clear that his bonds were deposited under that agreement, and the question before this court simply is, did the court below err in its construction of that contract? That court clearly stated the controversy in this way:

"The question involved is whether or not the complainant can be required by the defendants, as a condition of his obtaining from them \$21,000 of income bonds of the new company, to produce and surrender certain defaulted coupons which had been detached from the old bonds before they were deposited, or be required to pay the money collected by the complainant for the coupons out of the proceeds of the foreclosure sale, or whether the complainant is entitled to keep the money, and to demand and receive the new bonds unconditionally."

The bill of complaint is drawn upon the theory that the appellees, under the terms of the contract, have agreed to deliver to the appellant, unconditionally, the income bonds which are the subject of this controversy. The appellees insist that such delivery was only to be made after the appellant had performed the duties imposed upon him, the object of which was to equalize the condition of the bondholders participating in the benefits of the reorganization. All of the other bondholders have deposited all of the coupons relating to their bonds,

which were used by the appellees—they constituting the bondholders committee—in the purchase of the property at foreclosure sale; and the appellant's insistence is that, although he has retained three coupons pertaining to each bond deposited by him, nevertheless a court of equity will decree that he is entitled to share in the benefits of the reorganization plan equally with such other bondholders. The reorganization agreement was a mutual contract among the bondholders who signed it, and the appellees were their trustees, and it would certainly have been improper and inequitable for such trustees to have given any benefit growing out of the reorganization to the appellant that was not shared equally with all of the other bondholders. Such was the position assumed by the committee when they were first advised of the claim of the appellant, who then declined the tender of the committee to return him his bonds, and demanded from it all the securities, benefits, and advantages due to the depositor of bonds under the agreement. The appellees were not only authorized to represent those who had deposited bonds, in all proceedings instituted for the collection of such bonds, but were also expressly given the right to do whatever, in their judgment, might be necessary or desirable for the protection of the interests of those signing the agreement. It is clearly shown by the record that the appellees, as such committee, acting with the parties endeavoring to accomplish the reorganization, had formulated the plan upon the basis that no payment was to be made upon the bonds deposited under the agreement, nor for the coupons thereof maturing May 1, 1897, and subsequently, other than by the delivery of the income bonds of the new company; and it also plainly appears that all the depositors, except the appellant, turned over all their coupons for use by the committee in paying for the property purchased for the new company. We think that the appellant, when he became a party to such agreement, obligated himself to surrender all of the then past-due coupons of the bonds so deposited, and that such coupons were to be used by the committee in the purchase of the property, and also that such committee was fully authorized to adopt and enforce such methods of procedure as would bring about perfect equality among their beneficiaries. The appellant, as a party to the reorganization scheme, will not be permitted by a court of equity to claim any of the benefits resulting from the execution of that plan, until he has fulfilled entirely the stipulations that were to have been performed on his part. He is subject to and affected by all of the equities which the agreement to reorganize gives rise to. *Cook, Corp.* § 888; *1 Thomp. Corp.* § 275; *Jones, Mortg.* § 621a; *Appeal of Fidelity Insurance, Trust & Safe Deposit Co.*, 106 Pa. 144; *Short, Ry. Bonds*, § 902; *Bliss v. Matteson*, 45 N. Y. 22; *Ex parte White*, 2 S. C. 469; *Child v. Railroad Co.*, 129 Mass. 170.

The bill in this case does not complain of the plan of reorganization; does not question the power of the committee, nor allege any dereliction of duty on its part, other than the withholding from appellant of the said income bonds; but it relies upon both the plan, and what the committee has done in executing it, and prays the aid of equity in enforcing the terms of that plan along the lines as it is construed by appellant. To grant the prayer of the bill would be to

destroy the mutuality and equality which was the foundation of the plan of reorganization that has now been successfully carried out.

This, in effect, disposes of all the assignments of error except those alleging that the court below erred in decreeing that the appellant should pay to appellees the sum of money which the circuit court for the Western district of Virginia had decreed should be paid to him. The circuit court for the Western district of Virginia, on the complaint of the Fidelity Insurance, Trust & Deposit Company, the trustee under the deed of trust securing the bonds, decreed a sale of the property under the terms of the mortgage, and, as incidental to the distribution of the proceeds of sale, determined what bonds and coupons were outstanding and entitled to participate therein. It did not at any time assume jurisdiction over the committee having charge of the reorganization of the companies, nor did it pass upon the equities of the parties to the agreement among themselves. The parties to the present litigation were not all before that court; the committee, as such, was not impleaded; nor were the questions now under consideration ever raised, submitted to, or decided by that court; and therefore the decree referred to is in no manner an estoppel between the parties to this suit. Evidently the appellant's contention in this particular is founded upon an erroneous apprehension of what the true issues before that court were, as well as of the matters really disposed of by it. None of the questions relating to the rights of the parties to the reorganization agreement, as between themselves, as well as their mutual equities, were before that court, and could not, under the circumstances, have been within the scope of the foreclosure proceedings. The real questions now at issue were in fact raised after the circuit court for the Western district of Virginia had disposed of the case before it, and after the appellees, as the organization committee, had refused to comply with the request of the appellant relating to the delivery of the income bonds claimed by him.

We do not deem it necessary to consider other questions assigned as error and discussed by counsel, relating to the pleadings and bearing upon matters of practice, as the points suggested are without merit, and, under the circumstances and equities of this cause, entirely immaterial.

There is no error in the decree complained of, and the same is affirmed.

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MEXICAN NAT. R. CO. V. JACKSON.

(Circuit Court of Appeals, Fifth Circuit. November 18, 1902.)

No. 1,150.

**1. STATUTES—TITLES—PLURALITY OF SUBJECTS—CONSTITUTION—CONSTRUCTION.**

Const. Tex. art. 3, § 35, provides that no bill shall contain more than one subject, which shall be expressed in its title. *Held*, that the word "subject" as used in such section was not synonymous with "provisions," and that where the different provisions of the statute refer directly to the same subject, and have a mutual connection and are not foreign



to the subject expressed in the title, the statute is not in violation of the constitutional provision.

**2. SAME—INJURIES TO RAILROAD EMPLOYEES.**

Laws Tex. 1897, Sp. Sess., p. 14, is entitled "An act to prescribe and define the liability of persons, receivers or corporations operating railroads or street railways, for injuries to their servants and employes, to define who are fellow servants, and to prohibit contracts between employer and employe based on the contingency of injury or death of the employe, limiting the liability of the employer for damages." *Held*, that such act was not in violation of Const. Tex. art. 3, § 35, as containing a plurality of subjects.

**3. INJURY TO EMPLOYE—PLACE OF ACCIDENT—RELEASE.**

Where plaintiff, a resident of Texas, executed a contract with his employer, a sleeping car company, exempting it, and any corporation over whose railroads its cars might be transported, from liability for any injuries to plaintiff, which contract was void under Laws Tex. 1897, Sp. Sess., p. 14, providing that no such contract will be binding, the fact that plaintiff's injury, for which suit was brought in the federal court in Texas, occurred in Mexico, was immaterial as affecting the invalidity of such contract, when pleaded as a defense.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Texas.

Thos. W. Dodd, for plaintiff in error.

W. W. King, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. Neil Jackson, the defendant in error, brought his action against the Mexican National Railroad Company, the plaintiff in error (hereinafter styled the railroad), to recover damages for personal injuries claimed to have been received by reason of the negligence of the railroad and its servants. Besides other defenses not necessary to notice, the railroad pleaded: That it was a corporation owning and operating a line of railway in the Republic of Mexico, from the eastern margin of the Rio Grande, in Laredo, Tex., to the City of Mexico. That on the 15th day of April, A. D. 1888, before the date of the injury claimed to have been received by Neil Jackson, it had entered into a contract with the Pullman Palace Car Company (hereinafter called the Pullman Company), under and according to the terms of which the Pullman Company furnished the railroad with sleeping cars, to be owned and controlled by the Pullman Company, and (with exceptions not necessary to name) to be kept and maintained by it, and to furnish with each sleeping car one or more employes, as may be necessary, whose duty it was to collect fares for the accommodations furnished, for account of the Pullman Company, and generally to wait upon and provide for the comfort of passengers occupying seats or berths in the Pullman cars. That this contract by its terms was to run for a period of 15 years from May 1, 1888, and was in force on the 20th of December, 1900. That on the last-named date Neil Jackson was a porter upon the sleeper "Celaya," in the employment of the Pullman Company, and had been so engaged from July 11, 1900, under a contract in writing made at San Antonio, Tex., on July 11, 1900, in which contract, amongst other things, he agreed as follows:

"(1) I assume all risks of accident or casualties by railway travel or otherwise, incident to such employment and service, and I hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit, and discharge the Pullman Company and its employés from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

"(2) I am aware that said Pullman Company secures the operation of its cars upon lines of railroads, and hence my opportunity for employment, by means of contracts, wherein the Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to employés of the Pullman Company in cases provided for in such contracts; and I do hereby ratify all such contracts, made or to be made, by the Pullman Company, and do agree to protect, indemnify, and hold harmless the Pullman Company with respect to any and all sums of money it may be compelled to pay or liability it may be subject to under any such contract in consequence of any injury or death happening to me; and this agreement may be assigned to any such corporations or persons, and used in its defense.

"(3) I will obey all rules and regulations made for the government of their own employés by the corporations or persons over whose lines of railroad the cars of the Pullman Company may be operated, while I am traveling over said lines in the employment or service of the Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit, and discharge any and all such corporations and persons from all claims for liability of any nature and character whatsoever on account of any personal injury or death to me while traveling over such lines in said employment or service."

The railroad submitted that at the time Neil Jackson claims to have been injured he was in the Pullman Company's sleeper "Celaya," as an employé of that company as a porter, under the terms and conditions of his contract of employment, by which he had waived all rights as a passenger, and all damages for or on account of any injuries he might have received while in that employment, which the railroad here pleads in bar of any and all rights he otherwise might have been entitled to. To this plea in bar Neil Jackson excepted, on the ground that the contract on which it is based is in violation of law, and in contravention of the statute of Texas, which prohibits an employer from exacting such contract from one of its employés, and declares such contracts void. The railroad assigns as error the action of the trial court in sustaining the foregoing exception, on the grounds (1) that the statute referred to violates section 35, art. 3, of the constitution of the state of Texas, which reads: "No bill [with exceptions not necessary to note] shall contain more than one subject, which shall be expressed in the title." The statute referred to is entitled "An act to prescribe and define the liability of persons, receivers or corporations operating railroads or street railways, for injury to their servants and employés; to define who are fellow servants, and to prohibit contracts between employer and employé based upon the contingency of the injury or death of the employé, limiting the liability of the employer for damages." Laws 1897, Sp. Sess. p. 14. (2) That the act referred to is class legislation, applying especially to one class of persons, fixing limitations upon persons, receivers, or corporations operating railroads or street railways not imposed upon other persons, and is therefore in violation of the constitution of the United States.

The second ground urged to support the assignment of error seems to us to be manifestly not well taken, when we consider the utterances of the supreme court in the cases cited by the plaintiff in error. *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; *Railroad Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; *Bell's Gap Ry. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; *Railroad Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; the later case of *Railroad Co. v. Matthews*, 174 U. S. 96-110, 19 Sup. Ct. 609, 43 L. Ed. 909; and the case of *Association v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251.

In reference to the other ground urged in support of the assignment of error, it is conceded by counsel for the railroad that under the decisions of the supreme court of the state of Texas the most liberal construction should be given to the act to uphold its constitutionality, citing numerous cases, and making special reference to the case of *State v. Parker*, 61 Tex. 265, which announces the doctrine that none of the provisions of a statute should be regarded as unconstitutional on this ground when they relate, directly or indirectly, to the same subject, have a mutual connection, and are not foreign to the subject expressed in the title. The section of the constitution in question is not to be given a strict or literal construction. Such a construction would tend to unduly embarrass legislation. The object of the organic provision was to prevent the bringing together in one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of each, respectively, and thus secure the passage of several measures neither of which could succeed on its own merits, and to prevent the inserting in bills pregnant clauses of which the title of the act gave no information, and thereby secure legislation the real scope and effect of which had escaped the attention of many members. The first section of the act in question defines the liability of persons, receivers, or corporations operating railroads or street railways. The second section defines who are not fellow servants. The third section defines who are fellow servants. The fourth section prohibits such persons, receivers, or corporations from limiting their liability to their employés. Its language is as follows: "No contract made between the employer and the employé, based upon the contingency of death or injury of the employé, and limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid or binding." The word "subjects" as used in the constitution is not synonymous with "provisions." It does not require the interest of a party or the zeal of an advocate to discern that the provisions of this statute refer directly to the same subject, have a mutual connection, and are not foreign to the subject expressed in the title.

Neil Jackson, the plaintiff below, was at the time of instituting his suit, and at the time of entering into his contract with the Pullman Company, a citizen of Texas, and a resident of the county of Bexar, in that state. His contract with the Pullman Company was made at San Antonio, in Bexar county, Tex. One of the provisions of that contract is that "this agreement may be assigned to any such corpora-

tions or persons operating railroads, and used in its defense." It is wholly immaterial that the injury occurred in the Republic of Mexico. The citizenship of the parties, and the general law applicable thereto and to such cases, as we have held in recent decisions, and as seems to us to be settled by the decisions of the supreme court (and is not questioned in this case so far as the record shows), gave the United States court for the Western district of Texas jurisdiction of the parties and of the subject-matter. The contract on which the plea in bar reposes contemplates in its letter, on its face, and in the very nature of the contract itself that it is to be used, when used at all, as matter of defense. It does not provide, or, if it may be held to so provide, it is not urged to support any affirmative action against Neil Jackson. If it could in any state of case be sought to be enforced against him to support an affirmative recovery, it is not sought to be so enforced in this action, but it is sought to be enforced as matter in bar of Neil Jackson's suit. It is therefore unprofitable to inquire what might or might not be the result of pleading this contract in another forum. We are dealing with it as it is presented on this record, where it is sought to be enforced by one not originally a party to it against one of the makers. In the presence of the express statute on the subject (which is as binding on the circuit court of the United States sitting in Texas as it is on the state courts), we need not discuss or consider the question whether such a contract is against the general public policy. It is too clear for discussion that it is against the public policy declared by the statute, which fixes the law on that subject for the tribunal which took and rightfully exercised jurisdiction in this case. Therefore we do not discuss the bearing of the case of *Railroad Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, nor express any view as to the similarity or identity of the question presented and answered in that case to the question that would arise on the plea in this case in the absence of the statute. We have carefully examined and considered the decision and all the reasoning of the opinion in the *Voight Case*. But holding, as we do, that the contract which is attempted to be made the basis of the plea in bar falls within the provisions of the Texas statute, and is manifestly sought to be used to avoid those provisions, it seems to us superfluous to discuss the distinction between the liability of a common carrier and the liability of the same carrier as a private carrier, as is exhaustively done in the cases reviewed in the opinion in the *Voight Case*. And whether the relation of the porter on the Pullman car to the transportation company, in cases like the present one, more nearly resembles that of an employé than that of a passenger, or whether he is, technically, the one or the other, seems to us to be entirely immaterial, under the comprehensive provisions of the statute. We consider that the case before us presents only the question, is the statute of Texas a valid law? We hold that it is, and that the plea in bar has no support.

The judgment of the circuit court is therefore affirmed.

PARDEE, Circuit Judge, dissents.

## UNITED STATES ex rel. COFFMAN v. NORFOLK &amp; W. RY. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1902.)

No. 437.

## 1. DISMISSAL—RIGHT OF PLAINTIFF BEFORE TRIAL.

Under the rule of the common law, where no affirmative relief is asked for by the defendant a plaintiff may discontinue his action without prejudice at any time before trial, as a matter of right.

## 2. SAME—MANDAMUS—INEFFECTIVENESS OF WRIT.

A proceeding for mandamus should be dismissed where it is made to appear by the relator before trial that the occasion for which the writ was demanded has passed, and that there is no longer any actual controversy between the parties, and no subject matter involved on which the judgment of the court can operate.

In Error to the Circuit Court of the United States for the Northern District of West Virginia.

B. M. Ambler, for plaintiff in error.

James F. Brown and John H. Holt (Joseph I. Doran, on the brief), for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The judgment complained of was rendered by the circuit court of the United States for the Northern district of West Virginia in a proceeding instituted by the plaintiff in error under the act of congress of March 2, 1899, supplemental to the interstate commerce act of February 4, 1887, to compel by mandamus the Norfolk & Western Railway Company to furnish him a sufficient number of cars to enable him to transport the output of the Indian Ridge coal mine, one of a group of mines in what is known as the "Pocahontas Coal Field," in West Virginia, to Lambert's Point, a port on the navigable waters of the United States, in the state of Virginia. The relator prayed that the Norfolk & Western Railway Company be required to furnish him a sufficiency of transportation for said output to meet a specific demand created by sales of coal to be delivered in vessels at the port of Lambert's Point; such sales consisting of 2,000 tons for the barge R. R. Thomas, to be delivered on January 14, 1901, and 2,450 tons to the steamship Chattan, by January 21, 1901. The relator set forth in his petition that he resided in and was a citizen of the state of West Virginia, and that the Norfolk & Western Railway Company is a corporation organized and existing under the laws of the state of Virginia, and doing the business of a common carrier over the line of railroad owned by it, running from the city of Columbus, in the state of Ohio, through the states of Ohio, West Virginia, and Virginia, to said port at Lambert's Point, passing en route through said Pocahontas coal field and by the Indian Ridge mine, the product of which he controlled. The defendants other than the Norfolk

¶ 1. See Dismissal and Nonsuit, vol. 17, Cent. Dig. §§ 27, 33.

& Western Railway Company were certain officials of that company having charge and being in control of its transportation department. The relator alleged an unfair discrimination by said company against him, and in favor of other shippers, from other mines of the said coal field. The handling and transportation of the coal from that field were alleged to be interstate commerce and traffic, and the writ of mandamus as provided for in the act of congress mentioned was prayed for, commanding, compelling, and requiring the said railway company to move and transport the output from the Indian Ridge mine to the port at Lambert's Point, and to furnish the cars and proper facilities for the same, so that the relator would thereby be enabled to comply with his contracts to deliver coal at that point to the vessels and by the dates mentioned. On the filing of the petition, on the 15th day of January, 1901, the court issued the alternative writ of mandamus, returnable on the 17th of that month, on which day the defendants appeared and moved to quash the same, which motion was, after argument, overruled. The defendants then answered, denying the material allegations of the petition, and especially denying any discrimination whatsoever against the relator, or in favor of any other of its patrons. In such answer the respondents insisted that the alternative writ disclosed no right on the part of the relator which had been violated by them, or any of them, and they denied that he was entitled to the relief demanded. The relator objected to the filing of this answer, but his objections were overruled, and issue was thereupon duly joined, when the parties, by a written stipulation, waived a jury, and submitted all questions of law and fact to the determination of the court. Quite a number of witnesses were examined and other evidence introduced both on behalf of the relator and of the defendants, and the cause, after argument, was submitted, with the understanding that 15 days additional time should be allowed for the filing of briefs. On the 8th day of February, 1901, the relator filed his affidavit to the effect that all the cars asked for by him for the transportation of said coal had been furnished, that the coal had been transported to Lambert's Point, and that as the time when it was to have been delivered in cargoes, to wit, January 14th and January 21st, had then elapsed, the mandamus as prayed for would be wholly unavailable if issued. He therefore on that day moved the court that the proceeding be dismissed without prejudice, which motion the court then and there denied, and on the 15th day of June following rendered its decision denying the peremptory writ, quashing the alternative writ, and awarding costs against the relator. 109 Fed. 831. To this judgment the writ of error we are now considering was sued out.

A number of assignments of error are set forth in the record, and relied upon by the plaintiff in error, but we only find it necessary to consider the one relating to the refusal of the court to dismiss without prejudice. We think it entirely clear that the relator had the right to dismiss the proceeding he had instituted. Under the common-law practice, the plaintiff can discontinue his suit without prejudice at any time before a verdict is returned by the jury, or a judg-

ment entered in cases tried by the court. 4 Minor, Inst. 958; 2 Bart. Law Prac. 689; 2 Tuck. Bl. Comm. 299. The supreme court of the United States, in passing upon this question in *Veazie v. Wadleigh*, 11 Pet. 55, 9 L. Ed. 630, said:

"Before trial, then, the plaintiff may in many cases, as a matter of right, discontinue his cause according to the practice of the state courts, at any time when he is demandable in court. After a trial or verdict, he can do so only by leave of the court; which it may grant or refuse, in its discretion. But under ordinary circumstances, before verdict, it is almost a matter of course to grant it upon payment of costs, when it is not strictly demandable of right."

The limitations imposed under the statutes of West Virginia relating to this matter in no wise interfere with this rule of the common law, the existence of which is expressly recognized by the statute law of that state.

The defendants, in their answer, had simply denied the allegations contained in the petition. They had set up no counterclaim, and, from the nature of the case as made by the petition, could not have relied upon one; nor did they ask for any affirmative relief. The reason for the rule of practice referred to was therefore peculiarly applicable to this case, for it was quite apparent at the time when the motion to dismiss was made that no substantial benefit could accrue to the relator by the issuance of the writ, for the reason that the emergency because of which it had been asked for had, since the filing of the petition, and in fact during the pendency of the trial of the issues joined, entirely disappeared. Under the conditions then existing, the suggestion from the relator that there was no longer a cause for the pendency of the suit should have received the concurrence of the court, and, indeed, it would have been entirely proper for the court, of its own volition, to have directed a dismissal of the petition. It should also be borne in mind that the extraordinary writ of mandamus should never be issued when from the pleadings it is made to appear that it will prove fruitless and nugatory. The mandate of a court of justice should be issued only in cases where it can be made available. 4 Minor, Inst. 400; 19 Am. & Eng. Enc. Law, 756; High, Extr. Rem. § 14. A court will not exercise jurisdiction over a case in which it is powerless to grant relief. If it is made to appear that there is no actual controversy, involving real and substantial rights, between the parties, and no subject-matter upon which the judgment of the court can operate, the suit should be dismissed. *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *Kimball v. Kimball*, 174 U. S. 158, 19 Sup. Ct. 639, 43 L. Ed. 932.

At the time the motion to dismiss was made in the court below, there was no actual controversy pending between the parties to the record, the decision of which could have been carried into effect by judgment, and therefore the case should have been discontinued, and not held for the discussion of abstract propositions, which, however interesting, could not affect the matter in issue as it then existed.

The judgment complained of will be reversed, the order refusing to dismiss the petition on the motion of the plaintiff in error will be

set aside, and this cause will be remanded to the court from whence it came, with directions to dismiss the petition without prejudice. Reversed.

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STANDARD SEWING MACH. CO. v. LESLIE.\*

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 831.

1. JURISDICTION OF STATE COURTS—INCIDENTAL CONSTRUCTION OF PATENT.

An action by a patentee on a contract for royalties, to recover royalties on machines made by defendant, is within the jurisdiction of a state court, although the defendant, under a plea of the general issue, only undertakes to controvert plaintiff's evidence as to the construction of the patent, which is involved only incidentally and as a part of the contract.

2. PROCEEDINGS IN ERROR—EFFECT OF DECISION—LAW OF CASE.

The decision of an appellate court on a question arising in a case is not only binding on the trial court, but is the law of the case in the appellate court itself on a subsequent writ of error or appeal.

3. SAME—RULE APPLIED.

In reversing a judgment for defendant entered on a verdict directed by the court, the appellate court held that the evidence in the record introduced by plaintiff was sufficient on every issue to have justified a verdict in his favor, and that the line of evidence relied upon by defendant was incompetent under the issues. *Held*, that on a writ of error taken by defendant to review a judgment subsequently entered on a verdict for plaintiff, where plaintiff's evidence was the same and defendant introduced no evidence except such as had previously been held incompetent, the appellate court would not consider the instructions given or refused, since under its prior decision it would not have been error to direct a verdict for plaintiff.

4. SAME.

The fact that in such case plaintiff withdrew all objection to the admission of the incompetent evidence does not entitle defendant to have it considered by the appellate court and given an effect different from that to which it is entitled under the law of the case as previously settled.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Leslie began this action in the superior court of Cook county, Ill., upon a contract executed by the parties on August 20, 1884. The cause was removed to the federal court, on the petition of the company, on the ground of diversity of citizenship.

The contract provided: (1) A prior contract is hereby rescinded. (2) A trustee, to whom Leslie has conveyed full title, shall hold all of Leslie's patents for improvements in sewing machines and patents on "the Rotary Shuttle Sewing Machine" for the benefit of the parties under the terms of this contract. (3) Foreign patents may be taken out at the expense of the company, and shall be the joint property of the parties. (4) The company releases Leslie's debt to it. (5) The company agrees to pay Leslie as royalty "upon each machine manufactured by it embodying the principles covered by Leslie's patents" 7½ cents for the first 100,000 machines and 5 cents for the excess. The royalties shall be paid in cash, and \$1,000 thereof in advance. (6) Leslie "shall not be held to guaranty the validity of said patents or any of them or to protect said second party (the company) against infringements thereof or against actions brought against it for infringements, but all royalties hereunder shall cease upon the date of a decree of any

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\* Rehearing denied November 15, 1902.



court of competent jurisdiction declaring the invalidity of said patent or patents." (7) The company agrees to carry on the business with energy, "and shall make such number of machines as to keep the supply as nearly as practicable up to the demand of the trade, and this contract shall endure during the life of the patents issued in 1882 unless sooner terminated, as hereinafter provided." (8) The company "shall not be obliged to make Rotary Shuttle Sewing Machines like any model that has been or may be constructed or settled on as a standard, but it may from time to time make such changes as may seem to it expedient; but no such alteration or change shall relieve second party from the payment of royalties as herein provided so long as the machine made by it involves any of the essential principles covered by the patents of first party." (9) The company shall make monthly reports under oath. (10) The company "shall have the exclusive right to make and sell machines under said patents as above provided during the monthly statements." (11) The company "may terminate this contract upon giving written notice to first party, and notifying said trustee that it has no further interest in said patents, and that the same may be reassigned to first party." The declaration contained counts for the recovery of royalties, for damages for not making machines to the number required by the trade, and for damages for refusing to surrender the patents after demand. The company pleaded the general issue.

At the first trial Leslie proved the contract, his patents, the company's manufacture of a large number of machines like one or another of four models produced to the jury, refusal to pay royalty or to relinquish the patents, and introduced expert testimony tending to prove that each of the models embodied one or more of the essential principles covered by one or more of the patents. The company offered expert testimony to prove that none of the models embodied any of the essential principles covered by Leslie's patents, either in identical construction or mechanical equivalents. The court rejected the proffered evidence, charged the jury, in effect, that the company could not hold the patents and at the same time escape the payment of royalties by altering the form of its machines, and directed a verdict for Leslie. The judgment was reversed by this court in *Sewing Mach. Co. v. Leslie*, 24 C. C. A. 107, 78 Fed. 325.

At the second trial Leslie introduced substantially the same evidence as at the first. The company introduced a great deal of evidence to show the state of the prior art, and expert testimony to the effect that none of its models embodied any of the essential principles covered by the Leslie patents. The court charged the jury, in effect, that under the prior art there was no room for the application of the doctrine of mechanical equivalents to the company's models, and directed a verdict for the company. On a record that did not contain the proof made of the prior art, the judgment was reversed by this court in *Leslie v. Sewing Mach. Co.*, 39 C. C. A. 314, 98 Fed. 827.

At this the third trial Leslie made out substantially the same case as before. The company exhibited the prior art quite fully; introduced expert testimony to the effect that in view of the prior art Leslie's claims must be limited strictly to the very means detailed, and that, so limited, they do not cover any of the company's models; and also produced evidence tending to show that the changes were made in good faith, and not merely to escape the payment of royalty. No evidence was introduced to sustain the counts of the declaration other than the one for royalty. At the end of Leslie's evidence in chief, and again at the conclusion of all the evidence, the company moved the court to dismiss the cause for want of jurisdiction. The company further moved the court to direct a verdict in its favor. The cause was submitted to the jury, who returned a verdict in Leslie's favor. The company duly excepted to the giving and refusal of various instructions.

The assignments of error present the questions of jurisdiction, of the propriety of refusing to direct a verdict, and of the correctness of instructions given and refused.

John Dane, Jr., and Charles S. Holt, for plaintiff in error.

James H. Teller and Charles K. Offield, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after making this statement of the case, delivered the opinion of the court.

If the state court had no jurisdiction, the federal court acquired none by removal, even though the defect was that the action should have been brought in the federal court in the first place. That the state court had jurisdiction of the subject-matter of the counts for wrongfully failing to make the required number of machines and for wrongfully refusing to surrender the patents after demand plaintiff in error does not controvert, but contends that since these counts, though not dismissed, were not supported by evidence, they cannot be considered; that the subject-matter of the remaining count was not within the jurisdiction of the state court; and that, as soon as this state of things became apparent, it was the duty of the federal court to dismiss the action. If it be conceded that jurisdiction depends solely on the count for royalties, nevertheless we think the motion was rightly denied. Plaintiff in error admits that if it and Leslie agreed on the construction of the patents the case of *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295, would be decisive, but insists that their contention over the applicability of the prior art and its effect in limiting Leslie's claims transmutes the cause into one of exclusively federal cognizance. In any action upon contract for royalties, the plaintiff produces the contract, his patents, and the machines made by the defendant. The contract being proven, the question is, do the defendant's machines embody any of the essential principles covered by the patents? To determine this, it is necessary both that the patents and the defendant's machines be construed. Otherwise no intelligent comparison can be made. So the plaintiff introduces evidence on both points, but only to sustain his one contention, that the defendant has failed to pay a sum due under the contract. The interpretation of the patents as well as of the machines is necessary to a proper construction of the contract, but obviously is only incidental to that one purpose. The patents are construed, not as independent grants to which the defendant is a stranger, but as a part of the contract into which he entered. Now if, under a plea of the general issue, the defendant chooses to controvert the plaintiff's evidence only on the one point, and not on the other, how can it logically be said that the defendant's partial denial has changed the nature of the plaintiff's cause of action? A reduction of the contention to this form is, we think, its sufficient answer.

To solve the questions presented by the remaining assignments, it is necessary to understand the former decisions in this cause; for it is a familiar and entirely righteous rule that a court of review is precluded from agitating the questions that were made, considered, and decided on previous reviews. The former decision furnishes "the law of the case" not only to the tribunal to which the cause is remanded, but to the appellate tribunal itself on a subsequent writ or appeal. *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969: "There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on its opinions, or speculate of chances from changes in its members."

In *Sewing Mach. Co. v. Leslie*, 24 C. C. A. 107, 78 Fed. 325, it was ruled that the court's charge to the effect that the company could not

refuse to surrender the patents and at the same time escape the payment of royalties by altering the form of its machines was erroneous, that the company was not limited to making machines employing the Leslie patents, and that royalties were to be paid only on such machines as did embody some essential principle covered by the patents. That ruling, right or wrong, was binding on the parties not only in the trial court, but also in this court in subsequent proceedings. The decision, however, did not undertake to say in advance what kind of evidence the company might use to support its denial of royalties due.

In *Leslie v. Sewing Mach. Co.*, 39 C. C. A. 314, 98 Fed. 827, as already stated, the court charged the jury in effect that under the prior art there was no room for the application of the doctrine of mechanical equivalents to the company's models, and directed a verdict for the company. The judgment was reversed on a record that contained the plaintiff's case, but did not disclose the evidence of the prior art on which the trial court had ruled that the plaintiff's case was incontrovertibly overcome. The court said:

"When a finding has been directed in favor of the defendant in a case, and the bill of exceptions, though not purporting to contain all the evidence, contains a statement of evidence in behalf of the plaintiff sufficient on every issue to have justified a verdict in his favor, the rule (that the bill of exceptions must contain all the evidence) manifestly ought not to apply, especially if it be apparent that the action of the court was the result of a misapprehension of the bearing and force of the proof adduced. It is plain that there was such an error in this case. Upon the evidence set out in the bill of exceptions the plaintiff was entitled to recover on one paragraph of the declaration a stipulated sum for each machine manufactured by the defendant, if those machines involved 'any of the essential principles covered by the patents.' The question was taken from the jury because in the judgment of the court, as stated in its charge, the claims of each of the patents 'are restrictive by the terms of the patents, and, in view of the clearly shown prior art, to such an extent that the doctrine of mechanical equivalents cannot be invoked in this case.' That was to treat the case as if there were no contract between the parties, and the question were simply of infringement by a wrongdoer. \* \* \* The contract is explicit, and in our opinion excludes any inquiry into the prior art for the purpose of limiting the scope of the patents. It contains the express stipulation that Leslie 'shall not be held to guaranty the validity of said patents or any of them, or to protect said second party against infringement thereof, but all royalties hereunder shall cease upon the date of a decree of any court of competent jurisdiction declaring the invalidity of said patent or patents'; and it is further provided that the 'second party shall not be obliged to make rotary shuttle sewing machines like any model that has been or may be constructed or settled upon as a standard, but it may from time to time make such changes as may seem to fit expedient; but no such alteration or change shall relieve the second party from the payment of royalties, as hereinafter provided, so long as the machine made by it involves any of the essential principles covered by the patents of the first party.' This last expression clearly means that changes or alterations which should introduce only 'equivalents of the original elements should not relieve the second party from the payment of the stipulated royalties, and like the other provision that all royalties should cease on the date of a decree declaring the invalidity of the patents is inconsistent with the proposition of the court that the doctrine of mechanical equivalents could not be invoked in the case. To the same effect in our former opinion we said: 'Leslie was unwilling to guaranty the validity of his patented inventions, or to protect the company in their use should they prove to infringe upon another's protected rights. This risk was assumed by the company, upon the condition, however, that the payment of royalty should cease when a competent court should declare the invalidity of the invention.'"

The company contends that a licensee has the same right as an alleged infringer to go into the prior art for the purpose of limiting the scope of the patent; that in the present case the prior art shows that the elements in Leslie's combinations were old; that the elements in the company's combinations come nearer to the prior art than to Leslie's; and that, Leslie's claims and the company's models being properly interpreted in the light of the prior art, there can be no valid insistence upon mechanical equivalency. On this the corollary is predicated that the expressions in the opinion that "the contract excludes any inquiry into the prior art for the purpose of limiting the scope of the patents" and "alterations which introduce only equivalents of the original elements do not relieve the company from the payment of the stipulated royalties" are mere dicta. On the contrary, these pronouncements lie at the heart of the decision. The bill of exceptions contained evidence for Leslie "sufficient on every issue to have justified a verdict in his favor." If this had not been decided to be so the directed verdict against him would have been allowed to stand. The bill of exceptions did not contain the evidence relating to the prior art, introduced by the defense. The court was therefore bound to presume that the strongest possible defense in that respect had been made, that the prior art showed that the elements in Leslie's combinations were old, that the elements in the company's combinations came nearer to the prior art than to Leslie's, and that, Leslie's claims and the company's models being properly interpreted in the light of the prior art, there could be no valid insistence upon mechanical equivalency. In this state of the record a reversal required the court to hold that a licensee stands on a footing different from an infringer's; that the infringer is not bound by the patentee's ex parte statement of his claims; that the licensee comes into contract relation with the claims; that, by the contract in this case, Leslie did not guaranty the validity of the patents nor agree to protect the company against infringements, but royalties should cease upon a competent court's decreeing the invalidity of the patents; that the company was therefore required to accept Leslie's claims as he made them or let them alone; that the prior art therefore could not be inquired into for the purpose of limiting the scope of the claims; and that therefore the use of machines which embodied mechanical equivalents of Leslie's claims as he made them would not relieve the company from the payment of the stipulated royalties. We think it clear that the criticised portions were far within the necessities of the decision. This construction of the contract left it open for the company on the last trial to introduce evidence, if it had any, that the machines in question did not employ the mechanical equivalents of Leslie's claims as he made them, the prior art being left entirely out of view. And if we were to agree with counsel that the reasoning is all wrong, and involves "an obvious inversion of logic," it would not change the result that such is the law of the case.

At the last trial Leslie again produced the contract, his patents, the machines made by the company, and expert testimony that, without taking the prior art into account, the machines embodied the mechanical equivalents of several of Leslie's claims as stated in the

patents. As decided on the last preceding writ of error, this made a case for Leslie "sufficient on every issue to have justified a verdict in his favor." The expert testimony for the company with reference to the interpretation of Leslie's claims and the company's machines, and the comparison of the two, was based wholly and explicitly upon the prior art as a foundation. The remaining evidence of the company was to the point that the changes were made in good faith and not merely to escape the payment of royalty. This was irrelevant. If the company had in fact abandoned the use of the Leslie patents, the reason was entirely immaterial. There was, therefore, under the former decision, no evidence that was legally sufficient to meet Leslie's case. Consequently there would have been no error in directing a verdict for Leslie. And so it becomes of no concern what instructions the court gave or refused.

The situation is not at all changed by the fact that, after the court had indicated that he would exclude all evidence touching the prior art, Leslie withdrew his objection, and the court thereupon allowed the evidence to go in. If Leslie had been defeated, manifestly he would be estopped to predicate error on the admission of the evidence. But the fact that he was willing to take his chances before the jury does not authorize the company to require us to give an effect to the evidence different from what it was entitled to under the law of the case.

In addition to the foregoing considerations, we are inclined to believe that, on the contract and the whole record, the right result has been reached, and that intermediate errors, if any, should therefore be disregarded. If the company wants to contest with Leslie on the footing of an infringer, let it reassign the patents and continue the making of its present models.

The judgment is affirmed.

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**DAYTON FAN & MOTOR CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.**

(Circuit Court of Appeals, Sixth Circuit. November 5, 1902.)

No. 962.

**1. PATENTS—VALIDITY—SECOND PATENT FOR SAME INVENTION.**

An inventor may be entitled to a patent for the method or process for producing a new and useful result, and also for a mechanical means by which it is produced, when the method or process is susceptible of being performed by other known means, and the means invented are of such a character as to merit a patent.

**2. SAME—ELECTRIC POWER TRANSMISSION—SPLIT-PHASE MOTORS.**

The Tesla patents, No. 511,559, for a method of operating an electric motor by means of alternating currents, and No. 511,560, for a specific device for practicing such method, known as the "Split-Phase Motor," disclose invention, viewed in the light of the prior state of the art; and neither was anticipated by patent No. 416,193 to the same inventor.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

For former opinion, see 106 Fed. 724.

Albert H. Walker, for appellant.

Thomas B. Kerr and Parker W. Page, for appellee.

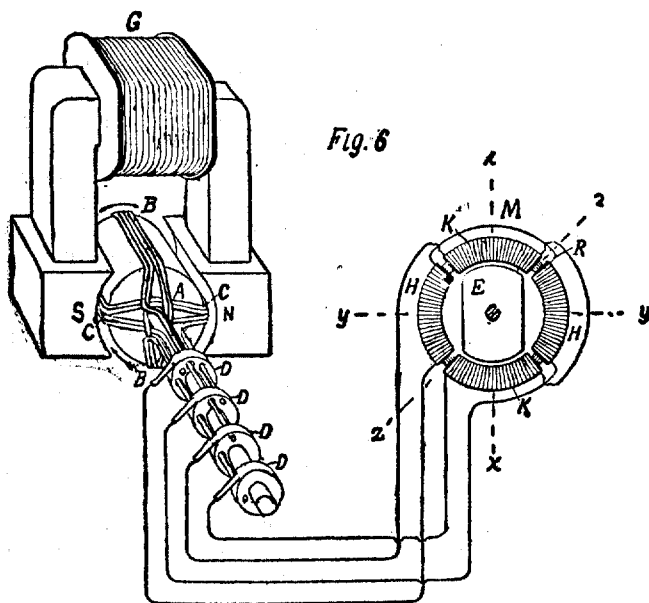
Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. The bill which was filed in this cause by the appellee complains of the infringement by the appellant of rights secured by letters patent No. 511,559, issued December 26, 1893, to Nikola Tesla, and by letters patent No. 511,560, issued on the same day to the same grantee, both of which patents the appellee claims to own by assignment. The patents (both of them) relate to Tesla's system of electrical power transmission, disclosed in his patents Nos. 382,279 and 382,280, issued May 1, 1888, and are for improvements in said system. The grounds upon which the appellant rested its defense at the hearing in this court were that the claims of the patents on which the appellee founded its suit were void for want of invention, and also that the inventions covered by said claims had been the subjects of a former patent (No. 416,193) issued to the same inventor, and that, as an invention cannot lawfully be twice patented, these later patents were void. Other grounds for disputing the validity of the patents were not pressed; nor was infringement denied, if the patents were to be held valid.

A brief description of Tesla's original invention, in which he developed his system in its application to the construction and operation of motors propelled by electro-magnetic power, is necessary to a clear understanding of the patents in suit. It consisted of an electro-magnetic generator so organized as to develop and transmit through two or more independent circuits alternating currents proceeding in definite succession to the motor; and a motor constructed in circular form, and so organized as to receive the respective alternating currents from the generator upon corresponding segments into which the ring of the motor is divided, and having an armature rigidly fixed in the center of the motor to an operating shaft extending transversely therethrough, the outer end of said armature being free and extending to a close proximity with the ring of the motor, and so susceptible of being actuated around its rigid center by the continuous shifting of the pole produced by the successive impulses of the currents proceeding from the generator to the respective segments of the ring. This organization is shown in the figure below.

A more particular description of the generator is unnecessary to be now stated, for the controversy relates almost wholly to the circuits and motor, though its construction and operation are incidentally involved, and will be referred to in the discussion of the principal subjects. But it will be useful to describe somewhat more particularly the motor and the method of its operation. We have stated that the ring of the motor was in segments. It was only theoretically so, for in fact it was entire. It was made of material which constitutes a good conductor, and around each pair of its several alternate segments is coiled one of the wires of a circuit coming from the generator, in the manner shown by the diagram. The alternating currents,

coming in succession through the coils, successively energize the segments of the ring on which they are respectively wound. The flow of the current develops magnetism, and this sets up polarity. The poles of the respective segments meet in the ring of the motor, and a consequent pole is established, resulting from the conjoint influence of the two currents; and this consequent pole will be manifested along the ring between the poles of the two pairs of segments, the location of the pole being governed by the relative strength of the two currents, and the armature will constantly turn to this pole. Thus, when the motor is being operated, the consequent pole will be shifted as the current in one pair of the segments of the ring grows stronger, and the current in the corresponding pair of segments grows weaker, and vice versa. The circuits are disposed in corresponding pairs on the opposite segments of the motor ring, and, by successively energizing them with their currents, the pole is kept moving progressively from place to place around the ring, drawing by its attraction the free end of the armature, and thereby rotating the shaft to which the armature is attached. The following figure illustrates the machine and its mode of operation:



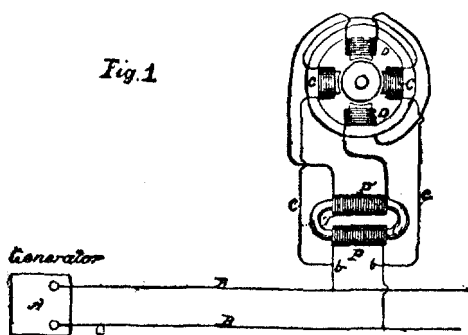
On the left is the generator. On the right is the motor. Between them are shown two independent circuits, carrying alternating currents, extending from the generator to the respective segments of the motor, H, H, and K, K. When the current in the coils K, K, is nil, and the current in coils H, H, is at its maximum, the pole will be equidistant between the latter on the line x, x, as shown, and, of course, the armature will stand on the same line. If, now, the current in the coils H, H, be diminished and that in the coils K, K, be increased, the pole will be carried over to the right hand, toward the

line, z, z, the armature following it. Then, if the coils in K, K, are receiving a still stronger current, and those in H, H, a weaker one, the pole will be carried over to the right still further toward the line y, y, the armature continuing to follow it; and so on progressively through the rotation.

In these patents the alternating currents are said to be of differing phases; that is, as we understand, having varying degrees of strength or voltage manifested at the same moment of time. It is not necessary to go into an explanation of the method by which the generator supplies the alternating currents, and determines the order of their succession.

We learn that, very shortly after this original invention, it was found that it was of great practical importance to dispense with the peculiar generators of the original structure, and, if possible, to substitute the simpler form of generators adapted to the transmission of currents over single circuits. The patents in suit are some of a considerable number containing many devices which the same inventor produced to meet this requirement. The substantial improvement made by them was to take out of the generator, and to carry over into the circuits near to the motor, the provision for effecting the succession of the alternating currents by which the motor is operated. The circuit court held the patents involved in this suit valid and infringed. The defendant in that court, upon this appeal, submits the questions whether these patents are valid, in view of the then state of the art, and whether they can be sustained as covering independent inventions, in view of a previously patented invention of the same patentee relating to the same subject, and, as is strenuously contended by counsel, covering the identical inventions of the patents in suit.

Proceeding to the first question, we insert here for reference Fig. 1 of the drawings annexed to patent No. 511,559, which fairly illustrates, in a general way, the changes made in the original structure in order to bring the current from the generator by a single circuit:



B, B, are the lines of the single circuit. At b, b, the lines are divided, one of each of the divided lines passing uninterruptedly to the segments C, C, of the motor. The other lines are connected with the primary coil, P, of a transformer or induction coil, T. A secondary current is set up in the coil, P', which is carried by the sec-



ondary circuit to the segments D, D, of the motor. The current, which is taken off the original circuit, is delayed by the process of induction, and the delay is so regulated that it reaches the motor in a predetermined order of succession to that of the primary circuit. This method of causing by induction one current to lag behind the other is only one of many ways of effecting that result, but it explains the scheme on which these patents were founded.

It is not seriously disputed that the original invention of Tesla, above mentioned, was new and patentable. But it is contended that the particular inventions of the patents in suit were not new, or at most were not beyond the skill of those practiced in the art, in view of what had already been attained and published in the development of the subject, at the time when these patents were applied for, by other scientific men and by himself in previously patented inventions. The history of this development involves too long an account to be here given, and we must content ourselves with a general statement of the conditions which existed at the time to which the objection has reference. It was, of course, known how alternating currents could be produced. It was also known that a current could be divided, and one of the divided currents be made to lag behind the other, either by induction of one of them, or by using smaller wire in one of the circuits, or different material, and probably in other ways. So the method of generating electro-magnetism, and the laws of its operation, and many methods by which it could be employed for practical purposes, were understood; and, especially taking into account what Tesla had himself discovered, devised, and patented, it was known that electro-motive power might be used for operating a motor distant from the generator. One method was disclosed by his original invention, which employed two or more circuits. Other ways had been disclosed in his later patents, in which the special characteristic was the method of organization by which he dispensed with all but one of the circuits leading from the generator, and thereby also dispensing with the generator of double circuits; and in some, one or more, he had disclosed special means for operating a motor upon his general scheme. But no one else had publicly disclosed, so far as we can discover, nor had he himself disclosed, and dedicated to the public, the particular inventions which are disclosed by the patents in suit.

An argument of great research and cogency was made by counsel for the appellant to establish the fact of the existence of the condition of the art at the date of the application for the patents in suit, as we believe it was, and have conceded it to have been. But it is still contended that, conceding the fact to be that no one had made these particular inventions, yet that, so much was known to men learned in the science or skilled in the art of the subject, it did not involve invention to devise these ways and means for accomplishing the desired result. As to this it must be said that the subject is one of the most abstruse and subtle of all the practical sciences, and its pursuit involves the exercise of the keenest intelligence and most patient research that gifted men can bestow upon it. We ought, therefore, to be cautious, when a distinct and practical improvement

is made in so useful an art, in denying to the author the reward which the law gives to meritorious inventions.

It is true, then, that the laws governing the action of electro-magnetism were, in general, understood, and many advances had been made toward applying it to practical uses, but no one beside Tesla had ever been able to devise practicable means for applying its energy to the operation of a motor with any substantial result. Without going through with an analysis of the testimony, this is the resultant fact, as we gather it from the record. The effect of Tesla's own previous inventions, and particularly of his previous patent 416,193, upon the patents in suit, we shall discuss later, in connection with the question whether these patents cover inventions which were the subjects of a patent or patents already granted to the same inventor. Recurring to the question of lack of invention, it is further to be observed that, both before and after Tesla's original invention, the public interest in the development of ways and means for applying the forces of electricity and magnetism to effect motive power for practical use was intense, and many scientific men were endeavoring to discover how and by what means this could be done. And notwithstanding Tesla had devised a general scheme by which it could be done, and had supplied a form or forms of apparatus by which it could be accomplished, the field remained open to invent any new subordinate methods or means for carrying to a useful result the scheme which he had inaugurated. The fact that, in such circumstances, no one accomplished it, is cogent evidence that these later inventions of Tesla were beyond the compass of the ordinary skill of the profession and beyond the line which divides the products of such skill from invention. In the case of Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 894, in commenting upon a case involving similar conditions, we emphasized the value, as evidence of invention, of such facts.

In each of the applications for the patents in suit, the inventor disclaims, for the purposes thereof, other methods and means which he had embodied in other applications. We think the inventions of the patents which form the basis of the controversy were not anticipated by anything theretofore discovered by others, and were, so far as concerns their merits, patentable.

Then as to the objection that these patents are for subject-matter which had been already covered by Tesla's prior patent No. 416,193. The former patent referred to as covering the inventions of the patents in suit is Tesla's patent No. 416,193, issued December 3, 1889, upon an application filed May 20, 1889, and is for a combination of motor and circuits. The claims are as follows:

(1) An alternating current motor, having two or more energizing circuits, the coils of one circuit being composed of conductors of large size or low resistance, and those of the other of fewer turns, of smaller size or higher resistance, as set forth. (2) In an alternating current motor, the combination, with long and short field-cores, of energizing coils included in independent circuits, the coils on the longer cores containing an excess of copper or conductor over that in the others, as set forth. (3) The combination, with a field-magnet composed of magnetic plates having an open center and pole-pieces or cores of different length, of coils surrounding said cores and included in independent circuits, the coils on the longer cores containing an excess of copper over that in the others, as set forth. (4) The combination,

with a field-magnet composed of magnetic plates having an open center and pole-pieces or cores of different length, of coils surrounding said cores and included in independent circuits, the coils on the longer cores containing an excess of copper over that in the others, and being set in recesses in the iron core formed by the plates, as set forth.

This first claim represents the invention of certain specific means for delivering at the motor alternating currents in a predetermined order of succession. This is done by so varying the capacity in the two circuits for self-induction or resistance (one or both) resulting from the difference of material used in the circuits, or from their mode of construction (one or both), as to accomplish the intended purpose of delaying one of the currents behind the other. The properties utilized by these means for producing the succession of the currents are those of self-induction and resistance in the circuit. These terms ("self-induction and resistance") are used to signify means of hindering or delaying the current in circuits, as contradistinguished from induction proper, which consists in taking off, in part, the current of the circuit by placing a conductor in proximity to such circuit, and within its influence, which is thereupon transmitted over another line or circuit. The second claim is for a subordinate feature, consisting of the introduction into such motors of alternate long and short field-cores carrying the coils of the respective circuits, the longer cores having an excess of copper or conductor over that in the others. This claim is also for specific means aiding in the result intended to be accomplished by the means mentioned in the first claim. The third claim, too, is for special means intended to promote the advantages of the first claim. The fourth claim consists of the same combination as the third, with the added feature that the cores are "set in recesses in the iron core formed by the plates." This claim is also for auxiliary means introduced into the mechanism already set forth in the preceding claims. Thus it will be seen that the whole body of the claims in this patent relates to the construction of motors and circuits capable of utilizing the properties of self-induction and resistance in the circuit to effect the delivery of alternating currents in such succession as to induce a sustained rotation of the motor.

The first (in number) of the patents in suit is No. 511,559, issued December 26, 1893, upon an application filed December 8, 1888. The claims are these:

(1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both of the said circuits, and retarding the phases of the current in one to a greater or less extent than in the other. (2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor, and varying or modifying the relative resistance or self-induction of the motor circuits, and thereby producing in the currents differences of phase, as set forth.

This patent relates to a method or methods of transmitting alternating currents proceeding from one original source through both of the energizing circuits of the motor, and at the same time retarding the phases of the current in one circuit to a greater or less extent than in the other. The patentee disclaims the specific means which he em-

plays in the method or methods which he discloses as his invention, reciting that they are the subjects of other applications. Claim 1 consists of a method of operating the motor by passing alternating currents to it through independent circuits, and retarding the phases of the current in one circuit more or less than in the other. The main line is not included, except as it is implied from the specification that the independent circuits will be connected with it and be energized therefrom. This is the broad statement of the method which Tesla employs in such of his constructions as use several circuits divided from one main circuit proceeding from the generator. Having disclaimed the apparatus by which the method is practiced, it is not particularized, but is suggested in a general way. The invention consists in dispensing with more than one circuit from the generator by dividing the main line at some point, which may be near the motor, and by interposing in the divided lines some means known to the electrical art for regulating the flow of the current through the lines in such way as that they shall successively energize the different segments of the motor. The patentee says in his specifications that this distribution may be effected by induction of the one current from the other, or by what is known as "derivation," in which case he inserts in one of the circuits a resistance or self-induction coil, in either of which cases the current is retarded so that it alternates with that over the other line in arriving at the motor; and he illustrates by several forms of apparatus how his method may be pursued. But these suggested forms are not exclusive of other devices adapted to the purpose, which, as he says, were well known. The second claim is substantially the same as the first, but is more restricted, in that it limits the method of producing the alternation of the currents by confining it to the use of means for varying the relative resistance or self-induction in the motor circuits.

Patent No. 511,560, issued December 26, 1893, upon an application filed December 8, 1888, is for apparatus. It relates to means employed in the transmission of electrical power to a motor through divided currents derived from a single current proceeding from the generator; the said divided currents being so regulated with reference to each as to arrive at their destination in the motor alternately. With what has already been stated about the nature of these inventions, it will be sufficient to lead to an understanding of this patent, so far as the purposes of this case require, to state those claims which are supposed to be infringed, namely, claims 1, 2, and 6, which are these:

(1) The combination with a source of alternating currents, and a circuit from the same, of a motor having independent energizing circuits connected with the said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase, and an armature within the influence of said energizing circuits. (2) The combination with a source of alternating currents, and a circuit from the same, of a motor having independent energizing circuits connected in derivation or multiple arc with the said circuit, the motor or energizing circuits being of different electrical character, whereby the alternating currents therein will have a difference of phase, as set forth. (6) In an alternating-current motor, the combination with the field-magnets or cores and independent energizing currents of different active resistance, and adapted to be connected with the line or trans-

mission circuit, of an armature wound with closed energizing coils or conductors, as set forth.

Claim 1 is for a combination made up of a generator, a single circuit leading therefrom, independent energizing circuits connected with said single circuit, a motor connected with said circuits, having an armature within the influence of said circuits, and means for rendering the current in the circuits of different phases. With respect to this last element no specific means are called for. They may consist of any means of the class designated. But the patentee, in his specification, disclaims other means than those employed, in case he takes one of the currents from the other by derivation,—that is, by a circuit which is connected with the other so as to divide the current, as distinguished from induction, where the new line is not connected with the other; and the means are thereby limited to the former class. This combination is of all the elements which make up an entire machine. Claim 2 is much like claim 1, when the latter is limited by the statement in the specification above mentioned, except that the armature is not mentioned, with the addition of specific means for effecting the alternation of phases in the currents by making the circuits of different electrical character. Claim 6 introduces a new element into the combination, namely, an armature wound with closed energizing coils or conductors,—a specific device to aid in effecting the general result.

It is contended by counsel for the appellant that “the invention of claim 2 of the patent in suit, No. 511,559, is necessary to the use of the motor of the former Tesla patent, No. 416,193,” and also “that the invention of claims 1, 2, and 6 of the other patent in suit, No. 511,560, is necessary to the use of the motor” of said former patent, and, further, that claim 1 of the patent in suit, No. 511,559, is a broad generic claim, which covers the said former patent. From these deductions it is insisted that, so far as concerns the claims of the later patents which are here relied on, they are for the same invention as that of the earlier patent, and therefore void. We will take up these several propositions in their order:

First. Is the invention of claim 2 of patent No. 511,559 “necessary to the use” of the motor of No. 416,193? Claim 2 of No. 511,559 is for “the method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor, and varying or modifying the relative resistance or self-induction of the motor circuits, and thereby producing in the currents differences of phase, as set forth.” The claim is for a method of accomplishing a certain result. That method may be practiced by the employment of any means adapted to the purpose, and then known to the art, or which might thereafter become known. To be sure, if the mechanical means employed are the subject of a patent, the party who uses the process must have or secure the right to use the patented method. Assuming for the moment that claim 2, just mentioned, was for a combination of generic means, such a claim would cover all known means of the kind enumerated. And it would cover all equivalents which might thereafter be discovered by the ordinary skill of the art, and were not the fruit of invention; and it would dominate the latter, if the latter

was of an improvement merely of the means covered by the former invention. But the invention of means hitherto unknown would be an independent invention, not covered by the patent, and, according to the well-settled rule, would of itself be entitled to a patent. If such an invention of improvements were made by a stranger, it cannot be doubted that he would be entitled to a patent for it. It might be that it would be impracticable for him to use it without acquiring the privilege of the underlying invention; nor could the owner of the latter use the improvement, except by treaty with the owner of it. And no valid reason exists why the patentee of an invention may not enjoy the privilege of a stranger in thereafter obtaining a patent for an independent invention made by him, although it relate to the matter of his former patent, and was described, but not claimed, therein, provided he has not dedicated such independent invention to the public; and this, in the present instance, the patentee had not done. And we applied the rule, where the same person was the author of both inventions, in *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 26 C. C. A. 107, 80 Fed. 712. Now, as has already been stated, all the claims of the patent No. 416,193 are for special means or apparatus designed to be employed in carrying out the inventor's method of operating his motor, as described in patent No. 511,559. Since, therefore, the invention of the specific means covered by these claims for the special means and the generic invention were for independent inventions, and neither had been given to the public, it was competent for the inventor to take out a patent for each; and we do not perceive that in such case it would be material that the taking out of the one patent was prior to that of the other. In the present instance the invention of the method (or generic means, as we have assumed, for argument, it might be) shown by claim 2 of the later patent no more covers the separate invention of the former patent than does every broad patent cover every invention of special matter covered by such broad invention. But we shall recur to this subject later.

2. It is further claimed that the invention of claims 1, 2, and 6 of the other of said later patents, No. 511,560, is necessary to the use of the motor described in the former patent, No. 416,193, and is therefore for the same invention. But as has already been stated, both the claims of the earliest of these two patents, No. 416,193, are for certain specific means for producing the requisite succession of the currents. Generally stated, they are means for producing that result by the particular methods characterized as self-induction and resistance, whereby the current in one of the circuits is made to lag behind the other.

Claim 1 of No. 511,560 is this:

"The combination with a source of alternating currents, and a circuit from the same, of a motor having independent energizing circuits connected with the said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase, and an armature within the influence of said energizing circuits."

This combination includes all the elements which constitute the machine which Tesla devised when he reorganized his apparatus disclosing his first invention of this class of motors, by dispensing with a generator which should be competent to send out alternating currents

over two or more independent lines, and substituting a generator with a single circuit, and then, by dividing the current and regulating its movement in the divided lines, produce the due succession of the currents at the motor. This was an important step, and greatly advanced his original invention for practical purposes. The new invention permeated the whole structure. He was entitled to claim all the co-operating elements in his new combination, and to have a patent therefor, and such patent would cover the known means for effecting the particular operations comprehended by it. If he also invented specially arranged apparatus, not theretofore known, for executing some of the subordinate functions of the whole machine, he was, upon the principles above referred to, entitled to a patent for that also. This was what he did by his invention covered by the patent No. 416,193. It was an independent invention, representing an improvement upon the known means for effecting a beneficial purpose, which improvement was not within the compass of the patent for the principal combination.

Claim 2 is as follows:

"The combination with a source of alternating currents, and a circuit from the same, of a motor having independent energizing circuits connected in derivation or multiple arc with the said circuit, the motor or energizing circuits being of different electrical character whereby the alternating currents therein will have a difference of phase, as set forth."

This claim is of the same character as claim 1. It contains some modifications thereof, but it stands on the same footing for the application of the principles referred to in the consideration of the first claim, and the like result to that there indicated must follow.

Claim 6 is this:

"In an alternating-current motor, the combination with the field magnets or cores and independent energizing circuits of different active resistance, and adapted to be connected with the line or transmission circuit, of an armature wound with closed energizing coils or conductors, as set forth."

This claim is also of the same character as claim 1, though it also suggests a peculiar construction, by winding the armature with closed energizing coils or conductors. We need not repeat the conclusions (which we have already stated with reference to the previous claims) respecting the result which follows upon a comparison with the invention of patent No. 416,193.

Then it is also said that claim 1 of patent No. 511,559 is broad and generic, and that it covers the patent No. 416,193, previously issued. It is true that the claim referred to is of the character ascribed to it. We have so treated it, but it does not follow that it covers the former invention. As we have explained, it does not cover it, because the former patent is for an independent invention of special means for fulfilling some of the requirements of the broad patent.

We have significantly referred to the fact that some of the claims in the patents considered are for methods, and others for apparatus, for the purpose of founding a distinction in the nature of the inventions. We have assumed, for the purpose of the discussion, that certain claims for methods might be regarded as claims for generic means, but in fact they are made as claims for methods;

and there is no doubt that it is established by authority that an inventor may be entitled to a patent for the method or process for producing new and useful results, and also for the means by which it is produced, when the method or process is susceptible of being performed by known means, and the means invented are of such a character as to merit a patent. *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235. If no means were known for practicing the method, the patentee would be obliged to specify some means; otherwise the invention could not be used. This doctrine has special application to the patent No. 511,559, which is wholly for methods, when compared with No. 416,193, which is wholly for apparatus.

In support of his contention, the learned counsel for the appellant relies with much confidence upon the authority of the cases of *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121, and *Palmer Pneumatic Tire Co. v. Lozier*, 62 U. S. App. 651, 33 C. C. A. 255, 90 Fed. 732; the latter being a case decided by this court. But these cases do not support the doctrine for which he contends. On the contrary, they are both founded upon principles which exclude its application here. In *Miller v. Manufacturing Co.* the patents being considered were both founded on the invention of a spring which the inventor devised to put into the combination of parts of a cultivator. It extended from the beam carrying the hoes to and under a grooved wheel pinioned on a post standing on the axle of the cultivator. The spring was so constructed that when the cultivator hoes were down and at work, the spring would tend to hold them down to their place. It also had the capacity to assist in raising the beam, and, of course, the hoes, out of and free from the ground as soon as the operator should start the upward movement. The first patent was for this spring, when adapted to perform both functions in combination with other parts of the cultivator. The second patent was for the same spring in so far as it was adapted to the function of assisting in raising the beam; but that part of the spring which was adapted to holding the implement down, although described, was not claimed, and was in fact immaterial, since the lifting did not employ the peculiarities of that part of the spring adapted to effect the depressing of the beam. The supreme court held that, inasmuch as the former patent included the invention of those characteristics which helped to lift the beam, as well as those which tended to hold it down, and the later patent was for a spring having only the same characteristics for lifting the beam, the so-styled new invention was parcel of that already patented. Substantially the same doctrine was applied in *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800. *McClain* had invented a pad for horse collars, which employed a double spring, having a hook at each end, for the purpose of securing the pad to the forward and rearward rolls of the collar, respectively; and he claimed as his invention a pad provided with such an attachment. Afterwards, perceiving that a single spring adapted to attachment to the forward roll would in many instances be more useful than a double spring, he applied for and obtained a patent for a single spring adapted to securing the pad to the forward roll. This second patent



was held void, for the reason that there was no new invention; the inventor having patented simply a part of the invention previously patented. So, in *Palmer Pneumatic Tire Co. v. Lozier*, the former patent was for a rubber fabric of peculiar construction, when put into a pneumatic tire in combination with other elements. As in the case of the spring, the fabric was the only thing new in the combination of the parts of the tire, and was only an improvement of the former fabric which had been used in the same place and for the same purpose. The whole invention was exhausted in devising the fabric, and it was for that invention that the patent was granted. Moreover, the invention could not be practiced by any means generally known, but only by the means thus specifically described. The later patent was for the same fabric, and that only. There was no new inventive act. The patentee had simply extracted the kernel of his former patent, and brought it over to constitute the consideration for a new grant. Both the cases referred to stand upon the ground that the first patent had been given for the actual invention, and could not be supported without it. And the court in each instance, disregarding mere formal appearances, looked to the substance of things, and refused to recognize as original that which it knew was old. In the *Miller Case*, Mr. Justice Jackson, after canvassing a number of previous cases, said:

"The result of the foregoing and other authorities is that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, though the terms of the claims may differ."

And in the *Palmer Pneumatic Tire Co. Case*, this court, following the *Miller Case*, said:

"That decision shows that it is not necessary to the rule that the patents should be for coextensive inventions, or that the subject-matter thereof should be technically the same."

We have no disposition to depart from the rules in respect to the identity of patents, and the method of determining it, here adverted to, which we deem sound and reasonable; but it would be a misapplication of them, and contrary to their spirit and purpose, to say that independent inventions may not be the proper subjects of independent patents, even though they may relate to the same subject-matter, and one may dominate the other in the same field. The distinction seems clear, and pains were taken in both of the above cases to point it out. In the *Miller Case*, Mr. Justice Jackson, after referring to several cases, further said:

"A single invention may include both the machine and the manufacture it creates, and in such case, if the inventions are really separable, the inventor may be entitled to a monopoly of each. It is settled, also, that an inventor may make a new improvement on his own invention of a patentable character, for which he may obtain a separate patent; and the cases cited come to this point, and to this point only, that a later patent may be granted when the invention is clearly distinct from and independent of one previously patented."

And in the *Palmer Pneumatic Tire Co. Case* this court said:

"Undoubtedly, as pointed out in *Miller v. Manufacturing Co.*, supra, if the second patent is for a distinct and separate invention, or, to put the matter in another way, has not been made integral with another invention already

patented, so as to be fairly necessary to its use, it should be sustained, if the other requisite conditions exist."

And we referred to the opinion delivered by Judge Taft in a former case,—that of Thomson-Houston Electric Co. v. Ohio Brass Co., 54 U. S. App. 1, 26 C. C. A. 107, 80 Fed. 712,—which was an illustration of that class of cases, and was one where the patent was sustained. Another case of the same class is that of Allington & Curtis Mfg. Co. v. Globe Co. (C. C.) 89 Fed. 865, where a patent for improvements on a machine had been taken out pending a prior application for a patent for the machine itself. Subsequently a patent was granted for the machine. It was held by Judge Taft, again distinguishing the case of Miller v. Eagle Manufacturing Co., that the granting of the former patent did not invalidate the latter. And in a more recent case—Thomson-Houston Electric Co. v. Jeffrey Mfg. Co., 41 C. C. A. 247, 101 Fed. 121—this court again emphasized the distinction made in the foregoing cases, and held that, the device in the later patent being substantially that patented by a former patent, the latter patent was void. To the same effect is Thomson-Houston Electric Co. v. Hoosick R. Co., 27 C. C. A. 419, 82 Fed. 461, in the circuit court of appeals for the Second circuit. And see, also, Industrial Mfg. Co. v. Wilcox & Gibbs Sewing Mach. Co., 50 C. C. A. 387, 112 Fed. 535.

The learned counsel lays special stress in his brief upon the language contained in the opinion of this court in the Palmer Pneumatic Tire Co. Case, where we said, as a deduction from the Miller Case, that "the rule rests upon the broad and obvious ground that, if the second patent is for an invention that was necessary to the use of the invention first patented, it cannot be sustained." But we were there considering a class of cases where the subject-matter of the later patent was an essential and necessary part of the former invention, and covered by the patent granted therefor; and the observation quoted has no application to that other class of cases where the subject-matter of the later patent (that is, the invention covered by it) was not a component part of the former invention, but was an independent invention, not necessary to the composition of the first, or included in it. And in a later part of the opinion, as has been already stated, we expressly distinguished the latter class of cases from the former.

We are of the opinion that the patents in suit are not void by reason of the inventions covered by them having been previously patented, and, infringement not being denied, the judgment must be affirmed.

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RAWSON et al. v. WESTERN SAND BLAST CO. et al.\*

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 850.

1. PATENTS—VALIDITY—PROCESS FOR CHIPPING GLASS.

The Evans patent, No. 494,999, for a process for chipping glass, held void for lack of novelty and invention, in view of a prior decree between complainant and a different defendant so holding, which was affirmed on

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\* Rehearing denied November 15 1902.

appeal, and the supreme court having refused to grant a writ of certiorari to review such decision.

2. SAME.

The Thompson patent, No. 405,283, for a process for chipping glass, held entitled only to a narrow construction in view of the prior art, and as so construed not infringed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

James H. Raymond and Otto R. Barnett, for appellants.

John W. Munday, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. Appellants filed their bill to enjoin appellees from infringing letters patent No. 405,283, June 18, 1889, to Thompson, and No. 494,999, April 4, 1893, to Evans, both for processes of chipping glass. The circuit court held that the Evans patent was void, and that the Thompson patent was not infringed.

Some years ago these appellants brought suit in the circuit court for the Northern district of Illinois against the Suess Ornamental Glass Company for infringement of the Evans patent, and were defeated on the grounds that the process lacked novelty and invention. 81 Fed. 198. This court affirmed the decision, and denied a rehearing. 28 C. C. A. 24, 83 Fed. 706, 30 C. C. A. 367, 86 Fed. 779. The supreme court refused to grant a writ of certiorari. 171 U. S. 687, 18 Sup. Ct. 942. Though the former case might not prevent a renewed inquiry into the merits of the Evans patent, we are persuaded that the pronouncements therein, in view of the supreme court's denial of appellants' application for a writ of certiorari, should, in the interest of faith in the stability of judicial decisions, be adhered to by us as the law of the patent.

Thompson describes his invention and makes his claim therefor as follows:

"In carrying out my process I first cover the part of the glass to be decorated with a layer of asphaltum or analogous adhesive matter, and on this I place a covering sheet of tin foil, paper, or the like. A mere covering of paint will answer the purpose. The desired pattern or design is next laid out on this covering, and the covering is cut out in the desired outline with a sharp instrument. The parts of the covering between the cuttings where the glass is to be chipped are now removed, or, if desired, the covering may at once apply only to the part of the glass which is not to be chipped. A layer of glue or other contracting substance or material is next spread over the glass so exposed, and may also extend over the covering. If the chipping process were now to be carried out in the usual manner, the glue would chip pieces of glass off beneath the covering. To avoid this I cut through the glue with a sharp knife along the margin of the space to be chipped and roll or strip off the glue while in a jellied state from the parts not to be chipped, but I do not cut any crease into the glass itself. The outline of the design or pattern being thus cut through the glue, the chipping may be proceeded with by subjecting the glass and its sharply defined glue cover to heat in the usual manner. If any part or parts of the glass are to be treated with acid or sand blast, this can be done either before or after the chipping process by first removing the covering where desired and then applying the acid or sand blast. By my improved process I am enabled to produce chipped glass in a simple and effective manner and without the glass at the sides of the design being affected by the chipping process. I do not claim

to have invented the process of preparing glass for chipping which consists in applying glue to the glass where the same is to be chipped, as shown in patent No. 63,328. Having now described my invention, what I claim is: The process of preparing glass for chipping which consists in covering the glass where the same is not to be chipped with a covering of paint or varnish, in then covering the glass where it is to be chipped with a layer of glue, and in then cutting through the glue along the edge of the pattern to be chipped, as specified."

The process used by appellees is this: (1) They cover a plain sheet of glass with tin foil attached to the surface by a thin film of wax; (2) with a needle point they cut lines through the tin foil to correspond with the desired pattern; (3) they cover the whole surface with a coating of wax varnish; (4) they strip off the portion of the tin foil that covers the part to be chipped by pulling it up through the wax varnish; (5) they sand-blast the exposed part of the glass; (6) they brush warm liquid glue through the adhering stencil, and, incidentally, upon it; (7) they strip off the stencil by pulling it up through the glue, leaving a side wall of glue exposed down to the glass along the lines within which the glass is to be chipped; and (8) they allow the glue thus left on the glass to harden, which has the effect of chipping the glass within the lines of ornamentation.

Appellees claim that they were doing only what was open to the world by reason of the prior art as exhibited in letters patent No. 15,532, August 12, 1856, to Shaw, No. 63,328, March 26, 1867, to Stremme, and No. 154,032, August 11, 1874, to Frederici, while appellants contend that the Thompson patent covers the primary discovery of the art of controlling the chipping within strict lines of ornamentation, by means of cutting away the surplus glue, enabling the glue to harden at the surface of the glass first along the lines of the intended ornamentation, thus causing the chipping invariably to take place from the lines and within the design, and that this cutting for this purpose is infringed by appellees' process of stripping a stencil up through the glue while it is of such consistency as to leave proper side walls.

Stremme said, among other things:

"The nature of my invention consists in applying to the ground surface of glass or other similar material a warm solution of glue or other sticky matter, such as paste, mucilage, white of eggs, etc., which, in the process of drying and hardening, contracts, and thus detaches and brings away, when removed, particles from the surface of the glass where applied, leaving the part which is covered to look like ice or frozen snow, thus producing ornamental figures or designs of any description desired upon glass. \* \* \* A coat of varnish is applied to the whole surface of the glass except that embraced within the figure (to be chipped). \* \* \* The mode here described may be simplified to a great extent by using patterns in applying the varnish, either in the manner of brushing through or printing on the glass the protecting varnish, which latter method would also be applicable in certain cases, even in transferring the glue, when the varnish would be dispensed with altogether."

The nature, scope, and effect of the Shaw and Frederici patents were thus stated by this court in the *Suess Ornamental Glass Co. Case*:

"In the Shaw patent, No. 15,532, which was for a method of lettering and ornamenting glass, patterns, preferably of tin foil or lead foil, were placed upon the back surfaces of plates of glass coated with the white of eggs, by

which the patterns were held, while over the whole surface of the patterns and glass was brushed the color desired for the background, after the drying of which the patterns were removed, 'so as to leave the designs with clean surfaces and smooth and sharply defined outlines.' And so in patent No. 154,032, granted to Carl Frederici in the year 1874, for improvement in processes of preparing glass for etching, a pattern upon a pane of glass to which a thin layer or film of beeswax, or equivalent material, has been applied, is stripped off, after the film is set, in such a manner that the parts from which the pattern has been removed may be exposed to the sand blast or etching fluid, while the remainder of the surface will be protected by the wax or other material, by which means, according to the specification, it is practicable to produce designs with sharp and clearly defined contours." 28 C. C. A. 24, 83 Fed. 708.

"Those patents cannot be excluded from consideration because they belong to the art of (painting or) sand-blasting (designs upon glass). \* \* \* The lifting of the pattern, and thereby cutting a film of glue, is not different from the lifting of a pattern, and thereby cutting a film of beeswax, paint, paste, mucilage, white of egg, or other semi-fluid or viscous substance." 30 C. C. A. 367, 86 Fed. 782.

The infringement in this case, if any, consists in the seventh and eighth steps of appellees' process, as hereinabove set forth. But the statement and application of the prior art as made by this court in the case quoted from show that appellees were doing only what was free to all. To give Thompson's patent the liberal construction contended for, and to hold that he made the mother invention in the art of controlling the chipping of glass within strict lines, would require us to give a different interpretation and effect to the prior art. To do this would virtually destroy the foundations on which rests the former decision respecting the Evans patent. That appellees appreciated this is probably shown by their joinder of the two patents in the present suit. To hold the Evans patent void, and in the same breath to give the Thompson patent a construction that repudiates the reasons for holding the Evans patent invalid and in effect revives that patent, do not consist. With Thompson's patent narrowly construed, appellees do not infringe.

For himself, the writer may be permitted to say that if the subject of the processes for controlling the chipping of glass within strict lines were *res integra*, and assuming, what the evidence seems to establish, that the chipping will almost invariably extend over the line, unless the surplus glue is cut away, thus causing the chipping to begin at the line and extend within the design, he would be disposed to hold that the Stremme patent for the chipping of glass did not foreshadow or suggest the Thompson idea; that the Shaw and Frederici patents, respecting the arts of painting and sand-blasting designs upon glass, in which never arose the problem of preventing the paint or sand-blast from cracking or chipping the glass beyond the line and under the stencil, are not applicable to the art of controlling the chipping of glass to a line; and that the Thompson patent covered a primary invention in a particular art, on which the Evans process was a valid improvement. But, in consideration of the supreme court's action on the application for a writ of certiorari in the Evans Case, he believes that these questions should not be opened up either at circuit or here.

The decree is affirmed.

## BRISLIN et al. v. CARNEGIE STEEL CO., Limited.

(Circuit Court, W. D. Pennsylvania. September 15, 1902.)

## No. 13.

## 1. PATENTS—INVENTION—FEEDING MECHANISM FOR ROLLING MILLS.

The Brislin & Vinnac patent, No. 345,953, for a feeding mechanism for rolling mills, was not anticipated, and the invention shown constituted the first successful and practicable device by which the rolling of heavy structural beams was done and the finished beams produced wholly by mechanical means. It made a distinct advance in the art, and discloses patentable invention. Claim 1 construed, and *held* infringed, and claim 2 not infringed.

## 2. SAME—INFRINGEMENT.

Adding to a patented machine a nonfunctional part, or a change in the position of parts, which does not change its method of operation, does not avoid infringement.

## 3. SAME.

Merely mechanical improvements in a patented machine which is practically operative, although they may increase its efficiency, but without changing the principle of its operation, do not avoid infringement.

## 4. SAME—INVENTION.

The Hanley & Richey patent, No. 352,748, for a feed table for rolling mills, discloses no patentable improvement on the combination of the prior Brislin & Vinnac patent, and is void for lack of invention.

In Equity. Suit for infringement of letters patent No. 345,953, granted to John Brislin and Antoine Vinnac July 20, 1886, and No. 352,748, granted to Patrick F. Hanley and Francis N. Richey November 16, 1886, both relating to a feeding mechanism for rolling mills. On final hearing:

James Negley Cooke, Kay & Totten, and James S. Young, for complainants.

John R. Bennett and Bakewell & Byrnes, for defendant.

BUFFINGTON, District Judge. The complainants, John Brislin and Antoine Vinnac, filed this bill in equity against the Carnegie Steel Company, Limited, charging infringement of the first and second claims of patent No. 345,953, granted them July 20, 1886, for feeding mechanism for rolling mills. The bill also charges infringement of the second, third, fourth, fifth, and sixth claims of patent No. 352,748, granted November 16, 1886, to Patrick F. Hanley and Francis N. Richey for a feed table for rolling mills, and thereafter assigned to complainants. The defenses are invalidity of the patents and noninfringement. The outcome of the case is important, in that it frees from or subjects to patent monopoly the mechanical rolling of steel beams used in modern building. Inasmuch as it is contended these patents are void, as not involving patentable novelty, it has seemed clear that a proper conclusion could be reached by us on this point only through careful study of the advance made in mechanical iron-rolling as contrasted with manual rolling by those who preceded Brislin and Vinnac. An intelligent, mechanical insight into their several devices, discrimination in estimating the comparative advance and the limitations incident to each, and a due regard to the practical effect

or noneffect they severally had, are the logical steps prerequisite to a just appreciation of what these present inventors in 1886 contributed to mechanical rolling. It will be observed that the present case charges infringement in the rolling of structural beams. In this process the initial mass of iron is so bulky, and the rolled product so unwieldy, that the rolling thereof can neither be compared to the operations of an ordinary rolling mill nor can it be appreciated by one who is only familiar with a mill of that description. In a general way, the art of rolling any size of iron consists in passing high-heated billets or blooms through different gauged roll-passes. This reduces thickness, but increases length or width. In manual rolling, men handle the metal with tongs, hooks, levers, and various appliances adapted to feed it on one side of the rolls, and catch and return it on the other. Where a stand of two rolls, technically styled "two-high rolls," is used, the return is made over the upper roll, while in a three-high stand a roll-pass both ways is made. Some kinds of iron are finished at a single stand of rolls; others transferred to an adjoining stand, which further reduces thickness and increases area. It will, of course, be apparent that, the bulkier the billets, with consequent lengthened product, the time, labor, and difficulty incident to manual handling increases. Moreover, as the process is prolonged, heat radiation either necessitates reheating of the unfinished metal; or, if rolling continues with the cooler and less pliable metal, risk of roll breaking is greatly increased. Accordingly the trend of advance has been from manual to mechanical rolling, since thereby great masses could be easily and rapidly handled, and manual labor restricted to the mere operation of the machinery used. Moreover, it must be borne in mind that in heavy rolling a change to machinery is more than mere economic gain of a labor-saving appliance. The heat radiated from these huge, fervid masses, to say nothing of the bulk to be handled in the face of this heat, created limitations to human endurance, which machinery alone could overcome. That a significant advance in such rolling art has been made is apparent in a modern beam mill. One accustomed to the picture of human activity in the ordinary old-style rolling mill, the number of men stripped to the waist, catching long, slender, red-hot bars, running backward with them as they emerge from the rolls, will be oppressed with the very weirdness of a modern mill, where, as the operations go on, the absence of men seems unnatural, and almost startling. The tremendous bulk of the metal, the ease and rapidity with which it is handled, the striking absence of men, unite to impress a thoughtful observer as no words can with the stride made in substituting mechanical for manual rolling. In view of this great change, it would seem just that those who have, from an inventive standpoint, substantially brought about such advance, should share proportionally in the gains thereof.

Without referring to all the factors in such advance, we may refer in order of date to the work of patentees to ascertain the successive stages of the inventive progress in reaching present conditions. In measuring the real advance made by successive inventors in solving the problem of continuous mechanical rolling,—and by that we mean a process where the finished product is wholly mechanically rolled,—

two facts should be borne in mind: First, the great economic gains incident to even a part mechanical process were clearly recognized; and, second, the key to the solution of the problem of continuous mechanical rolling, to wit, a pivoted table, was known to inventors, but unused, for upwards of 40 years. A pertinent illustration of these facts is afforded in the early French patent to Sauvage, No. 32,389 of 1857, given in evidence by respondent. The use of a pivoted table for rolling at a single stand of three-high rolls is shown by respondent's expert Laureau, who says:

"I have read the French patent you refer to, and I believe I understand it. It relates to a certain arrangement of rolling mills which permits to roll plates at one heat. The train is a three-high train, the rolls of which can be moved vertically so as to vary the distance between them. In order to facilitate the handling of the plates, lifting tables are placed at the front and back of the rolls. These tables are pivoted at their outer end, and are capable of vertical motion at their inner end. This vertical motion is communicated to them by steam cylinders placed directly above the inner ends, and connected to them by means of a yoke. The operation is very simple and easily understood. The piece, being placed on the front table, passes through rolls. It is caught at the back by the back table, which, by means of the cylinder placed above it, raises the piece to the level of the upper rolls. The piece then passes back to the front, is caught by the front table, which has been raised, and lowered again to the lower rolls, etc. It will therefore be seen that the feed-table apparatus consists essentially of a frame having loose rollers upon it, and pivoted at its outer ends, the inner ends being raised up and down by a cylinder placed directly above it."

Some of the advantages of mechanical rolling are forcibly stated at that early day by Sauvage in his patent; and a recognition of the advance incident thereto will be found in the patents of many subsequent inventors. With a well-recognized object in view, and with the pivoted table (which eventually solved the problem) in their possession, the work of these inventors must be instructive in solving the question whether its ultimate solution was a mere clever use of well-known means already at hand, or involved inventive genius. Turning to an examination of successive patents, the first is that granted to George Fritz, of Johnstown, Pa.,—No. 133,771, of December 10, 1872. Therein we find a horizontal table on each side of a three-high mill. These tables are adapted to be raised to the upper roll-passes and dropped to the lower ones by individual hydraulic cylinders. Reversible propelled feed-rollers constitute the beds of these tables. These rollers were adapted on the one side of the rolls to feed the iron forward to the roll-pass, and on the other to carry it away as it emerged, and both were adapted to reverse the operation as the metal was returned. The other details of the patent need not here be referred to. In summarizing the pertinent advance made by Fritz toward mechanical rolling, we note that the vertical lift capacity of his device fitted it for use at a three-high mill, and its feed-rollers, positively actuated when the table was at the upper as well as the lower pass, enabled it to do complete mechanical feeding and rolling at a single stand of three-high rolls. The substance of his contribution to the art was a lifting table and positively actuated feed-rollers. It is also clear, even at this early stage of the art's development, that Fritz recognized what is also recognized by several succeeding inventors, that



the special mode of applying power to his rolling agencies—in his case the lifting table and the propelled feed-rollers—was regarded as a minor matter, a question of mechanical methods. Thus he says of the operation of his tables:

"The feeding tables, N and N', as shown, are raised and lowered by hydraulic cylinders operated by the rods, F and F'. \* \* \* The tables may, however, be arranged and operated in any other suitable manner."

So, also, in reference to the mechanism propelling the feed-rollers:

"aa are shafts driven by means of the pulleys, bb. These shafts may be driven by any suitable means,—by power derived from the engine that drives the mill-rolls, or from any suitable line of shafting or engine."

In our estimate of this patent we have not overlooked the fact that Fritz provided means for laterally moving the metal so as to feed it to different passes on the lower level. But this mechanism was no part of his table, nor could the table itself be laterally moved. Under his lifting table was an auxiliary carriage, adapted to be laterally moved parallel to the rolls by a hydraulic cylinder. On this carriage were horns, which, as the table was lowered, caught the metal lying on the table, turned it over, and pushed it opposite the desired pass. This double mechanism tends to emphasize, rather than minimize, the originality of a single device wherein the lateral shifting was of the table itself, and where the extent of the shift was from one stand of rolls to another. At this point another fact may be referred to. It will be seen later an alleged infringing machine is used by respondent, among other places, at its 33-inch mills, which roll structural iron or beams. Such machine is adapted to move laterally, and operate at more than one stand of rolls. Inasmuch as it is now contended the respondent's device was a mechanical construction suggested, *inter alia*, by the Fritz table, it is proper to note that respondent some time previous to complainants' patents stopped manual rolling at one stand of rolls and installed the Fritz device mechanical rolling at such stand. Here was mechanical rolling at the roughing stand, but manual rolling was continued at the two adjoining finishing roll stands. Since the complainants' patents these stands were equipped with the alleged infringing device. The fact that in practice the Fritz device led them to no wider appreciation or application of its alleged mechanical adaptability is more convincing of its limit than after-contentions are of its breadth. As touching the use of the Fritz device at one stand and continuance of manual rolling beside it, we quote from testimony of Mr. Kennedy, one of the respondent's experts, and its then superintendent:

"The Fritz tables were used on the roughing rolls of what was known as the '33-inch mill,' which rolled the ingots part way to a beam; these beams being finished on two other trains of rolls in the same train, which were not, at the time I was in the works, provided with any tables. I believe they have now, however, tables very similar to the ones used in the newest beam mill at Homestead, at what is known as the '35-inch mill.'"

Measuring by acts and results, it will thus be seen that the continuous use of the Fritz device suggested no change in the hand-rolling beside it, and led neither to its adaption to more than one stand of rolls nor to the broad conception of a continuous mechanical process,

the outcome of which was a wholly mechanically rolled product. It must, therefore, be obvious that, if 14 years later such device came into use, presumably it was not a mere mechanical adaption suggested by the Fritz device. If there was suggestion of adaptation in the Fritz device, it was not likely to lie dormant through years of inventive effort to reach such result.

The next step in time appears in the patent of Frederick J. Slade, of Trenton, N. J.,—No. 222,845, granted December 23, 1879. The device therein shown was confessedly not an original device, but simply purported to be an improvement on a patent to Charles Hewitt,—No. 24,304, of June 7, 1859. In Slade's device we find a horizontal frame or hoist, adapted to be raised and lowered to the upper and lower passes of a single three-high roll stand. On each end of the hoist, and parallel to the roll axis, is a track, on which runs a laterally shifted carriage. This lateral-shift carriage has at each side a track at right angles to the rolls, on which track travels a table to receive and deliver the metal at the upper and lower roll-passes. This table is composed of a frame in which are journaled a number of rollers, the ends of which extend beyond the table frame. The part inside the frame forms a roller to carry the metal, and the part outside, the wheels, which rest on the track and carry the roller-frame. It will thus be seen that Slade's device, as a whole, has three movements. The main frame or hoist is moved vertically so as to reach the upper or lower roll-pass. The carriage upon it is moved laterally, so as to reach any groove in either upper or lower roll-pass the table upon the carriage is moved forward or backward so as to carry the metal to and from the rolls. The propelling power and its location should be noted. The movement of hoist carriage and table is severally made by an individual, independent mechanism. One of these is stationary, but two of them are located on and move with the hoist. Thus an engine on a fixed foundation moves the hoist; a second engine, on the hoist, moves the shift carriage laterally; a third engine, also located on the hoist, reciprocates the table. The reciprocating movement of the table, owing to difference in diameter of the rollers and track wheels, gives an accelerated movement to the metal coming upon or leaving the table. Compared with Fritz, Slade's device shows no advance, and in one important element it embodied a noticeable backward step. Like Fritz, it was only adapted to operate at a single stand of rolls, and it was, therefore, no advance over the old device. But in that it lacked the Fritz positively actuated feed-rollers it was a distinct step backward. True, its feed-rollers are, in one sense, positively actuated, in that they are propelled so long as the table moves backward and forward. But at the very time when positive propulsion is needed to carry the metal to the roll-bite they not only cease to be positively propelled, but, instead of positively rolling they are stopped dead, and thus become a positive obstacle to accomplish mechanical feeding. It is evident the roll-housings, the wheels, and the frame of the shift carriage necessitate the forward roller of the table to be placed at an appreciable distance back from the rolls, and the consequent stoppage of the table at such point. When this stop point is reached, not only do the rollers cease to be positively actuated, but the stoppage

of track wheels at the roller ends prevents the roller from even passively revolving. At the very time they are needed to feed the metal, they become a positive resisting force, stopping the forward movement of the metal toward the bite of the rolls. Just how, under such conditions, the metal could reach the rolls without some other agency than the rollers, neither the patent, the proofs, nor the probabilities indicate. In that regard there is no proof by any one who saw the device operate. Two experienced witnesses, both of whom are entitled to weight, are called by the respondent. In that regard their opinions differ. Mr. Kennedy is of the opinion the device would be operative, while Mr. Wellman says it would not be so, unless the rollers were made power-driven. The difference evidently arises from the point of views. If the device is regarded as a part mechanical, part manual, one, it would seem, in confirmation of Mr. Kennedy's view, that by manual feeding of the metal in some way the device would be operative in other respects. If the device is measured by the test of doing complete mechanical rolling without manual help,—and therein lies its pertinence to the present issue,—then it would seem, in confirmation of Mr. Wellman's views, it would be inoperative as such, unless the machine was reconstructed in some way so that the rollers were positively actuated up to the feeding point. Whatever might have been possible in practically solving this speculative problem on a horizontal table such as Slade employed, we can rest assured that, to feed ingots weighing tons up an inclined table such as complainants' device shows and as the respondent employs, Slade's rollers would be inoperative. It should not be overlooked that Slade demonstrated what Fritz had previously pointed out, viz., a different mode of power application. His mechanism is not only free from roll connection or roll-imparted power, but he showed at this early day how the motive power for a laterally moved carriage and a reciprocated table can be themselves placed on and shifted with the hoist. In spite, however, of any real or seeming advance made by Slade, later development has proven that his device was at variance with the lines on which mechanical rolling of heavy articles must be done. Not only did Slade lift the entire bulk of his metal, but his hoist, carriage, table, two track sets, and his two power cylinders all were raised. Indeed, this weakness of his construction lines led to the suggestion by the patentee himself of counterweights. Following, as above noted, the general teaching of these patentees, and evidencing the view that the application of power to operate his rolling device was a matter of mechanical adaption, Slade says:

"I have described separate hydraulic engines as a convenient means of moving the lift and the cars connected with it, but other means may be substituted for them or either of them: but such modifications are too well understood to require detailed description."

The next step is the patent of Christopher Lewis, of Columbus, Ohio,—No. 247,665, of September 27, 1881. In mills of the Lewis type we find on either side of the series of sets of two-high stands of rolls sets of laterally moved tables, mounted on tracks parallel to the roll axis. On these tables are feed-rollers adapted to be actuated when the tables are opposite the desired roll-pass. The stands of rolls in each set are run in opposite directions. The several tables are

moved laterally from one stand of rolls to the next of the set by individual, independently controlled cylinders. The feed-rollers are actuated when opposite the roll-pass by gearing in engagement with the main shaft which conveys power to the rolls. The substantial advance shown by Lewis was not only in making one carriage serve two stands of rolls, but in his use of a number of carriages he carried mechanical rolling through the entire process, thus securing what he styles a "continuous rolling mill." In Lewis we thus find the idea of the process of complete mechanical rolling continuous from the ingot to the finished product. His advance, however, by its lines of construction (and this as distinguished from the mere mechanical application of power), was limited to two-high rolls, and it necessitated the use of a considerable number of carriages on each side of the rolls. Whether his device was practical or not is not shown. It is certain it left no impress on the art, for though, theoretically, it embodied a process of complete mechanical rolling, the experienced experts of respondent say they never knew of the erection of a mill of the Lewis type. He reiterates the teaching of the art found in the prior patents of the mechanical nature of mere application of power. Referring to the possibility of substituting means to shift the carriage other than those shown by him, he says, "In the place of this steam cylinder, however, I may employ drums with belts, or any other well-known means, for shifting the carriage." It will be noted also that in his use of independent, disconnected motive power to laterally shift his carriage he showed that, while practical rolling required the delivering and receiving carriages to be opposite the desired roll-pass in the rolling process, yet they could be severally made to reach each point by independent mechanism, controlled by different operators. Adapting our language to that of some of the experts in the case, we may say that Lewis showed at this comparatively early day that the compulsory simultaneity of position essential in rolling did not involve inevitable simultaneity of propelling process to reach such position. In other words, while the carriages had to operate synchronously to deliver and receive the metal, that they could reach that point through independently-controlled motors. It should be noted that Lewis' entire mechanism was mounted on stationary tracks, and was a complete abandonment of the vertical movable table principle of Fritz and Slade.

The next stage of the art is shown in the patent of Samuel T. Wellman, of Cleveland, Ohio,—No. 277,860, May 15, 1883. We here find a return to the pivoted table. On either side of the stand of three-high rolls Wellman employs a table pivotally supported at its outer end on a stationary foundation. This construction, of course, leaves the inner end free to be raised or lowered to either roll-pass. In the bed of the table are rollers adapted to be positively revolved and reversed when the inner end of the table was at either angle. The inner ends of the table are raised and lowered simultaneously by a hydraulic cylinder placed on one side of the rolls. The feed-rollers are actuated by a single reversible steam engine. Wellman adopts the general prior teaching of the art, viz., the indifference of the mere modes of power application to his rolling agents. Thus, in speaking of driving *his* reversible feed-rollers, he says:

"This is accomplished by means of suitable lines of shafting with gearings, which are preferably driven by means of reversible engine, F; but they may be driven by means of any suitable driving power."

He also showed the application from a fixed point of positively propelling power to feed-rollers adapted to feed at two different planes. But the important feature was the return to the use of the pivoted table, which table has proved an essential element, in combination, in the subsequent advance in heavy rolling. The importance of the pivoted table is that by releasing the inner end of the table we are enabled to elevate the metal to an upper pass without raising either the whole bulk of the metal or the whole weight of the roller frame or table. Moreover, when once the positive propulsion of the feed-roller has carried the metal to the bite of the roll, instead of the power of the roll being utilized to project the metal on a horizontal table, the gravity exerted by the inclined receiving frame is an aiding force to carry the metal down such table. While Lewis, by lateral shifting, avoids lifting the metal and its carrying frame, yet Wellman, by pivoted lifting, is enabled to make the three rolls of one three-high stand do the work of Lewis' four rolls in his two-high stands. One significant feature of Wellman's patent should not be overlooked, since it may aid in reaching a proper construction of one of the Brislin-Vinnac patent claims. The table shown by Wellman is in the patent styled a "pivoted table," and they are described, "These tables are supported at their ends in such a manner as to also allow their ends, or the ends next to the rolls, to be raised or lowered as is needed." It will thus be noted that the term "pivotal table," described as so pivoted as to permit "the ends next to the rolls to be raised or lowered as is needed," suggests pivoting, which allows proper angular movement at the inner end as fulfilling the scope of the patent. Yet in the claims such tables are described and specified as "pivotally supported at their outer ends."

So far as shown by the patents in evidence, no further step is shown in heavy mechanical rolling (with exception of a patent to Saylor, hereinafter referred to) until the Brislin & Vinnac patent in suit. As we have seen, the Fritz tables were used at the roughing stand of rolls for some time at Homestead, as they were elsewhere; but there is no proof that any one thought of rearranging or reconstructing them in combination with the elements shown by Lewis, Slade, or Wellman, so as to broaden the art of mechanical rolling. The Wellman type of mill was also widely used as a one-stand device, accomplishing as it did part mechanical rolling. But part manual rolling still continued as to the remainder of the process beside these part mechanical devices. How desirable the substitution of continuous mechanical for manual rolling was is apparent from a consideration of what, for example, the manual rolling of structural iron involved. Such manual rolling may be thus described. In the framework of a mill, on either side of, parallel with, and a considerable distance above, stands of three-high rolls, were placed a number of tracks, adapted each, or sometimes by pairs, to carry a laterally moved frame on a wheel. Suspended from such frame was a cylinder usually actuated by water pressure, and to the piston was attached a sway

or chain having pivoted at its lower end a long lever or hook. Each of these sways was operated by a hooker-man, and as the metal emerged from the rolls it passed between two rows of hooker-men to be caught and supported on the sway hooks. As the rear end of the metal cleared the rolls, it was raised or lowered for return through the upper or lower roll-pass of that stand of rolls, or it was moved laterally by means of the sway pulleys (actuated in some cases by cylinder motive power) to an adjoining stand of rolls for further treatment. By this process the respondent on its 23-inch mill, with 13 men, rolled 100 tons at a labor expense of \$84, and its maximum output was less than 44 tons per hour. On its 33-inch mill, with 17 men, it rolled 100 tons at a wage rate of \$125, and the output was 40 tons per turn. Brislin and Vinnac were both ironworkers, and were acquainted with the difficulties incident to this work. Brislin had given up millwork, but Vinnac continued as roller. In answer to the question how they came to design the patented device, Brislin says:

"From the increase in size of the iron Vinnac had been in the habit of rolling, they rolled it one length when he was working at the rolls, then they increased it to two lengths. Vinnac and me got to talking one day about the length of iron, and we concluded that we would try and get up a machine and do away with the hooks, and we started to work on a model in January, 1884."

The proofs show that this model was placed in the hands of a patent solicitor to prepare specifications. This work was either so carelessly or ignorantly done that the application was rejected before it was considered at all on its merits. The crudity of the application is referable possibly to the fact which the proofs show, namely, that it was hurriedly filed under stress of threatened prosecution after protracted delay. The fact of its rejection being wholly on formal grounds should be borne in mind,—not to affect the claims which, as granted, are, of course, the sole measure of the patentee's rights, but to prevent such formal rejection having any undue effect in narrowing the claim. In the specification the difficulties incident to raising and lowering the metal between the passes of one stand of rolls and to transferring it laterally to another stand are set forth as follows:

"In heavy rolling the labor attendant upon elevating the heated iron and moving it laterally for the several passes required in the process of rolling is very laborious, and the difficulty attendant upon said manipulation causes a loss of time, and at the same time a loss of heat, thereby causing the iron to be more difficult to roll; and the stiffening of the iron by the cooling process due to said loss of time results in the breaking of the mechanism connected therewith."

The advance of the art in lifting is conceded, viz., "Mechanical contrivances have been constructed and used for the purpose of vertical lift of the heated iron in the operation of rolling," and the invention of the patentees in the device for both lifting and transferring laterally is stated, viz.:

"Our invention has for its object not only the vertical lifting of the heated iron, but also the lateral movement of it in the process of rolling; and our invention consists in a lifting mechanism and laterally moving mechanism, combined with rolls of a rolling mill, for the vertical lifting and lateral movement of the heated iron in the process of rolling it."

In the device shown are two carriages, one at each side of the rolls, and adapted to move on stationary tracks parallel with the roll axis. Those carriages are moved simultaneously from one stand of rolls to another by power conveyed through a shaft adapted to engage, through lever control, with the lower string of rolls. Upon each of these carriages is a mounted table pivoted near its outer end, and the distance to its inner end is such as to permit it to reach both upper and lower roll-pass. Such inner end rests upon and slides along a bar suspended by chains in front of the rolls. One of these bars is on each side of the rolls. These bars have a supporting chain, and the chains of both bars connect and are drawn up and released by a single mechanical contrivance, so that the inner ends of the tables rise and fall together. It will be noted—and this fact we deem helpful and explanatory in construing the language used in the body of the patent in describing the invention—that the table-lifting mechanism is not only entirely independent of the rolls as a whole, but it has no connection whatever with individual parts of the rolls, to wit, with the lower string of rolls, which conveys power to laterally move the carriage, with the middle string, which propels the feed rollers, or with the idling upper string. In other words, the table-lifting mechanism—and this is a significant fact, and one to be fully appreciated—is entirely independent of roll connection.

On the application as finally presented, three claims were allowed. The first and second are involved in this case, and are as follows:

"(1) The combination, in a rolling mill, of rolls, a carriage, a roller-frame therefor for feeding to the rolls and pivoted at its outer end, means for laterally shifting said carriage and roller-frame and devices for inclining said roller-frame on its pivot, so as to vary the feed of the latter to the rolls; substantially as set forth.

"(2) The combination, in a rolling mill, of carriages arranged at each side, and provided with roller-frames pivoted at their outer ends, means for laterally shifting said carriages, and devices for simultaneously inclining said roller-frames; substantially as set forth."

As stated, the defenses set up are nonpatentability and noninfringement. Turning first to the question of patentability, we have the *prima facies* arising from the grant of the patent. But we have not alone the presumption arising from such grant, but our examination convinces us that the patent was rightfully granted. In the Brislin-Vinnac device we find for the first time in heavy rolling—and if such thing existed in lighter forms of rolling it has not been deemed sufficiently relevant to be called to our attention—the combination of a pivoted table, adapted to feed metal at both the upper and lower passes of more than one stand of such rolls. Throughout the mass of proofs in this record, the testimony of experts familiar with the practices of the art in this country and abroad, this one fact stands out in bold relief, unquestioned: no one prior to Brislin and Vinnac thought of, much less embodied in form, the coupling of a pivoted table and a movable carriage. As we have seen, Fritz had positively propelled feed-rollers, but his horizontal table as well as the entire metal bulk had to be lifted. Moreover, his device, being immovable laterally, was limited to a single stand of rolls. Indeed, in common with other devices which bodily lifted the metal mass by sheer power

as contrasted with tilting tables, where only the end is lifted, we think the Fritz device belonged to another type of mechanism. It was not—and, we think, rightfully so—cited by the patent office in the consideration of this application. Slade's device lacked a pivoted table, and its lateral movement was limited to the different grooves of a single stand of rolls. His device had neither a pivoted table nor positively actuated feed-rollers adapted to feed up an inclined table. Lewis had positively actuated feed-rollers and lateral shift capacity, but its use was restricted to two-high rolls. Wellman, on the other hand, with his positively propelled rollers and inclined table, could feed to three-high rolls; but, restricted as it was to a single stand of rolls, it did not solve the problem of continuous, complete mechanical rolling. Conceding that all the elements of Brislin and Vinnac were in themselves old, yet it must be conceded that they were the first to take the separate, individual elements of advance in the rolling art, and so combine them as to accomplish continuous, complete mechanical heavy rolling, and to make possible a new product, to wit, a machine-rolled heavy beam. The separate steps of Fritz, of Slade, of Lewis, and Wellman, securing lateral movement, vertical movement, and tilting movements, were each deemed worthy of patent protection and reward. Why, then, should the steps of Brislin and Vinnac, which carried this advance to the culmination in combining lateral and vertical in such a way that both movements could be used in each form of roll to which prior inventors had succeeded in applying but one of such movements, be deemed not only worthy of patent protection, but of such favorable regard as the broad and important field it pertained to would warrant? A device which transfers from the field of human toil to mechanical work the handling of huge masses of iron heated to a point almost prohibitive to human handling is a beneficent factor that is not to be measured by the economics of a mere labor-saving machine. While the motive and reward of the inventor is a monetary one, his work, measured by beneficent results, may arise to the dignity of the humane. At all events, in this case it fulfilled the statutory requirement of being useful and novel. That the continuous and complete mechanical rolling of an ingot weighing tons to a finished product a hundred feet in length is a noteworthy mechanical feat, that it marks a great advance step, will be conceded. That the potent factor in that advance is the use of a pivoted table laterally movable is apparent. Whether credit for the result is due or shall be awarded these patentees, this fact is established beyond doubt as noted above. Indeed, we do not understand it is questioned that these men were the first to point out this combination. And the significance of this novel combination cannot be minimized. It was not the mere placing together of two elements, each of which in the new relation continued to travel in its old orbit, and accomplish the same result it had done singly. The union of the two left neither the same as before. The lateral movement of the carriage widened the sphere of the table so that it served a plurality of roll-stands. The vertical motion of the pivoted table doubled the sphere of the carriage, in that, while remaining on stationary tracks, it could reach a roll-pass on a level other than its own. The power to move existed in one factor. The power



to reach existed in the other. The union of the two gave to the moving factor the power to reach; gave to the reaching factor the power to move. In this flexible roller we have a new mechanical factor; in its work we have a new result, viz., a machine rolled product. Thus the two elements of a lateral shift carriage and a pivoted table, elements old in themselves, known and used for years, when united accomplished a novel result in a novel way. It is strenuously asserted by skilled engineers called by the respondent that the construction of such a device as Brislin and Vinnac's was a mere mechanical assembling or adaption of existing devices. We cannot accede to that view. In the absence of any one making such a device, possibly the best proof of what the skill of the art might have done is what it did do. In that regard the patent to Saylor, referred to above, is highly instructive. This patent—No. 320,973—was granted June 30, 1885, to Louis F. Saylor. It will be noted as the outgrowth of a period which had the benefit of all that Fritz, Slade, Lewis, and Wellman had done. At that comparatively late date the difficulties incident to rolling heavy and structural shapes was well understood. To place ourselves in the then point of view, and thus appreciate what Brislin and Vinnac accomplished, it is well to notice how Saylor, presumably familiar with the art, sought to solve the problem of heavy mechanical rolling,—a problem, the solution of which we are now told was purely mechanical. This patent, which was placed in evidence by the respondent, recognized the difficulties incident to the old system, and the efforts made to solve them: "In operating old-style rolling mills," says Saylor, "one of the most laborious and severe parts of the work is that which has been known as 'hooking,'—that is, raising and lowering the blooms and partly rolled rails as they are run through the rolls,—and much time and labor have been spent to produce satisfactory machinery for performing the work." The object of this invention, as stated by him, is substantially the same as Brislin and Vinnac's. He continues: "This is the object of my present invention, and said invention principally consists in tables mounted on tracks running along parallel with the rolls, provided with rollers mounted on swinging arms, and mechanism for driving said tables back and forth and raising and lowering said rollers." To accomplish his purpose, Saylor, it will be noted, passed by the pivoted table,—an efficient factor in all subsequent advance,—and returned to the horizontal table with the lift of the entire metal bulk. By a most complicated mechanism he causes the rise of a system of swinging arms, which extend over the entire surface of the table, and these tables he makes movable from one roll-stand to another. Without entering into a description of the mechanism of Saylor's device, it is sufficient to say that to the disinterested mind it is cogent proof of the fact that the solution of the problem of mechanical rolling was by no means simple.

This backward step of a presumably practical man like Saylor in passing by the pivoted table and returning to the horizontal table, in imparting lateral motion to a horizontal instead of a pivoted table, shows that the conception of the application of the pivoted table to

the broader field of continuous rolling was a step not apparent even to inventors, to say nothing of mere mechanical improvers.

The discriminating student of all the devices—Fritz, Slade, Lewis, Wellman, and Saylor—will see that the gist and substance of progress lay in the several types of carriages, tables, and rollers used, and not in transmitting power to them. So far as power went, Slade had shown that individual cylinders could be used placed on the carriages themselves. In thus locating the power at the point of application on a movable carriage, the question of the transmission thereof was eliminated as a mechanical difficulty. The vital question was the use to be made of the power in the movement of tables and rollers, not the obtaining of power. It is not often the thread of inventive advance is so clearly traceable as in the present case. Fritz gave the vertical movement to the horizontal table and propelled rollers. In placing the motive power on the carriage, Slade gave freedom from power transmission problems. Lewis gave lateral movement to the horizontal table, and Saylor gave both vertical and lateral movement to such table. Sauvage and Wellman gave a pivoted table, and Brislin & Vinnac released such table from its fixed pivoted point, and by the movable carriage gave it a combined lateral and vertical movement. And this dual capacity of vertical and lateral movement in a pivoted table is the objective point in this case. Eliminate it, and there is nothing left worth contending for. Thus regarded,—and without reference to the claim obtained,—we think the substance of Brislin & Vinnac's invention consisted, not in gearing and power transmitting mechanism, but, as stated, in the patent "in a lifting mechanism and laterally moving mechanism, combined with rolls of a rolling mill, for the vertical lifting and lateral movements of the heated iron in the operation of rolling it." Such being the substance of the invention, we next inquire what claims were granted, for they, and they alone, are the measure of the inventor's right. The elements of the first claims are: (1) Rolls; (2) carriage; (3) a roller-frame therefor, (a) for feeding the rolls, and (b) pivoted at its outer end; (4) means for laterally shifting said carriage and roller-frame; (5) devices for inclining said roller-frame on its pivot, so as to vary the feed of the latter to the rolls. It is contended on behalf of respondent: First, that the first element "rolls" are, in the combination of the claim, the means for laterally shifting the carriage and roller-frame, and that this claim is therefore restricted to a device in which the power is roll transmitted; second, that the element "a roller-frame \* \* \* pivoted at its outer end" excludes pivoting at any point of the outer portion or end of the frame except the literal extreme end. In construing this claim it will be observed that it is not for the device of the patent as a whole. The operative device of the patent, embodying a carriage on each side of the rolls, with the means for simultaneously raising the inner ends of the roller-frames, is embodied in the second claim. The combination embodied in the first is for a mechanism on one side of the rolls. It cannot do complete mechanical rolling. It has but one carriage; it can operate on but one side of the rolls. Possibly it covers a single stand of rolls, for, no lateral movement whatever of a pivoted table being shown in the prior art, there is noth-

ing to necessitate this claim being limited to two stands of adjoining rolls. It will therefore be seen, the claims not being for the entire operative device of the patent, we are not forced to adopt a construction inferable from the claim being of that character. In accordance with the statutory requirement that patentees shall disclose the "best mode in which they contemplated applying their principle," these patentees showed a roll transmission of power in utilizing their principle of a laterally and a vertically moved pivoted table; but it seems to us a fair reading of the claim—a reading in keeping with the substantial character of the disclosure made by the patent—does not restrict it to that specified element of power supply. It is a familiar canon of construction that that construction should be followed which gives force to every part of an instrument. If the element "rolls" be used in the operative sense of means of power transmission for laterally shifting the carriage and roller-frame, then the fourth element, "means for shifting said carriage and roller-frame," have no effect. It will not do to say that the "means" here referred to are the gearings and shafting between the rolls and the carriage, for it will be observed that the roll shafts are not the origin of power, but are mere power transmitting shafts—transmitting power. They are embraced in the term "means for shifting said carriage and frame," because in function that is precisely what they do; hence if the element "rolls" is to be construed as a power transmitter to the carriage, the fourth element is a useless repetition. It is urged, however, that this construction is imperative, because the patentees have so defined their invention. The language of the patentees, "our invention consists in a lifting mechanism and laterally moving mechanism, combined with rolls of a rolling mill, for the vertical lifting and lateral movement of the heated iron in the operation of rolling it," respondent claims make the combination of the rolls with the lateral moving mechanism to affect the lateral movement of the iron the invention disclosed. The fallacy of such construction is apparent when we reflect such reading would make the combination of the rolls with the lifting mechanism to effect the vertical lifting of the iron the invention in that regard. But this is not the fact. The rolls do not enter in combination in any way to operate the lifting mechanism. The roller frame is lifted by an independent mechanism. Moreover, it will be seen that such reading is at variance with the facts in another regard. It will be observed that the power to laterally move the carriage is transmitted from the engine, not through the medium of the rolls generally, but solely through the lower roll as a shaft. So, also, the power to propel the feed rollers is transmitted through the middle roll as a shaft. The upper roll is an idler, conveying no power. In all other places through the patent where the term "roll" is employed the entire stand is meant, and where a single section or roll string is referred to it is designated as such. Thus, "In the process of rolling it is necessary to elevate the iron so that it will pass through between the upper and middle rolls"; "in moving the iron from one groove to another, and from one set of rolls to another set." So, also, what are the rolls is expressly defined: "In the accompanying drawing, A, B, C are rolls mounted in housings, D, D, and provided with the usual coupling and adjusting mechanism.

To the couplings of one of the rolls is attached a shaft, E, on which are mounted bevel wheels." "In the construction of the machine it will be readily comprehended that the lift and side moving mechanism, T, is arranged on each side of the rolls." "1, 2, refer to parallel bars, a pair of which are arranged at each side of the rolls." "The iron to be rolled is placed upon the lifts, T, and the roller will carry it forward on one of the lifts to the rolls, and from the rolls on the other lift." It will thus be seen by these selections, which embrace all mention made of that element, that the term "the rolls" apply to the entire stand, and where one roll section is defined it is in some way specified as such, viz., "the upper," "middle roll," "one of the rolls." It will also be noted that this "one of the rolls" to which is attached the shaft, E, is the one which, with the shaft, E, transmits power to propel the feed-rollers. We but follow the body of the patent and the instructions of the patentee when in the claim we give to the term "the rolls" the definition of the patent. "A, B, C are rolls mounted in housings, D, D, and provided with the usual coupling and adjusting mechanism." To give "the rolls" of the claim the meaning of the roll string, B, which transmits power to laterally shift the carriage" is to fly in the face of the meaning given that term in the body of the patent. Moreover, it will be noted that in describing and lettering the device the power transmitting mechanism is described not as the rolls, but as "transmitting shafts" on one part of which the rolls are placed. Take, for example, patent Fig. 2. The shaft, E, which transmits power to the feed-rollers, is not only so lettered at the left of the figure, but its lettering is carried through not one, but two, stands of rolls, and is placed at the extreme right of the figure. So, also, in the case of shaft, E', which transmits power to laterally move the carriage, not only is such shaft made to extend clear through the rolls, and the lettering placed at both ends, but in speaking of it as the power transmitting agency there is absolutely no mention made of the fact that a string of rolls is located upon it, or, indeed, any mention made of rolls. The significance of roll omission or reference thereto in describing the carriage moving mechanism warrants its citation: "On the shaft, E', is mounted a wheel, V, which meshes into wheels, V, V, on shafts, W, W, which are provided with couplings or clutches, X, X. The shafts, W, W, have also mounted upon them wheels, a, b, which are arranged to be snited through the medium of rods, c, and lever, d, for the purpose of bringing the wheels, a, b, at will, into gear with the bevel-wheels, e, on the shaft, f, on which are mounted wheels, g, which mesh into racks, h, h, attached to the lifts and side-moving mechanism." We have, then, the fact that the patentee has in the body of the patent defined the term "the rolls" not as meaning a power transmitting device, but what is commonly meant by the term, viz., "rolls mounted in housings, and provided with the usual coupling and adjusting mechanism." Such defined, ordinary meaning can be given said term in the claim. The patentees have also specified in the patent their "means for laterally shifting said carriage and roller frame" without mention or inclusion of the rolls therein. Such meaning can be awarded that element in construing the claim. It would, therefore, seem neither necessary nor just that the term "rolls" in the claim

should be held to be "means for laterally shifting said carriage and roller frame," and that by construction there should be injected into the term "rolls" a meaning at variance with its use and definition in the patent, and that the means for lateral shifting should have injected into it an element functionless in itself, and which the patentee, by his omission to mention, had not made a named or needful element. Such a narrow, technical, and unwarranted limitation of this claim, which it must be remembered is for a single carriage, would allow a gross infringer to escape infringement by extending shafts E and E' direct to an engine, instead of passing through the medium of rolls, functionless, as rolls, to carry power to the carriage and feed-rollers. We cannot join in thus stripping of patent protection this novel and useful carriage. There is nothing in the claim which demands such judicial annihilation of property rights. The invention of the carriage embodied in this claim is one of merit. There is nothing in the prior art or in the language of the claim itself to make this forced, narrow, and unnatural construction imperative. Using the terms in their ordinary meaning, we give to it a construction in accord with the substantial character of the invention, disclosed for the first time in this patent. This construction gives to the term "rolls" its ordinary meaning, and does not include in it the "means for laterally shifting said carriage." The latter is a separate, individual element of the combination, and should be treated as such.

We next seek the meaning of the claim term "a roller-frame \* \* \* pivoted at its outer end." The respondent contends that any pivoting which is not at the extreme outer end of the table avoids the claim. The specifications as originally filed made no mention of a pivoted table. On September 22, 1885, the patent was rejected without action on its merits, the office saying, "Action on the merits of the case must await proper amendments." On March 20, 1886, it was again rejected, the office saying, "Action on the merits must await proper amendment." In this latter rejection the attention of the patentee was called to the lack of description of the table, viz.:

"The description of this table is incomplete. Nothing is given as to the construction of the feed table itself, how it moves laterally, whether the racks, h, are attached to the table, what the table travels or is carried on, whether it is pivoted at its rear, or where, or what."

It will be noticed the office made no requirement as to pivoting at the outer end. Its inquiry only suggested possible pivoting (not at the outer end), but at its rear. And it was specifically inquired how the roller frame, while being lifted, could be moved laterally. Its inquiry was: "By what mechanism is it that the lifting mechanism is connected to the table so that the latter may move laterally, yet be operated upon in any position by this lifting mechanism?" In other words, the office could not understand how a table could be lifted vertically and moved laterally at once. An answer to its last question solved both inquiries. The amendment stated:

"The chains, j, are connected at their extremities to a horizontal bar, 5, said connection being made outside of the limit of the lateral movement of the carriage, T. Inasmuch as the inner end of said carriage only rests upon said bar, the carriage can move freely and laterally relative thereto when power is imparted to the chains, j, j, the bars, 5, 5, will be elevated, and cor-

respondingly elevate the inner end of each carriage, T; the shaft, 4, constituting a pivotal bearing for each carriage."

It is clear from the context that this language was used to explain the capacity of the frame to be lifted and moved laterally at the same time, and that freedom of the inner end of the frame to move up and along was the subject of the paragraph. That it could move along was shown in that it rested on the cross-bar. That it could move up with the raised bar was shown by the fact it was pivoted. In the Century Dictionary the word "outer" is defined as "opposed to inner." We think it is in this sense it is used in the claim. The inner end is free to move, the outer end is pivoted; and, thus constructed, they form a frame functionally fulfilling the claim element, "devices for inclining said roller-frame on its pivot, so as to vary the feed of the latter to the rolls." It would, therefore, seem that the phrase "pivoted at its outer end" is not a limitation to make the extreme tip of the outer end the sole place of pivoting, but rather a descriptive word, showing a table pivoted so far from the inner end as to allow such an angle of inclination to such inner end of the roller-frame that, in the language of the claim, it will "vary the feed of the latter to the rolls." About the year ——— the respondent began to install the devices complained of, and used them for rolling structural iron. No account is given of the origin of the idea. We are simply told the designs were prepared by its mechanical engineers. Whether there is any connection between that fact and the fact that the attention of several of its officials had been called to the Brislin and Vinnac carriage does not appear, and is a matter of no moment. The carriage was already in operation at the works of the Wheatland Iron Company at Wheatland, Pa. Shortly after the patent was granted, that company examined it, took a license, and placed it in its mills at Wheatland, where it was successfully used for the manufacture of skelp iron for pipes. It will be noted that in the device constructed under this license the Wheatland Company substituted a rod and lever arrangement for the chain and bar roller-frame lifting device of the patent. They also pivoted their roller-frame some distance from its outer end. These facts are not unimportant, as showing that practical iron men—"those skilled in the art," to whom the patent was addressed—made changes in mechanical details of construction and power application, and that such changes were not regarded as departing from the scope of the patent. The carriage installed by the respondent was placed on two lines of tracks parallel to the axis of two stands of three-high rolls adjoining each other. Therein we have in a rolling mill the first specified elements of the first claim, viz., "rolls," an "a carriage." On this carriage is pivoted "a roller-frame." In its 23-inch mill, the roller-frame is pivoted very near the rear end, as will be seen from the testimony, which we quote in full. Ritchey, a workman at the mill, was asked:

"Q. What kind of tables are used on this 23-inch mill? A. Traveling feed tables. Q. How many of these traveling feed tables are used on this 23-inch mill. A. Two; one on each side of the rolls. Q. How are they made to travel? A. By means of electric power on the tables. Q. Are these tables raised and lowered at one end? A. They are raised and lowered at the front end by means of a hinge at the back or rear end. Q. Are both of these tables

hinged at their rear end? A. Yes, sir. Q. About how far is the hinge located from the extreme rear or outer end? A. I should judge from 2 to 3 feet."

Duncan, a roller on the 23-inch mill, testified to the same effect:

"Q. How do they handle the metal at present on this 23-inch mill? A. By traveling tables. Q. Are these tables adapted to travel from one set of rolls to another? A. Yes, sir. Q. How do they do such traveling? A. By means of electricity on the table. Q. How are these tables raised and lowered from one roll pass to another? A. By hydraulic cylinder on one end of the table. Q. Please state whether or not these tables are pivoted, and, if so, where? A. They are, close to the outer end."

On cross-examination on this point his testimony was:

"Q. As a matter of fact, none of the tilting tables at Homestead are pivoted directly at their outer ends; this is correct, is it not? A. Yes."

McCague, a roller employed on the 23-inch mill, testified on cross-examination:

"Q. At Homestead the 23-inch mill tables are pivoted almost at the middle are they not? A. No, sir; they are very near the ends in the 23-inch mill. \* \* \* Q. Is there any advantage of pivoting them at the end instead of the middle? A. Yes, it moves quicker. Q. It requires more power, does it not, to lift it when it is at the end? A. Yes, sir; I believe it does. They have a large cylinder and plunger connected with it. Q. As a matter of fact, none of the tables at the Homestead works are pivoted directly at the end, but all of them have their pivotal points somewhat removed from the end of the table, have they not? A. Yes, sir."

It will thus be seen that the roller-frame of the 23-inch mill is pivoted so near the extreme outer end that these witnesses describe it as "close to the outer end," "very near the ends," "two to three feet" distant. In the absence of any suggested difference in operation secured thereby, it would seem this frame was—in the literalism of the claim—"pivoted at its outer end." As to the 33-inch mills, the proofs show a similar construction. McCague testifies:

"Q. Where is the pivot on the table in the 33-inch mill located? A. The pivot on one of the tables is very near the outer end, and the other is near toward the center."

Duncan says:

"Q. Are the tables on the 33-inch mill the same as to operation as those on the 23-inch mill? A. Yes, they operate practically the same. The only difference is that one of the tables on the 33-inch mill has its pivotal point about two-thirds of the way from its inner end, and located near the outer end."

Ritchey says:

"Q. About how far from the back end of the table of the 33-inch mill is this one table hinged or pivoted that you say is located at the back end of the table? A. Well, I never measured it, but I should judge it would be 4 or 5 feet; it might be a heap less, and then it might be more."

Clark, an expert witness for complainant is asked:

"Q. At what point in the length of the defendant's roller frame do you find it is to be pivoted? A. At a point somewhat beyond its center of gravity, outward, approximately, I should say, about three-fifths of the distance from its inner end."

The testimony of the respondents does not disclose where the pivoting is in their machines. Mr. Laureau, their expert, produces a model

in court. He does not state from which mill it was modeled. Obviously, it was not the 23-inch mill. In reference to it Mr. Laureau says:

"The feed table is placed upon this frame, and it is suspended at the point which is not quite in the center, so as to allow the table to tilt downward at its inner end against the roll. The overhanging end at the other side of the point of suspension is such as to offer a partial counterbalance for the heavier end toward the rolls."

When asked, "Do you agree with the complainants' expert, Mr. Clark, that in the defendants' feed tables the roller frame is pivoted 'about three-fifths of the distance from its inner end,' as compared with being pivoted at the outer end in the Brislin and Vinnac feed tables," he says, "I think that Mr. Clark is substantially correct in his statement." The pivoting of these frames being at a sufficient distance from the inner end to thereby enable the roller frame to vary its feed to the rolls, we are of opinion the device embodies the third element,—“a roller frame therefor for feeding to the rolls, and pivoted at its outer end.” We are also of opinion that the extension beyond the pivoting is merely mechanical, nonfunctional, and that such extended part is one whose presence or absence would not affect the operation of the device. The expert witnesses for respondent have not attributed to this extension any functional duty. At most, it is a mere counterweight or a mechanical aid in handling long beams. As we have seen, one of them simply says, “The overhanging end at the other side of the point of suspension is such as to offer a partial counterbalance for the heavier end toward the roll.” On the other hand, the complainants' proof shows that, while this counterbalance necessitates less power to raise the inner end, absence thereof makes a quicker-acting device. The statement of complainants' expert that “the outer end of a frame may be removed, and yet the device remain operative,” is not denied or questioned. It would, indeed, be a curious perversion of the patent law if the respondent's 23-inch mill frame, pivoted from two to three feet inward, should be held not to be pivoted at its outer end. And, if it fall within the patent, it would seem clear that an extension added to such outer end would not avoid infringement. “Addition to a patent machine or manufacture,” says Walker on Patents (page 294, § 347), “does not enable him who makes, uses, or sells the patented thing with the addition to avoid the charge of infringement. This is true even where the added device facilitates the working of one of the parts of the patented combination, and this makes the latter perform this function with more excellence and greater speed.” So, in *Electric Co. v. La Rue*, 139 U. S. 607, 11 Sup. Ct. 672, 35 L. Ed. 294, it is said, “Even if the defendant does use the retractable spring in aid of the torsional spring, it could not thereby escape the charge of infringement.” In reference to the phrase, “pivoted at the outer end,” Mr. Kennedy, an expert for the respondent, frankly says, “I think it would be fair to construe this language as prohibiting the pivoting of the table at its outer end.” If, then, in further prohibition, we remove the pivoting so far from the inner end as to allow an angular tilting of the roller-frame “so as to vary the feed of the latter to the rolls,” such pivoting is at the func-



tional, if not the extreme physical, outer end of the frame. If the roller-frame is extended beyond this functional outer end, such extension beyond is unnecessary, nonfunctional, indifferent. As was well said in the case of *Cahoon v. Ring*, 1 Cliff. 620, Fed. Cas. No. 2,292, and repeated in *Machine Co. v. Murphy*, 97 U. S. 125, 24 L. Ed. 935:

"Inquiries of this kind are often attended with difficulty, but if special attention is given to such portions of a given device as really does the work so as not to give undue importance to the other parts of the same, which are used only as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome."

As we have seen, the elements of a laterally moving carriage and a roller-frame pivoted thereon are the combining, co-operating factors constituting the novel combination of this claim. The remaining elements, while essential in combination, are purely mechanical, in that they simply vitalize or utilize the capacity of the combination table. The elements, "means for laterally shifting said carriage and roller-frames," and "devices for inclining the roller-frame on its pivot," are mechanical expedients to carry power to the table to operate it. Neither the means to shift the carriage nor the device to incline the roller-frame, which are used by these patentees, are made the subjects of individual claims. We cannot well see how they could have been. The elevation of the Brislin-Vinnac table is by the use of an independent individual mechanism. Raising a table in this way was no novelty. Fritz raised his tables by hydraulic cylinders; Slade raised his by hydraulic engines; while Wellman showed the use was optional of either a steam or a hydraulic cylinder for that purpose. So, also, Brislin and Vinnac utilized roll-conveyed power as their means of laterally shifting their carriage and propelling their feed-roller. There was no novelty in their going to the rolls for power. As we have seen, Lewis, to propel his feed-rollers, took power from a main shaft, which also propelled the rolls, while Saylor took direct from the rolls the power to both laterally and vertically move his horizontal table. This is conceded by the respondents. Its expert, Mr. Laureau, says:

"The relation of the Saylor device to claims 1 and 2 of the Brislin and Vinnac patent is very close, and, with the single exception that the Saylor tables are not pivoted at their outer ends, the claims alluded to are an exact description of the Saylor table. There is the same combination of rolls, carriages, roller-frame, means for laterally shifting carriage, and devices for allowing the roller-frame to deliver metal to both upper and lower passes. \* \* \* The Saylor device is therefore substantially the same as the Brislin and Vinnac device."

It will thus be seen the novelty of Brislin and Vinnac's combination lay not in their commonplace means and devices for transmitting, but in the novel combination table they operated by, such power. It would, therefore, seem the patentees in their claim for this carriage were not restricted to the exact means and devices for power transmission they used, but were entitled to include all existing mechanical equivalents therefor as fairly within the scope of "means for laterally shifting said carriage and roller-frame" and "devices for inclining the roller-frame on its pivot." We have seen the re-

spondents use the combination of a carriage and the roller-frame pivoted thereon; that they place it on tracks parallel to rolls, and to that extent have availed themselves thereof to secure the advantage of the combination shown in the claim. It remains, therefore, to inquire whether in the use of means to laterally shift and devices to incline the roller-frame they so obtain power as to avoid the claim. Brislin and Vinnac used an independent cylinder, and transmitted power through chains, pulleys, and bar to the front end of the table, which was then raised by power and depressed by gravity. In accord with a well-recognized engineering principle that the most direct application of power is the best, the respondents placed a hydraulic cylinder on their carriage directly over the front end of the roller frame, and raise it by power and depress it by gravity. This was but the use of a common, ordinary power source in a well-known manner. Slade had shown to the rolling art that the engine to furnish power in moving could be placed on the shifting carriage. It therefore seems to us that the respondents' device for raising the front end of their roller-frame is a mechanical equivalent of the complainants', and that it accomplished the same purpose in substantially the same way. Indeed, the mechanical construction used by respondents is conceded by Mr. Laureau to have been used years before by Sauvage on his stationary pivoted table. Speaking of that table, he says:

"As compared with the Brislin and Vinnac patent, this apparatus shows a feed table pivoted at its inner end, \* \* \* the vertical motion of its front end being given by a cylinder which pulls. \* \* \* In defendant's table I find that it is pivoted, and that it moves up and down in the same manner as the table described in the French patent in evidence."

The fact that in complainants' device the raising chains are connected, and the roller-frames rise simultaneously on both sides of the rolls, while the respondents' roller-frame operates independently, and without reference to the carriage on the other side of the rolls, makes no difference, so far as this claim is concerned. The first claim, as we have seen, is for a single carriage, and the device is not one for raising roller-frames on both sides of the rolls, but for "inclining said roller-frame on its pivot." In the Brislin and Vinnac device the power to laterally shift the carriage is obtained from a roll shaft through gears and shafting as is also their feed-rollers' propelling power through another such roll shaft. The device is such that the power is conveyed at the same time to each of the carriages on either side of the rolls. The respondent makes a direct application of power. By means of an extension telescopic pipe they carry steam from an outside supply to the carriage, and place thereon an engine, which moves the carriage and also propels the feed-rollers. If we are influenced by form and led by appearance, we can see a wide difference between complainants' and respondent's device. If we measure by substance, we find them substantially the same. The patentees were rollers, and the rolling part of the problem—and that was the vital part—they solved successfully and on the lines which all roll-beam mills have followed. They were not engineers, and, while their device was operative, as we have seen at Wheatland, it

requires no special mechanical knowledge to see wherein their appliances for furnishing power to their carriage were crude, and afforded room for considerable improvement. In that regard we may quote with approval Robinson on Patents (volume 1, p. 185), where it is said: "Mechanical perfection is the achievement of the artisan, rather than the inventor, and does nothing to develop or to illustrate the idea of the invention. Possibilities of greater excellence in shape, location, arrangement, material, or adjustment do not affect the fact that the inventor has produced a practically operative means, and all such possibilities are legally embraced in what the inventor already has accomplished. Nor is it necessary that the invention, as a means, should be incapable of further improvement by the exercise of additional inventive skill. If it accomplishes the end desired, it is perfected invention, although some newly generated idea, or some better mode of application, may reach the same end, and in a more perfect manner. It is enough that the inventor has devised a means, has put his thoughts into practical and useful form, and placed where the public can at once employ it,"—and refer to *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *The Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863; *Independent Electric Co. v. Jeffrey Mfg. Co. (C. C.)* 76 Fed. 991. The mechanical changes made by the respondents, while extensive in appearance, have left unchanged the gist of the combination in the flexible table adapted to lateral and vertical shift. That remains precisely as Brislin and Vinnac conceived it. To the layman these changes seem radical. Not so to the engineer. Mr. Kennedy, respondents' expert, when asked whether it was not within the province of a skilled engineer to take the Brislin and Vinnac device, and adapt it to independent operation, said, "It would be very easy to take the Brislin and Vinnac patent and adapt it to get this independent operation." Speaking of a date a few months later than Brislin and Vinnac's patent, but several years before the respondent's alleged infringing device was built, he said:

"It having been old and well known to every one in the slightest degree familiar with mechanical subjects to use motors mounted on moving machines as a well-known mechanical equivalent to fixed motors attached to these machines by suitable connection, such a substitution could not, in my opinion, involve any invention whatever."

Summing his views on the relation of fixed and movable motors, he says:

"It would be utterly absurd to think of there being any invention involved in substituting a motor mounted on a moving mechanism for a fixed one, adapted to draw it along by interposed connections, or vice versa. The interchangeability of these devices was as apparent and well known as that of cogwheels and band pulleys. Which device is better to use for any purpose is simply a matter of ordinary judgment."

So also, Mr. Lareau, speaking of the substitution in another patented device of the self-contained movable motors for the stationary mechanism of the Brislin and Vinnac carriage, says:

"The application of the motors as shown in the said patent was simply the substitution of a simple and well-known mechanical appliance for a more complicated intervening device to communicate motion. The application of

motors directly to the object to be moved was a thing so common at that time that mere ordinary mechanical skill was sufficient to make the substitution."

It is thus apparent on respondents' own showing that in substituting movable for fixed motors they were simply bringing to bear, in their use of Brislin and Vinnac's carriage, plain, well-known engineering practice. In seeking compactness of plant and direct application of power, their engineers did not revolutionize,—did not change the table proper; they simply followed the lines of modern installation in order to use it. As Mr. Laureau says, "Practice had led to the recognition of the fact that, the nearer the motor was placed to the work to be performed, the more economically could this work be done." It will therefore be seen that the difference between the mechanical roller of Brislin and Vinnac and that of respondent does not lie in the carriage proper. That essential feature is the same, pivoted laterally and vertically working in both structures. The difference lies in the means used to apply operative power to the carriage by a change and substitution of power transmitting devices. When trained engineers tell us that the interchangeability of such devices was apparent, and that which shall be used was simply a matter of ordinary judgment, it must be apparent that when these patentees, in compliance with the statutory obligation, chose one of many well-known methods to operate their table, they did not empower an infringer to take the other well-understood alternative methods, and use them to avoid their invention. After full consideration, we have concluded the first claim of this patent is infringed, and that it should be so held.

In view of what has been said, the remaining points require but brief notice. The second claim calls for a combination of carriages on each side of the rolls, and embodies devices for "simultaneously" inclining the roller-frames of the two. The simple answer to this claim is that respondent has no such device. It employs no device for doing that which is made an element of this particular claim, viz., "simultaneously inclining said roller-frame." The element of compulsory simultaneity is here made an element of a device to operate both carriages. This the respondent does not do. As to the Hanley and Richey patent, we are of opinion that the defense of invalidity because of nonpatenability must be upheld. It consists simply of the substitution on a Brislin and Vinnac carriage of movable motors of various kinds for the fixed motors shown in the Brislin and Vinnac patent. This substitution to form a combination with such a table was, in our judgment, a mere engineering problem, and involved no inventive faculty. We have already quoted in part the language of Messrs. Kennedy and Laureau to emphasize our view of what was involved in a similar substitution made by the respondents. Their testimony was given upon the question of the validity of the Hanley and Richey patent. We agree with their conclusions, and content ourselves by here embodying them as expressive of our views. Mr. Kennedy says:

"It having been old and well known to every one in the slightest degree familiar with mechanical subjects to use motors mounted on moving ma-

chines as a well-known mechanical equivalent to fixed motors attached to these machines by suitable connections, such a substitution at the time mentioned could not, in my opinion, involve any invention whatever. For instance, it was customary at the time to operate traveling cranes, the motions being transmitted from fixed motors by means of cords or chains, the operator remaining at one spot, as well as to operate similar cranes by means of motors mounted on the crane and traveling with it, the operator at the same time being carried on a platform attached to the crane, the advantage of this construction being that the operator traveling with the crane was in better position to see his work and place his crane properly than he could possibly be if he remained in one fixed location. This is precisely the same advantage, and the only advantage, that is gained by the Hanley and Richey construction, as compared with the construction of the type of the Brislin and Vinnac. There are, of course, other advantages in the Hanley and Richey, as described, over the Brislin and Vinnac, but these are due to better detailed design, and not inherent in the type of machine."

Mr. Laureau says:

"Such a substitution as the date of application of the Hanley and Richey patent would certainly not have involved an invention. The application of the motors as shown in the said patent was simply the substitution of simpler and well-known mechanical appliances for a more complicated intervening device to communicate motion. The application of motors directly to the object to be moved was a thing so common at that time that mere ordinary mechanical skill was sufficient to make the substitution. It was within the reach of every one versed in the art, and it had been [done?] so often that the application did not call the inventive faculty in requisition."

Let a decree be drawn in accord with the views expressed in this opinion.

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MOORE v. SCHAW et al.

(Circuit Court, N. D. California. August 25, 1902.)

No. 12,955.

1. PATENTS—INVENTION—UTILITY OF DEVICE.

A combination of old elements into a machine for riveting the circumferential seam in pipe-line work which accomplishes several times as much work in a given time as any mechanism before in use, and requires less expensive labor to operate it, constitutes patentable invention.

2. SAME—ANTICIPATION—DEVICE RELATING TO DIFFERENT ART.

A device relating to a different art, and not adapted to perform the functions of a patented machine, is not an anticipation of such machine.

3. SAME—INFRINGEMENT—HOLDING DEVICE FOR RIVETERS.

The Moore patent, No. 622,251, for a holding device for riveting pipe, was not anticipated, and discloses patentable invention. Claims 5 and 6 also held infringed.

In Equity. Suit for infringement of letters patent No. 622,251, for a holding device for riveters, issued to Robert S. Moore, April 4, 1899. On final hearing.

N. A. Acker and Wm. F. Booth, for complainant.

John J. Scrivner and James L. Hopkins, for defendants.

MORROW, Circuit Judge. In this suit the complainant seeks to enjoin the defendants from making, using, or selling a holding device for riveters embracing the invention described in letters patent of the United States No. 622,251, granted to the complainant on April 4, 1899. The defendants are charged with infringing the rights of the

complainant accruing under said letters patent, to the complainant's damage. The defendants deny generally the charges of the bill of complaint, and as matter of defense aver that the complainant's patent is void for want of invention and by reason of anticipation, and that they have not infringed.

From the specifications of complainant's patent it appears that the device in question is intended for use in connection with the riveting of circumferential seams of pipe sections, tubes, or cylinders generally, and designed more especially for use in "line-pipe riveting,"—riveting the pipe when the pipe is in the ditch. The inventor says in the specification:

"Heretofore the riveting or joining together of pipe sections has been accomplished either by hand or by the use of heavy and complicated power devices, which head or upset the rivets by pressure exerted thereon. The objection to the former method of riveting is that the work is necessarily slow, and the rivets are not uniformly driven; and, again, it requires the employment of expert riveters, while by the use of the power mechanism the pressure upon the inner wall of the pipe is so great that unless heavy and strong external devices be employed to compensate for such pressure the pipe is liable to be damaged by the undue strain to which it is subjected. The main object of my invention is to provide a simple, comparatively light, and inexpensive holding device by means of which the pneumatic or other tool may be employed for the driving, heading, or upsetting of the hot or cold rivets during the riveting of the pipe sections; the device being so constructed that it may be easily and quickly moved along the line of piping, or from one section to another, and adjusted to the rivet holes of the sections in order that the riveter may be brought into alignment therewith, and be permitted free movement the entire circumference of the pipe sections. The holding device comprises an annular frame adapted to embrace the entire circumference or a part diameter of the pipe section, combined with a tool-holder either movable upon the frame, so as to traverse the circumference of the pipe, or it may be rigid therewith, and the frame movably secured around the pipe section. Hence, broadly stated, the invention may be said to comprise an 'annular frame' (by which expression I wish to be understood as meaning a frame embracing the entire circumference of the pipe section) either rigidly or movably connected or supported transversely to the length of the pipe line, in connection with a tool-holder mounted upon and carried by the frame. By the use of the present holding device I am not only enabled to reduce the cost incident to the riveting of pipe sections, by dispensing with the necessity as to the employment of skilled or expert riveters, but all the riveting required to properly join or unite the pipe sections may be quickly performed while the pipe is in position within the trench, and the rivets driven at the rate of about fifteen hundred or more per day, and more perfectly than they can be driven by hand, as is usual in this class of work. As the rivets may be driven at any distance from the end of the pipe, it allows all the pipe sections to be assembled and temporarily joined in the ditch or trench, and each section permanently riveted as the work progresses."

The device is particularly described in the following specification, with references to the drawings accompanying:

"The holding device comprises a frame preferably consisting of two plates or rings, B B<sup>1</sup>, Figs. 1 and 2, which are composed of distinct sections joined together by bolts, a. These plates or rings are designed to loosely embrace or encompass the pipe sections, one resting upon each section of the pipe a short distance from the other.

"The ring sections of the annular frame that encircle the pipe sections when in place are fastened or held together by means of the lock or cross bars, B<sup>2</sup>, which bars are connected by hinged joint, a<sup>1</sup>, to one ring of the frame, and secured to the other when thrown over by means of the clips, a<sup>2</sup>, hinged to said ring, which clips fit over the free end of the cross-bars, B<sup>2</sup>, Fig. 2. Each bar is formed with a depending lug, b, which engages the

inner face of one of the rings of the annular frame, so as to hold the frame rings a given distance apart.

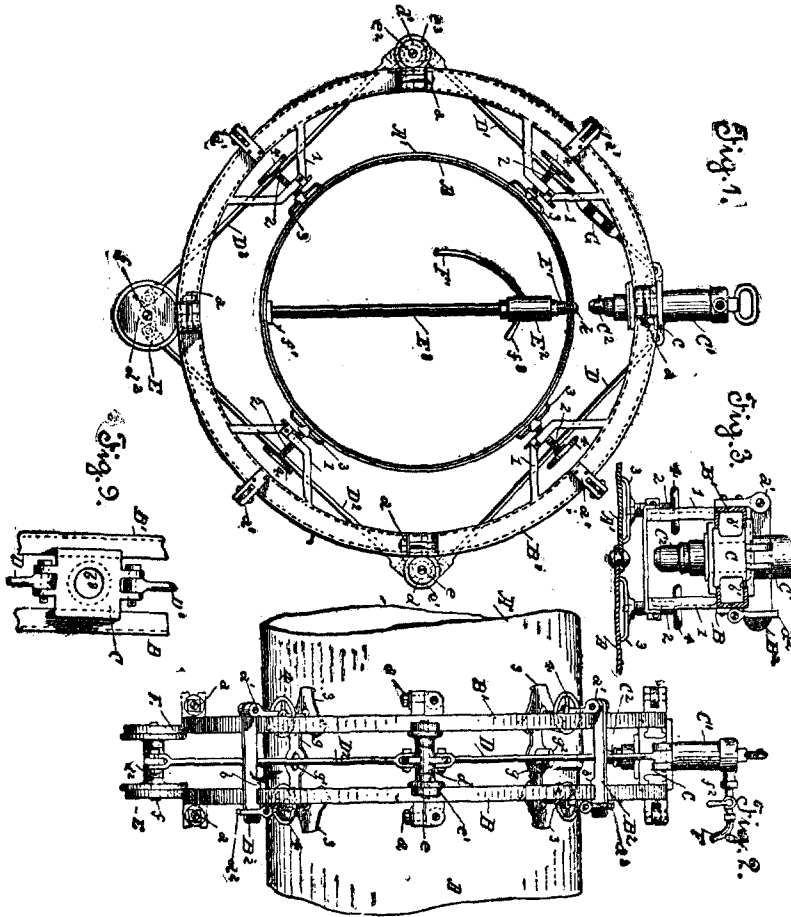
"Inasmuch as the end of one pipe section fits within that of the other section an even or unbroken surface is impossible. Consequently it is required that means be provided to adjust one frame section to the other, so as to secure horizontal alignment and to hold the rings against displacement after being properly aligned to each other and to the circumferential rivet holes of the pipe sections. To accomplish this, each section of the frame is formed with a downwardly extending bracket or support, 1, through which works a screw-threaded bolt, 2, carrying at its lower end a foot, 3. This foot rests upon the pipe section of the respective rings, and either ring is raised or lowered by simply turning the hand-wheel, 4, so as to move the screw-rod inward or outward. This form of adjusting mechanism is preferred where the frame is a rigid one, owing to its simplicity, although any other suitable adjusting device may be employed for this purpose.

"By preference the annular frame is formed of channel iron, and between the rings composing the frame is fitted to move the slide tool-holding block, C, which block is formed with the side grooves, b<sup>1</sup>, so the edges thereof embrace the upper and lower faces of the rings, B B<sup>1</sup>, Figs. 2, 3, and 9. This slide-block is provided with a vertical central opening, b<sup>2</sup>, within which is fitted the cylinder, C<sup>1</sup>, carrying the pneumatic hammer or riveter, C<sup>2</sup>, which when the annular frame is properly adjusted upon the pipe sections is in line with or centered to the rivet holes of the pipe. In order to permit free circumferential movement of the slide holding-block carrying the riveter, the same is connected by tie-rods, D D<sup>1</sup>, to the sleeves, d d<sup>1</sup>, which sleeves in turn are connected to the sleeve, d<sup>2</sup>, by tie-rods, D<sup>2</sup> D<sup>3</sup>. Through sleeve, d, is fitted axle, e, carrying rolls, e<sup>1</sup>, and within sleeve, d<sup>1</sup>, works axle, e<sup>2</sup>, carrying rolls, e<sup>3</sup>, while through sleeve, d<sup>2</sup>, works axle, f, carrying the larger rolls, E. Each of the rollers, e<sup>1</sup>, e<sup>3</sup>, and E, works upon the periphery of the rings composing the annular frame, and while answering to hold the sliding tool-holding block in position also assists in moving the same around the frame. Owing to the weight of the riveter, it is necessary that a counterpoise or counterweight be employed to assist the operator in holding the slide-block and riveter in proper position. This is accomplished by making the rolls, E, of such size that the weight thereof will approximately equalize that of the slide-block and riveting-tool combined. Hence only slight pressure is necessary to enable the operator to move the slide-block the entire circumference of the pipe sections, as required, to head or upset the rivets in order to rivet-joint the pipe sections.

"When riveting is done from the outside, it is necessary that the workman inside the pipe be provided with an anvil or take-hold for the rivet, so as to hold the rivet in place while being headed or upset by the riveter. In the present case I make employment of an ordinary pneumatic holder or take-hold, E<sup>1</sup>, which works in the usual cylinder, E<sup>2</sup>, mounted upon the support, E<sup>3</sup>. This support is provided at its opposite end with a head, f<sup>1</sup>, which rests against the inner wall of the pipe at a point opposite to the rivet being headed or upset. By means of this support the workman is relieved of all strain incident to the holding of the rivet while being headed by the riveter. If the riveting is to be done from the inside of the pipe, the position of the holder or take-hold and riveter will be reversed; that is, the riveter will be attached to the support, E<sup>3</sup>, and the holder or take-hold fitted within the slide-block or tool-holder, C. It is thus obvious that it is immaterial whether the riveting be done from the outside or inside of the pipe.

"The air necessary to operate the riveter and the rivet-holder or take-hold, which serves as an anvil, is conveyed from an air-compressing apparatus located at point convenient to the line of work by means of the flexible pipes, F F<sup>1</sup>, the inlet of air to the respective tools being controlled by the cocks, f<sup>2</sup> f<sup>3</sup>.

"Inasmuch as the pneumatic riveter and rivet-holding tool are well known and their operation and construction perfectly understood by those familiar with such tools, a specific description thereof is believed unnecessary in the present application, as they form no part of my invention, which relates to devices designed to permit the use of such tools in connection with the work of riveting.



"Rigidity is secured at the bottom of the rings composing the annular frame in order to prevent spreading by riveting to the depending brackets, 1, of opposing ring sections a cross-tie plate,  $g$ , Figs. 1 and 3. These cross-tie plates not only hold the rings of the frame an equidistance apart, but give firmness to the annular frame at its base, while the hinged lock bars or rods,  $B^2$ , secure the same at the top. Each cross-tie plate is provided with a central opening,  $g^1$ , through which fits a plug,  $g^2$ , which plug is used to assist in aligning the frame or centering the same to the rivet holes.

"By reference to Figs. 4, 5, and 6 a modification of the holding device is illustrated. In this case the annular frame is composed of two flexible bands or cinctures,  $F^2$ , preferably composed of a series of links carrying rolls,  $f^{21}$ . Each band or chain encircles the pipe sections, and the free end of each is connected to a tool-holding block,  $F^3$ , by means of bands or rods,  $F^4$ . This constitutes a flexible frame, which is adapted to be moved the circumference of the pipe sections as the work of riveting progresses, to this extent differing from the frame set forth in Fig. 1 of the drawings, which is a fixed one, and upon which the tool-holding block moves. Where the frame is a rigid one, the slack of the slide tool-holding block may be compensated for by means of the turn-bolt,  $G$ , introduced in the tie-rod,  $D^1$ , Fig. 1, while in case chains be employed the tension may be regulated by taking out or putting in a link or by any suitable tension regulating device.



"Fig. 4 illustrates the riveter, held in the slide-block in order to rivet outside of the pipe, while in Fig. 6 the riveter is illustrated inside of the pipe and the holder or take-hold as being carried by the tool-holder or slide-block."

The operation of the device is described as follows:

"In the operation of riveting or joining the ends of pipe sections when the work is done from the outside, an operator inside of the pipe receives a hot rivet handed him from the outside through an opening formed in the pipe. The rivet is then placed in the take-hold, and the air-inlet cock opened, so that the take-hold is forced outward, and the hot rivet is firmly held in the rivet-hold of the pipe sections. After the rivet is in place the operator on the outside opens the air-inlet cock of the riveter or riveting tool, so as to operate the hammer, and cause the heading or upsetting of the rivet, which projects through the rivet hole. Upon the completion of the riveting or heading of one rivet, the operator inside the pipe receives another rivet, which is placed and held in the next rivet hole, and the operator upon the outside moves or advances the slide-block or tool-holder to place the riveting tool over such hole. The operation of heading or riveting is the same as that just described, which continues the entire circumference of the pipe, or until all the rivet holes of the circumferential seam have been closed. As the tool-holder approaches one of the lock-bars, the same is released to permit the holder to move past the bar, after which the same is refastened.

"Inasmuch as the present invention is designed for use in connection with the riveting of the circumferential seam of pipe section and not the longitudinal seam, it is not necessary that space be left below and around the pipe its entire length in order to fit the apparatus thereto, but only sufficient room or space be left at the end of the section to permit adjustment of the parts and allow the outside operator to pass around the pipe to guide and advance the riveting tool as the work progresses. Upon the completion of the riveting of one circumferential seam the apparatus is taken apart and carried forward and adjusted around the pipe section for the riveting of the next circumferential seam, the operator inside of the pipe likewise moving forward."

The defendants defend this action upon the usual grounds that the combination described in the patent was merely the product of mechanical skill, and not the result of the exercise of the inventive faculty, and that they have not used the combination. The claims of the patent sued upon in this case are known in law as "combination claims." A combination claim is one which takes various mechanical elements and joins them together in such a way as to make an operative mechanism, the action of which is produced by the joint action of all the mechanical elements in the combination. The letters patent are prima facie evidence of the novelty of the invention. The invention described in the patent in suit relates to means whereby the work of pipe-line riveting is facilitated; to means whereby the hand riveting formerly used for such work is dispensed with, and the employment of skilled or expert riveters in connection with such work rendered unnecessary. The complainant contends that the invention was the result of successfully solving the problem of providing a device for use in connection with the work of pipe-line riveting, so constructed as to obtain certain results. These results were: To reduce the cost incident to the work of pipe-line riveting; to permit the work of riveting a circumferential seam to be accomplished mechanically instead of by hand, as formerly; to dispense with the employment of expert riveters in connection with the riveting of the circumferential seam in pipe-line work; to enable the rivets to be uniformly driven or headed; and to facilitate the work of riveting the circumferential seam of pipe-line work. All of these results appear to have been accomplished by

the complainant's device, and in the art of riveting it is certainly a new and useful result to produce a device which will accomplish several times as much work in a given time as any mechanism before in use, and requiring less expensive labor to operate it; and the adaptation of old elements to this new use required, in my judgment, the exercise of the inventive faculty.

In *Willcox & Gibbs Sewing Mach. Co. v. Merrow Mach. Co.*, 35 C. C. A. 269, 93 Fed. 206, the patents declared upon were for devices in sewing machines. The circuit court there found from the proofs in the case that prior to complainant's machine the practical work of such machines (over seam machines) was not more than 1,000 stitches per minute, while by complainant's machine more than 2,000 stitches could be made. The circuit court of appeals for the Second circuit commenting upon these proofs, said, at page 272, 35 C. C. A., and page 209, 93 Fed.:

"When the increase of speed is so great as it appears to be in this instance, and that, too, in an art where increase of speed (efficiency being preserved) is of such practical importance, we are disposed to consider the changes in parts and arrangement of parts as showing meritorious invention."

A new combination of old elements by which an old result is obtained in a more facile, economical, and efficient way may be protected by patent. *Thomson v. Bank*, 3 C. C. A. 518, 53 Fed. 250, 252; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 45 C. C. A. 544, 106 Fed. 693, 707; *Kinloch Tel. Co. v. Western Electric Co.*, 51 C. C. A. 369, 113 Fed. 659, 665; *Seymour v. Osborne*, 11 Wall. 516, 542, 20 L. Ed. 33; *Gould v. Rees*, 15 Wall. 187, 189, 21 L. Ed. 39.

The claim of anticipation is based upon prior patents, and is met by the objection that the inventions approaching more nearly to the device described in the claims of the patent involved in this suit relate to a different art. For example, the patent granted to Daniel O'Neil, dated February 9, 1895, numbered 534,572, is for an apparatus for caulking joints of pipe and mains, and has no relation to the art of pipe-line riveting, the invention now under consideration. The patents introduced relating to pipe riveting relate also to a different method of practicing the art. "A machine or combination which is not designed by its maker, nor actually used, nor apparently adapted to perform the functions of a patented machine or combination, but which is discovered in a remote art, and was used under radically different conditions to perform another function, neither anticipates nor limits the scope of the patent." *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 18, 12 Sup. Ct. 601, 36 L. Ed. 327; *Topliff v. Topliff*, 145 U. S. 166, 12 Sup. Ct. 825, 36 L. Ed. 658; *Potts & Co. v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; *Westinghouse Air-Brake Co. v. New York Air-Brake Co.* (C. C.) 59 Fed. 581, 590. Under these authorities, it is clear that the complainant's device amounts to invention, and is entitled to the protection of the law.

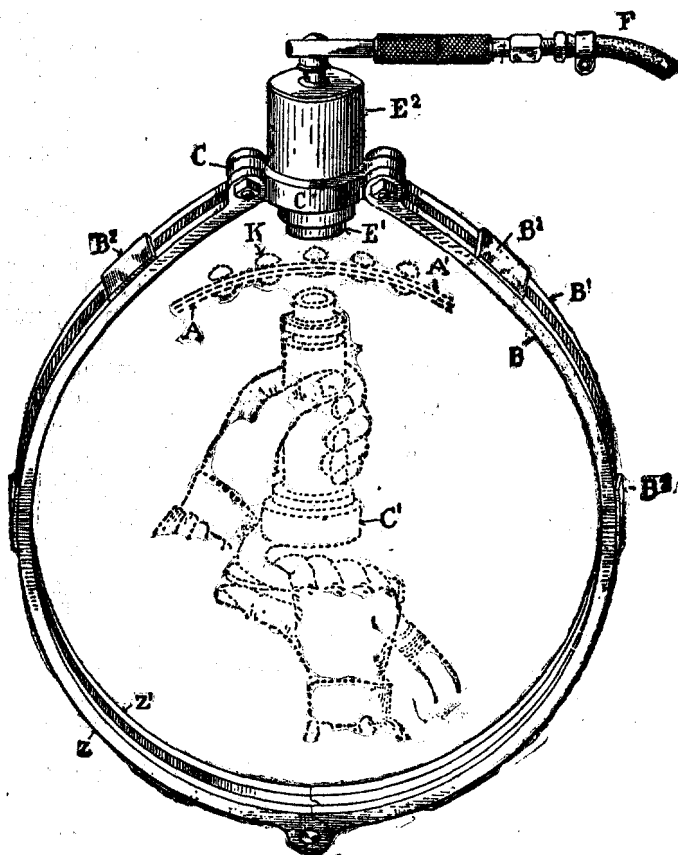
With respect to the defense that the defendants have not used the combination, it is contended by the complainant that the device in use by the defendants infringes claims 5 and 6 of his patent. Those claims read as follows:

"(5) The combination with a pipe-riveter of an annular frame composed of independent members, each member of which comprises a series of sections united together, and of a tool-holding block secured to and carried by said frame, said block adapted to be moved over the holes to be riveted so as to place the tool carried thereby in vertical alignment therewith.

"(6) In a holding device for use in connection with riveting the circumferential seam of pipe sections, the combination with the rigid annular frame, of devices for attaching the same to the pipe to be riveted, of a tool-holding block secured on and carried by the frame, said block adapted to be moved around the pipe seam, and of a tool-supporter located inside the pipe."

As it is not a particular principle in mechanics or the discovery of new elements that comprises the invention herein, but rather the arrangement of old elements, whereby means is provided for effecting a much more useful result than before produced in the same line of work, an infringing device must necessarily contain the same arrangement of parts, or so nearly the same, as to be practically identical in operation and result with the original device. A safe rule for guidance in such cases is that a device which would anticipate if earlier, infringes if later.

The device used by the defendants, which is charged to infringe that of the complainant, is illustrated by the following drawing:



This drawing shows an annular frame, consisting of two members, B B<sup>1</sup>, which lie one on each side of the circumferential line of rivet holes. These members are independent, and composed of independent sections. They are united by cross-plates, B<sup>2</sup>, and by the tool-holding block, C, and when so united form a rigid frame. The tool-holding block is secured to the annular frame, and carried by it around the pipe, thereby enabling the tool-holding block to be placed in vertical alignment with the holes to be riveted, successively. There also appears a tool-supporter located inside the pipe. All the elements of claims 5 and 6 of complainant's patent are thus present, and in practically the same arrangement for operation, except that the illustration does not show any devices for attaching the annular frame to the pipe to be riveted. From the testimony, however, it appears that the hinge opposite the take-hold or holding-on device, together with the bolts in the tool-holding block, are used for attaching the machine to the pipe. It appears to the court that the defendants' device is not only functionally the same as that of the complainant, but that it reaches the result by substantially the same or similar means, and, as the invention of the complainant is contained in the means devised for operating the riveting tools, the use of such means by others is infringement. *Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 569, 18 Sup. Ct. 707, 42 L. Ed. 1136.

For the reasons here stated, let a decree be entered in favor of the complainant.

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#### VICTOR TALKING MACH. CO. et al. v. THE FAIR.

(Circuit Court, N. D. Illinois, N. D. November 15, 1902.)

#### 1. PATENTS—SUIT FOR INFRINGEMENT—EFFECT OF ABSOLUTE SALE OF PATENTED ARTICLE.

The manufacturer of a patented article, who makes an absolute sale thereof to a jobber, without reservation or condition, so far as relates to its sale by the jobber, cannot, by a notice placed thereon, impose restrictions upon its sale to the public by a retail dealer, so as to render him and all users subject to suit for infringement of the patent in case it is sold for less than a fixed price. If he has any remedy for the violation of such conditions, it is upon the alleged contract, and not by a suit in a federal court for infringement.

In Equity. Suit for infringement of patent. On demurrer to bill.

Horace Pettit and Peirce & Fisher, for complainant.

Walter H. Chamberlain, for defendant.

KOHLSAAT, District Judge. On or about April 18, 1902, complainant the Victor Talking Machine Company sold one of its patented talking machines, numbered 23,157, to a jobber. The jobber took the machine subject to the legal effect of certain conditions, to wit, those contained in a certain printed notice fastened upon said machine, which reads as follows:

"This machine, which is registered on our books, No. 23,157, is licensed by us for sale and use only when sold to the public at a price not less than \$25. No license is granted to use this machine when sold at a less price. Any sale or use of this machine when sold in violation of this condition will

be considered as an infringement of our United States patent under which this machine and records used in connection therewith are constructed, and all parties so selling or using this machine contrary to the terms of this license will be treated as infringers of said patents, and will render themselves liable to suit and damages. This license is good only so long as this label and the above-noted registered number remain upon the machine, and erasures or removals of this label will be construed as a violation of the license. A purchase is an acceptance of these conditions. All rights revert to the undersigned in the event of any violation.

"Victor Talking Machine Co.

"March 1st, 1902."

Of this notice the jobber was advised. The jobber sold the same to the defendant herein, who took the same charged with such notice. The defendant subsequently advertised and sold said machine for \$18, without any authority from complainant so to do, and, it is alleged, in violation of the terms and conditions of the said requirement.

Complainants charge that the transaction amounted simply to a license upon condition, viz., a limited license, and not to an absolute sale, and that, by reason of the sale of said machine at less than \$25, defendant became an infringer. On the other hand, the defendant insists that the sale, as originally made, was an absolute sale of the machine, and that, if the complainant has any remedy, it grows out of the contract. The suit is for infringement of complainant's patent.

In support of its right to maintain such a proceeding, complainant cites *Bement v. Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. —, which was a case taken by writ of error to the supreme court. It was brought originally in the courts of New York, and, of course, could not have involved any question of infringement of a patent. Justice Peckham, speaking for the court, said that the only federal question raised in the record was as to the so-called Sherman act. It was in fact a suit on the contract of license which the New York court of appeals took jurisdiction of, and which was affirmed by the supreme court. Moreover, that case grew out of a license to manufacture and sell the patented articles in manufacturing and selling harrows, and no attempt was thereby made to bind purchasers from the licensee.

Complainant also cites *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, 77 Fed. 288, 35 L. R. A. 728, decided by the circuit court of appeals for the Sixth circuit. In that case the facts were briefly as follows, viz.: Complainant sold a patented machine for fastening buttons to shoes. Affixed to the machine was a metal plate inscribed:

"Condition of Sale.

"This machine is sold and purchased to use only with fasteners made by the Peninsular Novelty Company, to whom the title to said machine immediately reverts upon violation of this contract of sale."

The defendant, the manufacturer of rival fasteners, was held to be a contributory infringer. The court held that only a limited right to the use of the machine was granted, i. e., in connection with complainant's fasteners. This case carries the law very far, but it is decided upon circumstances which do not exist in the case at bar.

The supreme court, in *Bement v. Harrow Co.*, quotes from this opinion with approval an extract bearing on the general control a patentee has over his patent. No reference is made to the matter decided in that case, so that the decision of the court of appeals cannot be held to have been approved by the supreme court as to the point before us.

In the case of *Phonograph Co. v. Kaufmann* (C. C.) 105 Fed. 960, defendant was held to the terms of an agreement made by a dummy for him. The sale was a fraud upon the complainant, and the district judge entertained a bill for infringement. The published opinion of the learned judge does not recite the terms of the so-called jobber's agreement. In the absence of this, I am unable to say how far that case bears upon the one at bar.

In the case of *Phonograph Co. v. Pike* (C. C.) 116 Fed. 863, the complainant sold the machines to a jobber, requiring him to make no sales to dealers who would not sign an agreement governing the sale of the machines, or to those on the suspended list of manufacturers. The jobber sold to defendant without taking such agreement from him. The court held defendant to be an infringer by reason of the jobber's violation of the agreement, and consequent annulment of the license.

These latter cases are those nearest in point for the complainant. Whether or not they correctly express the law in those cases need not be discussed here. They do not apply to the facts of the present case. In the case of *Wilson v. Sandford*, 10 How. 99, 13 L. Ed. 344, defendant was licensed to use a certain patented machine on payment of \$1,400,—\$250 in cash, and the balance in installments, for which notes were taken,—“and if said notes, or either of them, be not punctually paid, \* \* \* then all and singular the rights hereby granted are to revert to the said Wilson, who shall be reinvested in the same manner as if this license had not been made.” Default was made, and a bill filed to declare a forfeiture and for injunction. The court held the remedy to be upon the contract, and not cognizable in the federal court, as affecting a patent. In this connection the language of the supreme court in *Keeler v. Folding-Bed Co.*, 157 U. S., at page 666, 15 Sup. Ct., at page 741, and 39 L. Ed. 848, is significant:

“Whether a patentee may protect himself and his assigns by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion.” It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.”

The court was then discussing the emancipation of an article from subjection of the patent covering the same.

There can be no doubt that a patentee can convey the whole or part of a patent or a patented article. But can he make a completed sale of a completed article, so that the title vests absolutely in the purchaser, and afterward become reinvested with the title to that specific article? The notice, by its terms, binds only the person who sells to the public and the purchaser at such sale. The jobber took an absolute title. There was no limitation upon him as to price or

otherwise. Is it possible for a vendor to reserve a limitation to attach after a sale absolute? I do not think so. The patented article has passed, by the sale to the jobber, entirely out of the domain of patent, and cannot again be brought within that domain. If complainant has any remedy, it is upon the alleged contract. This court is without jurisdiction in the premises.

The demurrer is sustained and the bill dismissed for want of jurisdiction.

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JENNINGS v. MENAUGH et al.

(Circuit Court, D. Indiana. November 15, 1902.)

No. 9,952.

1. FEDERAL COURTS—RIGHT TO TAKE DEPOSITIONS—DISTANCE FROM PLACE OF TRIAL.

Whether a witness lives at a greater distance than 100 miles from the place of holding a federal court, so as to authorize the taking of his deposition for use in a civil cause depending therein, under Rev. St. § 863 [U. S. Comp. St. p. 661], is to be determined by taking the ordinary, usual, and shortest route of public travel, and not by the distance in a straight line.

At Law. On motion to suppress depositions.

William V. Rooker, for plaintiff.

Asa Elliott, S. H. Mitchell, and C. C. Hadley, for defendants.

BAKER, District Judge. The plaintiff has moved the court to suppress the depositions of some 30 witnesses of the defendants on the ground that each witness lives within 100 miles of the place of trial. It is shown in support of the motion that each witness lives within less than 100 miles of the place of trial, measured by a direct line. It is shown in opposition thereto, and it was conceded on the hearing of the motion, that each of said witnesses, by the ordinary, usual, and shortest route of public travel, lives at least 140 miles from the place of trial.

Section 863, Rev. St. U. S., in force since September 24, 1789 [U. S. Comp. St. 1901, p. 661], provides "that the testimony of any witness may be taken in any civil cause depending in a district or circuit court of the United States *de bene esse* when the witness lives at a greater distance from the place of trial than one hundred miles."

Section 876, Rev. St. U. S. [U. S. Comp. St. 1901, p. 667], in force since March 2, 1793, provides that "subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district; provided, that in civil cases, the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."

The question for decision is, how is the distance from the place of residence to the place of trial to be measured? By a straight line from the one place to the other, or by the ordinary, usual, and shortest route of public travel? In my opinion, the distance is to be determined by

¶ 1. See Depositions, vol. 16, Cent. Dig. § 27.

the ordinary, usual, and shortest route of public travel, and not by a mathematically straight line between the place of residence and the place of trial. This was held to be the true rule to be applied in such cases in *Ex parte Beebees*, 2 Wall. Jr. 127, Fed. Cas. No. 1,220, where Mr. Justice Grier, sitting at the circuit, said: "The court must, of course, have regard to the actual distance by the usual routes, and not the imaginary rules assumed for the benefit of mail contractors." In *Fost. Fed. Prac.*, on page 638, § 286, the rule is laid down in these words: "Whether a witness resides more than one hundred miles from the place of trial is to be determined by the actual distance by usual routes." In *Re Foster*, 44 Vt. 570, construing a state statute, the supreme court of that state said: "It was made a prominent point in the argument that the deposition could not be lawfully taken, because the relator did not reside more than thirty miles from the place of trial. In the opinion of the court, the distance, as affecting the right to take and use the deposition of a witness, is to be computed upon the way of usual travel from one point to the other, namely, the residence of the witness and the place of trial." The supreme court of the state of New York, in the case of *Smith v. Ingraham*, 7 Cow. 419, where the question arose as to the rule of allowing service on agents where the attorneys do not reside within 40 miles of each other, held that "distance" in the rule means by the usually traveled road.

This rule for the determination of the distance between the place of residence and the place of trial seems to me to be the only reasonable one, and, in my opinion, it ought to be applied in determining a party's right to take the deposition of a witness. The fact, if it be a fact, that a witness may be compelled by subpoena to attend the court where he resides within the district at a greater distance than 100 miles is not influential in determining the party's right to take the deposition of the witness instead of compelling his attendance. Nor does the fact, if it be a fact, that a witness living within the district, and more than 100 miles from the place of trial, who has been subpoenaed and compelled to attend, may be entitled to his fees for travel for a greater distance than 100 miles, affect the construction of section 863, touching the right of parties to take the depositions of witnesses.

For these reasons the motion to suppress the depositions of witnesses, on the ground that their places of residence, measured by a mathematically straight line, are severally less than 100 miles from the place of trial, will be overruled. So ordered. The plaintiff is given an exception.

# INTERSTATE COMMERCE COMMISSION v. LOUISVILLE & N. R. CO. et al.

(Circuit Court, S. D. Georgia, E. D. July 1, 1902.)

## 1. CARRIERS—SUIT TO ENFORCE ORDERS OF INTERSTATE COMMERCE COMMISSION—BURDEN OF PROOF.

The conclusions of the interstate commerce commission, based upon its findings of fact that charges made by a railroad company are unjust and unreasonable or unlawfully discriminating, are presumed to be well founded and correct, and in a suit to enforce its orders the burden rests upon the company to show them to be erroneous.



2. SAME—DISCRIMINATION IN RATES.

Conceding that a railroad company may, to a reasonable extent, so adjust its rates as to promote its own interest by favoring and building up a seaport on its own line at the expense of another on a rival road, it cannot, with that purpose, adopt rates unreasonable in themselves, nor which are unduly preferential to its own port and unduly prejudicial to the other or to the public; and rates upon products shipped from points on its line where there is no competition, which are so grossly discriminating as to be prohibitory of shipments to the latter place, which affords the better market, adopted for the purpose of compelling the shipment of such products in the opposite direction to its own port, are unlawful, not only as unduly discriminating between the two cities, but as making a discrimination injurious to the public.

3. SAME.

The fact that a railroad line operated as a part of a large railway system, considered as a separate road, fails to pay expenses, does not justify the charging of unjust and unreasonable rates nor undue discrimination in rates.

4. SAME—INTERSTATE COMMERCE COMMISSION—JURISDICTION.

An advanced rate of freight on certain articles, filed with the interstate commerce commission, and put into effect pending a hearing before the commission on the legality of the rate previously in force, is properly before the commission for consideration on such hearing.

5. SAME—JOINT THROUGH RATE—SEVERAL RESPONSIBILITY OF COMPANIES.

The making of a through rate on interstate shipments by the joint action of connecting railroads is the act of each, and brings each within the scope of the interstate commerce act, and renders it responsible for such rate, without regard to the proportion thereof received for its own service.

6. SAME—UNREASONABLE AND DISCRIMINATING RATES—EVIDENCE CONSIDERED.

Evidence examined, and *held* to sustain the findings and conclusions of the interstate commerce commission that rates charged on through shipments of naval stores and uncompressed cotton from points on the Pensacola & Atlantic Division of the Louisville & Nashville Railroad to Savannah were in violation of sections 1 and 3 of the interstate commerce act, as being both unjust and unreasonable in themselves and unduly discriminating.

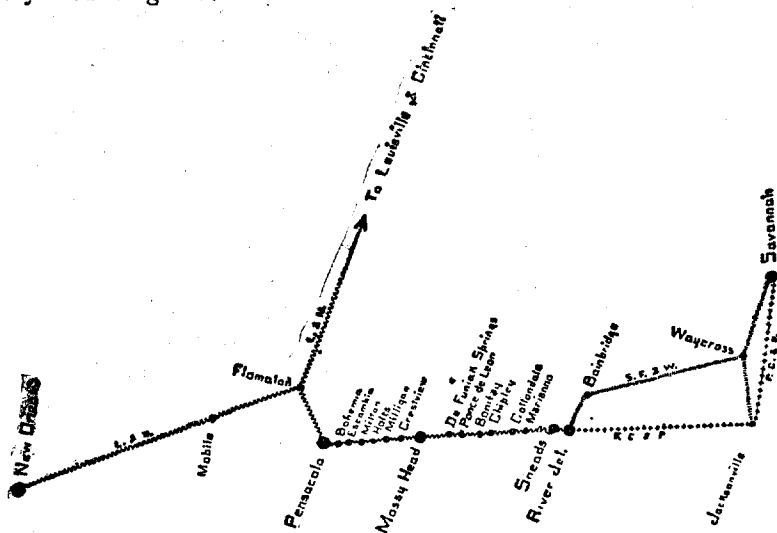
In Equity. Suit to enforce orders of the interstate commerce commission.

L. A. Shaver and William W. Gordon, Jr., for the commission.  
Ed Baxter, for respondents.

SPEER, District Judge. The interstate commerce commission brought this proceeding against the Louisville & Nashville Railroad Company, the Florida Central & Peninsular Railroad, and the Savannah, Florida & Western Railway Company. An injunction is sought to restrain the collection of certain rates exacted on shipments to Savannah of naval stores and uncompressed cotton. These are blanket or group rates, enforced upon shipments of these commodities from all points on the Pensacola & Atlantic Division of the Louisville & Nashville properties. The suit originated as follows: The Savannah Bureau of Freight and Transportation and nine other complainants, who described themselves as "general merchants, naval stores manufacturers, and cotton shippers," made complaint to the commission against the defendant companies. The complainants allege that they and all other shippers of cotton and naval stores from the points mentioned had been subjected to undue and unrea-

sonable prejudice and disadvantage because of these rates. The principal offender, it is alleged, was the Louisville & Nashville Railroad Company. The lines of this company begin at Louisville and Cincinnati, traverse the states of Kentucky, Tennessee, Alabama, and a portion of Florida. At a station known as "Flomaton," in South Alabama, its lines diverge, the westward division deflecting through Mobile towards New Orleans. A much shorter line, trending to the southeastward, reaches the port of Pensacola. At this point also begins what is known as the "Pensacola & Atlantic Division." This division reaches the city of Jacksonville through connection with the lines of the Florida Central & Peninsular Railroad Company at a place on the Chattahoochee called "River Junction." Also, at River Junction the Pensacola & Atlantic connects with the Savannah, Florida & Western Railroad, which operates a line from that point via Bainbridge and Waycross to the port of Savannah. Contributory to the commerce of many states, with terminals at the ports of New Orleans, Mobile, Pensacola, and Savannah, all with abundant facilities for deep-sea navigation, the commercial communities of these cities and the public generally are gravely concerned for the legality and fairness of the freight rates these great railroads assess and exact.

To facilitate a clear understanding of the country and terminal points affected by this controversy, reference may be made to the subjoined diagram:



Before the interstate commerce commission it was complained that the freight rates charged upon shipments from stations on the Pensacola & Atlantic Division to Savannah were unjust and unreasonable in themselves; further, that such rates were relatively unjust and unreasonable when compared with the rates charged from the same stations to Pensacola, Mobile, and New Orleans. Consequently it was alleged that the complainants and all shippers of like situation

were subjected to unjust discrimination, and were made to suffer undue and unreasonable prejudice and disadvantage; that this rebounded to undue and unreasonable preference and advantage to the mercantile communities of Pensacola, Mobile, and New Orleans, and to the Louisville & Nashville Railroad Company. The respondents appeared before the commission and made answer to the complaint. Evidence was taken, and the respondents were heard. Upon consideration it was found that the respondents were violating sections 1 and 3 of the act to regulate commerce. To arrest these violations the commission ordered: First. That the respondents should desist from charging a rate to Savannah of \$3.30 per bale of 500 pounds of uncompressed cotton from any station on the Pensacola & Atlantic Division aforesaid, for the reason that this rate was deemed unlawful under sections 1 and 3 of the act. Respondents were further enjoined to desist from charging any other than reasonable, just, and lawful compensation for such transportation. Second. The commission ordered that the respondents should desist from charging the rate increased from \$2.75 to \$3.30 per bale on such shipments from the stations mentioned to Savannah, the commission declaring the whole of such increase to be unlawful. Third. The commission ordered the respondents to desist from charging from the stations mentioned a rate to Savannah which should exceed by more than 25 cents per bale of 500 pounds the rate charged at the time over the Louisville & Nashville Railroad from the same point of shipment to New Orleans. Relative to naval stores the commission ordered that respondents should desist from charging on shipments of car-load lots of these products from the stations above mentioned to Savannah a rate of  $24\frac{1}{4}$  cents per 100 pounds of rosin and  $38\frac{1}{2}$  cents per 100 pounds of turpentine. These rates were declared by the commission to be unlawful, under sections 1 and 3 of the act to regulate commerce. Respondents were also ordered to desist from charging or receiving any other than reasonable, just, and lawful rates for such transportation. Second. The commission ordered that the Louisville & Nashville Railroad Company desist from charging on car-load shipments of rosin from the stations mentioned via River Junction to Savannah any higher rate per 100 pounds for its service to River Junction than it at the same time charged or received for the transportation of car loads of rosin to Pensacola, for approximately the same distances. The commission also ordered that the Louisville & Nashville should desist from charging for its service to River Junction any higher rates per 100 pounds on shipments in car loads of turpentine from Mossy Head and other westerly stations on the Pensacola & Atlantic Division via River Junction to Savannah than it contemporaneously charged and received for the transportation to Pensacola of turpentine, in car loads, for approximately the same distances. The commission further ordered that the Louisville & Nashville Railroad should desist from charging on shipments of turpentine, in car loads, from stations east of Mossy Head on the Pensacola & Atlantic Division via River Junction to Savannah any higher rate per 100 pounds for its service to River Junction than 6 cents per 100 pounds in excess of the rate it had contemporaneously in force for

the transportation of turpentine, in car loads, to Pensacola from Sneads, the station nearest to River Junction.

From the report of the commission the following material facts appear: It is 259 miles by the line of the Savannah, Florida & Western Railway from River Junction to Savannah. Between the same points, by the line of the Florida Central & Peninsular Railroad, the distance is 347 miles. From River Junction to Mobile is 265 miles, and to New Orleans 406 miles. The Pensacola & Atlantic Railroad was constructed by the joint efforts of the state of Florida, the Louisville & Nashville, and the people who live along its line. To aid in its construction, the state conveyed to it nearly 4,000,000 acres of land. Of this grant over \$1,000,000 worth of land has been sold by the Pensacola & Atlantic and the Louisville & Nashville. Considered as an independent line, the Pensacola & Atlantic is not prosperous, but the Louisville & Nashville, operating it since the beginning of the year 1885, is both solvent and strong. In 1889 the latter paid its accrued funded debt obligations and declared a dividend of  $3\frac{1}{2}$  per cent. on its stock. It has nearly \$55,000,000 of stock outstanding. The country served by the Pensacola & Atlantic is sparsely settled. There are not 1,000 inhabitants at any town on the line except at Pensacola. It follows that the traffic originating along this division is not large. It consists mainly of cotton, naval stores, and lumber, some wool, and a few melons. Pensacola is a considerable city, and according to the census of 1890 had a population of 11,750. By the same census Savannah shows a population of 43,189. Pensacola is an important export market for lumber. Savannah is the largest market for naval stores in the world. The trade of Pensacola in naval stores is inconsiderable. Since the rates complained of went into operation, a very small amount of the rosin and turpentine produced along the Pensacola & Atlantic is shipped to Savannah. To show the difference in the markets, the commission points to the fact that in 1896-97 Savannah received 1,505,517 barrels of naval stores, while Pensacola received about 45,000 barrels. The term "naval stores" includes rosin, turpentine, products of crude turpentine, tar, and rosin oil; but rosin and turpentine are the only products involved in this controversy. There is but one grade of turpentine. It is shipped in standard barrels, weighing, when full, about 420 pounds. There are 15 grades of rosin known to the trade. These are designated alphabetically, and also as "window glass" and "water white." Rosin is also shipped in barrels, and is sold on the basis of what is known to the trade as a weight barrel of 280 pounds. The casks actually weigh 450 to 500 pounds each. The value of a barrel of rosin depends upon its grade, the highest price being "water white." The prices of the Savannah naval stores market control the price of naval stores in all the markets of the United States. At Pensacola the price of turpentine is always a half cent less per gallon, and the price of rosin 10 cents less per barrel of 280 pounds, than the daily closing quotations of the Savannah market. Eighty per cent. of the naval stores shipped to Savannah is exported, and only 20 per cent. is exported from Pensacola. It follows that lower export freight rates are obtainable at

Savannah than in Pensacola, and lower rates of marine insurance. At Pensacola there is only one firm dealing in naval stores. It is controlled by S. P. Shotter, a dealer in naval stores at Savannah. It is enabled to absolutely control the market at that place. It takes all the turpentine and rosin shipped to Pensacola at a smaller rate than the Savannah market without any regard to the activity of the demand at Savannah. At Pensacola there is no provision for inspecting naval stores. Savannah, on the contrary, has provided gaugers, who are sworn to the performance of their duty, and who act under bond. It is their duty to ascertain the number of gallons in each barrel of turpentine, and to detect any adulteration. Each barrel is also examined, weighed, and given its proper grade. There is also a supervising inspector appointed by the board of trade upon the recommendation of two-thirds of the buyers and factors of the naval stores market. At Pensacola the sole firm engaged in the business has one of its employes to gauge turpentine and grade rosin. All of the receipts are sold to this firm, who ship very largely to points in the interior. It further appears that the dealers in naval stores on the Pensacola & Atlantic Division of the Louisville & Nashville are dissatisfied with the results of gauging and grading at Pensacola, and they prefer to sell their product in Savannah. Instances to show the existence of good reason for this dissatisfaction are given in the testimony. It appears indeed that on the better grades a slight error of inspection may change the value from 10 to 30 cents a barrel. The commission finds that the grading and inspection at Savannah is more likely to be accurate. The Louisville & Nashville does not own or control any line of railroad entering the city of Savannah. Its revenues on east-bound shipments are for the short haul to River Junction. The conditions are reversed as to traffic going westward. A great proportion of the naval stores shipped from Pensacola & Atlantic stations westward are consigned to interior points like Louisville, Nashville, Cincinnati, and Chicago; and it follows that the Louisville & Nashville secures a long haul from Pensacola. It therefore is strongly interested to have this freight moved west, to or through Pensacola, rather than east by River Junction to Savannah, and its rates are made to induce a westward movement. A former agent of the railroad at a station on the Pensacola & Atlantic testified that his salary was made to depend to some extent upon whether shipments were sent west or east, and he received a larger commission when the traffic was destined west. It also appeared that shippers had difficulty in ascertaining the rates on shipments to Savannah, and solid car loads of rosin and turpentine were required when the shipments were destined to that point, while mixed car loads were accepted on the west-bound movement. These practices, the commission holds, discriminated against shippers desiring to use the Savannah market.

The commission also finds that through rates from all points on the Pensacola & Atlantic Division to Savannah are blanket or group rates, and are made in connection with the Savannah, Florida & Western and the Florida Central & Peninsular. The same rate is charged from all shipping stations on the Pensacola & Atlantic

without any regard to the distance of the stations from Savannah. When the complaint was filed, the rates were 15 cents a hundred pounds on rosin and 25 cents on turpentine. These were subsequently withdrawn, but of the rates as modified the Louisville & Nashville's share of the through blanket rate to Savannah equals its former local rates. It does not seem to be in dispute that this reduction of rates to Pensacola and increase of rates to Savannah is due to the direct interference of S. P. Shotter aforesaid. This is practically admitted in the argument of respondents' counsel and in the testimony of Mr. Shotter himself. The evidence, we think, supports these findings. River Junction, the eastern terminus of the Pensacola & Atlantic, is 259 miles from Savannah, and Pensacola, the western terminus, is 420 miles from Savannah. The distance from River Junction to Pensacola is seen to be 161 miles. It also appears that since 1892 a blanket through rate has been in force on all shipments of naval stores from stations on this road to Savannah. This rate is  $24\frac{1}{4}$  cents per 100 pounds on rosin, and  $38\frac{1}{2}$  cents per 100 pounds on turpentine. Thus it appears that the same rate is enforced from all stations on the road, whether the traffic originates at Sneads, the station nearest to Savannah, or at Bohemia, a station 149 miles farther westward. In this connection the report of the commission affords a table, which clearly shows the prejudicial character of these rates against Savannah and in favor of Pensacola. A few instances will suffice to make this clear. On a shipment of rosin from Sneads to Savannah the Louisville & Nashville would receive 75 cents per barrel for a haul of 6 miles, while the Savannah, Florida & Western would receive only  $46\frac{1}{4}$  cents for hauling the same barrel 259 miles. In other words, the Louisville & Nashville would receive nearly double the price for a 6-mile haul that the Savannah, Florida & Western or the Florida Central & Peninsular would receive for a haul of, respectively, 259 miles or 347 miles, if the shipment is via Jacksonville. On a shipment to Pensacola, however, from the same station, there is a vast difference. Sneads is only 6 miles from River Junction, but it is 155 miles to Pensacola, and the total charge made by the Louisville & Nashville for the long haul is only  $47\frac{1}{2}$  cents per barrel. Thus it is seen that the Savannah shipment, for a transportation of 6 miles, is mulcted nearly twice as much as the Pensacola shipment for a distance of 155 miles. The discrimination is made more surprising when we consider that Bohemia is 6 miles from Pensacola, and Sneads is 6 miles from River Junction. On a west-bound shipment from Bohemia to Pensacola the rate is 25 cents per barrel, on an east-bound shipment from Sneads to River Junction the rate is 75 cents per barrel. From De Funiak Springs, which is about half way between Pensacola and River Junction, the Louisville & Nashville will transport rosin to Pensacola for  $7\frac{1}{2}$  cents per 100 pounds, but charges 15 cents per 100 pounds for a haul the same distance to River Junction. From Cottondale, for a 35-mile haul of a shipment on the way to Savannah, the Louisville & Nashville charges more than the Plant System exacts for a 293-mile haul to Savannah from the same place. In thorough demonstration of the excessive and prejudicial character

of these rates afforded by the investigations of the commission, the court is furnished with a table of local rates over the Plant System covering 290 local stations. The distance of these stations to Savannah vary from 265 to 452 miles. The average distance is  $358\frac{1}{2}$  miles. The rates fixed vary from 10 to 18 cents on rosin and from 15 to 27 cents on turpentine. The distances from Pensacola & Atlantic stations to Savannah vary from 265 to 414 miles, the average being  $339\frac{1}{2}$  miles, and the blanket through rates from all these stations are  $24\frac{1}{2}$  cents on rosin and  $38\frac{1}{2}$  cents on turpentine. In the one instance we have local rates which are generally higher than through rates. In the latter we have through rates which are universally more liberal. In the former we have the greater average distance, in the latter the less. Yet the maximum charge of the Plant System to Savannah is 18 cents and the Louisville & Nashville  $38\frac{1}{2}$  cents per hundred pounds. The unreasonable character of these rates may be illustrated by another fact which appears in the evidence. It is 813 miles from River Junction to Louisville, Ky. It is only 259 miles to Savannah. And yet the highest rate from any Pensacola & Atlantic station to Louisville is  $23\frac{1}{2}$  cents on rosin and 30 cents on turpentine, while the Savannah blanket rate, as we have seen, is  $24\frac{1}{4}$  on rosin and  $38\frac{1}{2}$  on turpentine. Thus it appears that, while the distance from the farthest point on the Pensacola & Atlantic to Louisville is double the distance from the farthest point on the same road to Savannah, yet the Savannah rates, in proportion to distance, are more than double the rates to Louisville. It is obvious from these facts, and from the other means and expedients resorted to to compel a westward rather than an eastward shipment of freight originating along its line, that the Louisville & Nashville has established a prohibitory tariff against shippers to Savannah. Whatever may be the wish of the shipper or the interest of the community at large, these rates compel the transportation of all the products of 161 miles of road to Pensacola, and, since there is but one dealer in naval stores at the latter point, this misuse of its franchises by this powerful railroad enables that person to enjoy an absolute and injurious monopoly of naval stores in that portion of the county tributary to 161 miles of this road,—a road constructed, as we have seen, for the general welfare, largely by individual sacrifice and the aid of the state.

The rates on uncompressed cotton, also the subject of animadversion and order by the commission, are not less prejudicial to the shipper than to the port of Savannah. Pensacola is not in any sense a cotton market. Savannah ranks among the first cotton ports in the world. These are Galveston, New Orleans, and Savannah. The rates imposed by the Louisville & Nashville on shipments from stations on the Pensacola & Atlantic Division to New Orleans and Savannah are blanket rates, or group rates, to both markets. At the date of the complaint the rate from Pensacola & Atlantic stations to New Orleans was \$2.50 a bale, and to Savannah \$2.75 a bale. In September, 1897, while the complaint was pending, the Savannah rate was raised from \$2.75 a bale to \$3.30 a bale, and no advance was made on the New Orleans rate. Consequently, the Savannah rate is 80 cents a bale higher than the New Orleans rate. At the time of the advance the rate of \$2.75

per bale to Savannah had been in force for nine years, and appears to have been, as found by the commission, a reasonable, fair, and remunerative rate. There was no change of conditions. The sole reason assigned by the traffic manager of the Louisville & Nashville for the increase of rate was that the lines from River Junction to Savannah desired to secure more revenue for the transportation of cotton. Out of a rate of \$2.75 the lines east of River Junction received \$1, and the Louisville & Nashville received for the haul to River Junction \$1.75 a bale. It does not appear, therefore, that the desire for the increase of revenue was confined to the connections of the Louisville & Nashville. This is plain from the fact that, while the average haul of the Louisville & Nashville to River Junction is 80½ miles, that company demanded and received \$1.75 therefor, while the connecting roads to Savannah received only \$1 for a haul of 259 miles. It may be true that the increase in rate was not made at the instance of the Louisville & Nashville, but it is evident enough that the excessive proportionate charge of that company is responsible for the increase, and consequently for the excessive through rate of \$3.30 per bale. The commission condemns this entire through rate for its excessive character. That it is relatively prejudicial to Savannah, and preferential in favor of New Orleans, is also true. The average distance from stations on the Pensacola & Atlantic Division to Savannah is 339½ miles, while the average distance from the same stations to New Orleans is 326 miles. This makes the average distance to Savannah only 13½ miles greater, and yet the Savannah rate exceeds the New Orleans rate by 80 cents a bale.

Again, the commission furnishes a tabulated statement which affords much light for the proper determination of this controversy. This shows the rates on uncompressed cotton between numerous points, not on the Pensacola & Atlantic, and Savannah and New Orleans, respectively. The distances vary from 425 miles, from La Grange to New Orleans, to 1,173 miles, from River Junction to New York. The rates in the tables vary from 45 to 65 cents per 100 pounds, and yet the rate from all stations on the Pensacola & Atlantic to Savannah is 66 cents. It is true that some of these rates are from competitive points, but many are from strictly local stations like those on the Pensacola & Atlantic. It also appears from this table of rates on the principal railway lines in the cotton region are materially less than the rates charged from Pensacola & Atlantic stations to Savannah. From 22 local stations in Alabama on the Louisville & Nashville the distances to New Orleans range from 265 miles to 411 miles, the rates range from 50 to 60 cents. From 19 stations on the Seaboard Air Line, in North Carolina, South Carolina, and Georgia, the distances to Norfolk range from 336 to 573 miles, and the rates range from 41 to 49 cents. From 13 local stations on the Seaboard Air Line in Georgia the distances to Wilmington, N. C., range from 267 up to 413 miles, and the rates range from 38½ to 48 cents. From 19 local stations on the Southern Railway in South Carolina, Georgia, Alabama, and Mississippi the distances to Norfolk range from 434 miles to 1,054 miles, and the rates range from 38 to 61 cents. This comparative statement might be extended. In every instance the average distance on the roads last men-



tioned to the point of destination is much greater than the average distance from Pensacola & Atlantic stations to Savannah, and yet the rate is invariably much less. We find that it costs more to ship cotton from River Junction to Savannah, 259 miles, than it does to ship cotton from Sneads, a station on the Pensacola & Atlantic, 6 miles from River Junction, to New York, a distance of 1,173 miles, or from the most distant point in Mississippi to Norfolk, 1,154 miles.

The facts ascertained by the commission and herein set forth are of the highest significance. In the absence of satisfactory reply by the respondents, they must control the action of the court. The act to regulate commerce (sections 14 and 16) provides that "the findings of fact in the report of the commission shall be *prima facie* evidence of the matters therein stated." And it will be observed that the conclusions of the commission upon the facts and the orders based thereon have equal effect. The interstate commerce commission must be regarded as an expert tribunal with relation to transportation rates. Said Judge Taft, delivering the opinion of the circuit court of appeals for the Sixth circuit in the case of *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*:

"It has been suggested that the traffic managers are much better able, by reason of their knowledge and experience, to fix rates, and to decide what discriminations are justified by the circumstances, than the courts. This cannot be conceded so far as it relates to the interstate commerce commission, which, by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is, in a sense, an expert tribunal." 39 C. C. A. 425, 99 Fed. 64.

It may be added that whether the members of the commission be in fact expert or otherwise is not open to question, for they are, by section 12 of the act, required to execute and enforce its provisions regulating commerce. In the case of *Interstate Commerce Commission v. Louisville & N. R. Co.*, 102 Fed. 709, the circuit court of the United States for the Southern district of Alabama declares:

"The findings of fact in the report of the commission are made by law *prima facie* evidence of the matters therein stated, and the conclusions of the commission, based upon such findings, are presumed to be well founded and correct."

It follows that the burden is upon the respondents to show the erroneous character of the commission's findings. A brief inquiry will indicate, we think, that this has not been done.

As a part of the defense it is contended by the learned counsel for the respondents that the rates complained of are justified because Pensacola is entitled to rates lower than to Savannah from stations on the Pensacola & Atlantic. This, however, does not meet the commission's finding. If Pensacola offered all the advantages to shippers that can be obtained in Savannah, the traffic would naturally go to the former market, for the reason that it is nearer. But since, on the other hand, superior advantages in the way of higher prices, better inspection regulations, cheaper export rates, and cheaper marine insurance are afforded at Savannah, that city may, in spite of its greater distance, expect to receive a share of the traffic originating on the Pensacola & Atlantic road, provided, of course, that the rates to Savannah are reasonable as compared with the rates to Pensacola. It does not

follow that, because the rates to Pensacola would ordinarily be less in the aggregate than the rates to Savannah, that the Louisville & Nashville has the right to make the latter so much higher and the Pensacola rates so much lower as to utterly exclude Savannah from any share of the traffic originating in its line.

It is further contended against the report of the commission that the fact that the Pensacola rates are lower does not establish the unreasonableness of the rates to Savannah. That may be conceded. It has been held that:

"The fact that a rate over a road or line in one direction is materially higher than the rate on the same road or line, and between the same points, in the opposite direction, does not, as in the case of a haul over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate." *Duncan v. Railroad Co.*, 6 Interst. Com. R. 103.

Where the movement in a certain direction is greatly in excess of the movement in another, or where there is a substantial difference in the cost of operation by reason of heavy grades, or because the tonnage runs largely in one direction, it is conceivable that a discrimination in rates may not be unreasonable; but do any of these conditions appear in this case? On the contrary, by the evidence of a principal witness for the respondents the contrary is made to appear. Mr. Saltmarsh, division superintendent of the Pensacola & Atlantic Railway was asked: "Is there any reason why the haul east over the Pensacola & Atlantic Division should be more expensive than the haul over the division for the same distance west?" He replied: "So far as the actual cost of transportation is concerned, perhaps not; but the bulk of our business is southbound, and we have empty cars coming north. To the extent that this is the case, it would, of course, make a difference in the cost of transportation in each direction." Surely it cannot with good reason be urged that this would justify the tremendous difference in rates of which complaint is here made. Nor is there any other evidence to justify rates so preferential to one port and so prejudicial to the other.

It is, moreover, contended that it is competent for the Louisville & Nashville Railroad Company to advance its own interest to the extent of building up a seaport on its own line at the expense of another port on a rival line. That this may be done to a reasonable degree may be conceded. It is competent for a railroad company to so adjust its rates as to promote its legitimate interest, but it cannot, with this purpose, adopt rates excessive in themselves, unduly preferential to its own port and unduly prejudicial to another port. The rate to Savannah is not only excessive, but it is prohibitory. This is shown by the testimony taken by the commission. One witness—Mr. W. C. Powell, a commission merchant dealing in naval stores at Savannah—testified rosin and turpentine cannot be brought from Pensacola & Atlantic stations to Savannah because of the rates charged; that the superior market, the regularity and fairness of grading, superior marine insurance, and the like, afforded by Savannah, did not amount to enough to overcome the difference in rates. Another witness—Mr. J. H. Godwin—testified the rate seemed to be prohibitory in an easterly direction. The result is, not only to give the

inferior market of Pensacola a monopoly, but, as we have seen, to give the entire control of that market to one dealer in naval stores.

It is settled law relative to questions of this kind that discriminations or preferences in rates may be justified to safeguard the interest of the public. It follows that the contrary proposition is true,—that they may not be justified when they injure the interest of the public. The rates now in force result in injury not only to Savannah, but to the people along the Pensacola & Atlantic Railroad, for it debars them from the advantage of two markets for their products, and restricts them to one, and that the inferior market, and to a private monopoly there. Nor does the fact that the Pensacola & Atlantic, considered as a separate railroad, fails to pay its expenses, justify this discrimination in rates. There are many such roads absorbed by the principal railway systems of the country, and, if this contention were allowable, it would, in a great majority of cases, involving unfair and prejudicial rates, effectually nullify the interstate commerce law and the powers of the interstate commerce commission. Indeed, it has been held by the supreme court of the United States in *Smyth v. Ames*, 169 U. S. 544, 18 Sup. Ct. 433, 42 L. Ed. 819:

"It cannot be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interest, and ignore the rights of the public."

In the case of *Road Co. v. Sandford*, 164 U. S. 596, 597, 17 Sup. Ct. 205, 41 L. Ed. 560, the same high authority has declared:

"The public cannot properly be subjected to unreasonable rates in order simply that the stockholders may earn dividends. \* \* \* If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it, and one which the constitution does not require to be remedied by imposing unjust burdens upon the public."

Many other considerations of less important character are suggested in the very able and extended oral and printed argument of the respondents' counsel. None of them, however, are deemed of sufficient weight to overcome that presumptive force which the law imparts to the findings of the commission. The considerations sustaining the report of the commission with regard to Savannah rates on naval stores are with the greater force applicable to its ruling with regard to rates to Savannah on uncompressed cotton. It is contended by the counsel for the defendants that the commission had no jurisdiction to declare this \$3.30 rate unreasonable and excessive, because it was not in effect at the time of the hearing before the commission. It is true, however, that the respondents advanced the rate while the case was pending before the commission. The advanced rate was filed with the commission, and therefore its attention was called to it by the defendants. A matter in issue before the commission was the cotton rate to Savannah, and the legal effect of the commission's findings will not be defeated upon a technical objection of this character. Besides, whatever the defendants might have said before the commission, they are estopped from objecting to the jurisdiction of this court, because in their answer to the tenth paragraph of the bill they deny that the rates charged and received by them at the date (January 8, 1900) of said order—Exhibit F to the bill—were then or are now in violation of

sections 1 and 3 of the act to regulate commerce, as found by the commission in its report and opinion,—Exhibit E hereto attached. On this issue evidence has been taken, and the defendants have clearly submitted to the jurisdiction of this court in respect to the advanced cotton rate.

It may be said generally that in this case the usual plea of competition is neither set up nor available to sustain these rates. The discriminations against Savannah are practically admitted by the respondents. The sole justification relied upon is the promotion of the interest of the Louisville & Nashville Railroad by building up a nearby port, and further by securing the long haul from Pensacola towards the northwest. But considerations of this character cannot justify rates unreasonable and excessive, in violation of section 1 of the law. Nor can they justify rates unduly prejudicial to one locality and unduly preferential to another, in violation of section 3 of the law. Nor has a railway company engaged in interstate and foreign commerce the right or authority to enact rates which are actually prohibitory to traffic in one direction without regard to the wishes of the shippers, or the fair opportunity of a community thus prejudiced to promote its commercial prosperity. In all cases it must be regarded as true that discriminations made for the purpose of promoting the interests of the carrier are subservient to the interests of the general public and to the principles of justice in such matters sought to be attained by the purpose of congress to regulate commerce. It is self-evident that rates which would give to producers and manufacturers on the Pensacola & Atlantic the competitive benefit of the Savannah market would be more conducive to their business and prosperity than rates which confine them to the Pensacola market; and, while it is true that a carrier has the right to exact a fair return for the public utilities it affords, the public is entitled to exact that no more be required of it for the use of such utilities than the services rendered are reasonably worth, and where there is a plain and irreconcilable conflict between the interest of the public and the interest of the carrier the former must prevail.

In this case an injunction will be granted against each and all of the respondent companies, so that the order of the commission may be enforced. This is made necessary by the fact that the rates to Savannah, which are declared to be unreasonable and prejudicial, are joint through rates of all the defendants. Such rates must be construed as entireties. It follows, necessarily, that each carrier who is a member of the through line must be regarded as severally as well as jointly responsible for the unfair and oppressive rate. While this unfairness appears to be attributable to the exactions made by the Louisville & Nashville, the other members, by their assent, are joint participants in the wrong. These are regularly published rates, in which each of the defendants participated, and their proportionate divisions are brought about by agreement between themselves. This constitutes "a common control, management, or arrangement for a continuous carriage or shipment," as defined by section 1 of the act to regulate commerce, and it therefore appears that each of the participating roads are within the scope of the act to regulate commerce, and to the extent of its authority under the control of the interstate commerce commission.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 662, 20 Sup. Ct. 209, 44 L. Ed. 309; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 192, 193, 16 Sup. Ct. 700, 40 L. Ed. 935; Texas & P. R. Co. v. Same, 162 U. S. 205, 16 Sup. Ct. 666, 40 L. Ed. 940.

We do not underestimate the gravity and importance of the interests involved in this controversy. The record has been given that anxious and deliberate consideration, seemingly appropriate, and which, besides, was made necessary by its great volume and complexity. The railways of our country have been aptly said to constitute the arteries of the national life. The public official or other person who would grudge to them the large measure of prosperity which their inestimable services to the country deserve is as shortsighted as unpatriotic, as narrow as unjust. While this is true, the mistakes or excesses of zeal or judgment on the part of railway officials may at times make these vast enterprises, ordinarily benevolent, instrumentalities of grave private wrong and communal injury. The framers of the constitution, though unconscious of the indescribable development in the intercommunication of the people, yet "prophetic and prescient of all the future had in store," provided for every contingency when it bestowed upon congress the tersely expressed but elastic power "to regulate commerce with foreign nations and among the several states." Congress has exercised this power, and the righteous orders of the great commission it has primarily entrusted with the tremendous duty should in all proper cases be respected and enforced by the courts of the country. The organic law upon which this power in congress and in the courts is founded is the sure guaranty to investors in transportation lines against the assaults whether of the agrarian or the demagogue, the anarchist or the mob. While, on occasion, the railway company or other corporation may suffer a temporary diminution of revenues from an order of this character, the interest of the public, and in the end the interest of the corporation itself, is conserved. In all such cases the general welfare must control. "*Salus populi est suprema lex.*"

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**NATIONAL BANK OF THE REPUBLIC OF NEW YORK et al. v. HOBBS et al.**

(Circuit Court, S. D. Georgia, W. D., August 10, 1901.)

**1. CREDITORS' SUITS—ABATEMENT—EFFECT OF BANKRUPTCY PROCEEDINGS.**

The jurisdiction of a federal court of equity to proceed to a final decree in a pending suit by judgment creditors, commenced after the return of executions nulla bona, to set aside alleged fraudulent conveyances by the debtor, is not affected by the filing of a petition in voluntary bankruptcy by the defendant.

**2. SAME—EVIDENCE—PRESUMPTION FROM FAILURE TO PRODUCE BOOKS OF BANK.** In a creditors' suit against the members of an insolvent banking firm to set aside alleged fraudulent transfers of the bank's assets, the failure of defendants to produce the important books of the bank when required, or to account for the same, raises a presumption of fraud, of the most damaging character.

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¶1. See Bankruptcy, vol. 6, Cent. Dig. §§ 289, 651.

## 8. FRAUDULENT CONVEYANCES—APPOINTMENT OF RECEIVER—EVIDENCE CONSIDERED.

Evidence examined on an application by complainants in a creditors' suit for the appointment of a receiver, and *held* to strongly sustain the allegations of the bill that conveyances of large amounts of real estate by the judgment defendant, the greater part of which came into the possession of his wife and other relatives, were fraudulent, and made with intent to hinder and delay creditors, and to entitle complainants to the appointment of a receiver for such property.

In Equity. Creditors' bill. On application for appointment of permanent receiver.

Hall & Wimberly, W. W. Bacon, Jr., and D. H. Pope & Son, for complainants.

Hardeman, Davis, Turner & Jones, Guerry & Hall, and J. W. Walters, for respondents.

SPEER, District Judge. The questions for determination here have been presented in a full hearing upon an application for the appointment of a permanent receiver in the above-stated case. The case itself was originated by a creditors' bill brought by judgment creditors of Richard Hobbs and A. W. Tucker, formerly conducting a banking firm under the name of Hobbs & Tucker. The bill is intended to reach and subject to the judgment debts of the plaintiffs certain lands and other assets which it is alleged were fraudulently conveyed, and are fraudulently protected from the liens of said judgments.

It is contended by the respondents that the jurisdiction of the court to redress the injury complained of has been nullified by the bankruptcy act of 1898, and the voluntary petition in bankruptcy filed by Hobbs & Tucker. Now, it cannot be intelligently denied that the court had jurisdiction when the bill was brought. The remedy in equity sought is not only the one most usually resorted to by creditors holding executions with return of nulla bona under similar circumstances, but it constitutes the most ancient foundation of jurisdiction of equity courts. Bump, Fraud. Conv. § 532, p. 525. The return of nulla bona is conclusive of the fact that the remedy at law no longer exists. *Jones v. Green*, 1 Wall. 330, 17 L. Ed. 553. It is true, moreover, that if the contention of defendant's counsel that the proceeding here has abated because of the voluntary petition in bankruptcy is true, it follows that the defendant by his own act effectually precludes all relief in the courts of the United States, and the doors of these courts are effectually closed to creditors who may have occasion to apply to them to enforce judgments against fraudulent transfers by the debtor of his property. However clear the right, however glaring the fraud, it is then competent for a defendant who has made fraudulent conveyances to destroy this valuable power of a court of equity, secured to nonresidents by the constitution of the United States, by merely filing a voluntary petition in bankruptcy. If this power resides in the debtor, he can exercise it at any stage of the case; and, no matter what the court has done, or how far the cause has proceeded, the lawfully acquired jurisdiction must be relinquished, and the plaintiffs, at their own expense, denied the bene-

fit of the litigation commenced and conducted by them. A number of cases have been cited by respondents' counsel in support of this plea in abatement, but they are all cases in which the creditor held no judgment or other lien at the time the petition in bankruptcy was filed. In none of these cases had the creditor obtained a judgment against the bankrupt until after the filing of the petition, the adjudication, and discharge. On the contrary, the precise question now before the court has been definitely decided. In *Kimberling v. Hartly* (C. C.) 1 Fed. 571, the court held:

"Judgment, execution, and a return of nulla bona place the judgment creditor in a position to assail conveyances made by the judgment debtor to defraud his creditors; and the filing of a bill for that purpose, and the service of process in the action, create a lien in equity upon the lands described in the bill, and entitle the plaintiff to priority over other creditors. The lien thus created is not displaced by the subsequent bankruptcy of the judgment debtor, but is protected by the bankrupt act."

Again:

"Where an action is pending in a state court of competent jurisdiction to enforce a specific lien on property of the debtor, the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the cause, and execute the same. The assignee in bankruptcy may intervene in such action, but the jurisdiction of the state court, and the validity of its decree, is not affected by his failure to do so."

The court continues:

"The judgment creditor filed his bill, had a subpoena served, and thereby acquired a lien, before the commencement of proceedings in bankruptcy. He did not prove his debt against the estate of the bankrupt, or in any manner voluntarily submit himself to the jurisdiction of the bankrupt court, but was allowed to proceed to enforce his lien without objection from that court or its assignee. In this state of the case, the state court had a right, and it was its duty, to proceed with the cause. Its jurisdiction was complete, and its decree and the title acquired under it are as valid and effectual as if the bankruptcy of the defendant had not intervened."

The following cases are cited, and fully sustain the ruling of the court: *Sedgwick v. Menck*, 6 Blatchf. 156, Fed. Cas. No. 12,616; *Clark v. Rist*, 3 McLean, 494, Fed. Cas. No. 2,861; *In re Davis*, 1 Sawy. 260, Fed. Cas. No. 3,620; *Goddard v. Weaver*, 6 N. B. R. 440, Fed. Cas. No. 5,495; *Second Nat. Bank v. National State Bank*, 10 Bush, 367; *Davis v. Railroad Co.*, 1 Woods, 661, Fed. Cas. No. 3,648; *Norton's Assignee v. Boyd*, 3 How. 426, 11 L. Ed. 664; *Townsend v. Leonard*, 3 Dill. 370, Fed. Cas. No. 14,117; *Johnson v. Bishop*, 1 Woolw. 324, Fed. Cas. No. 7,373; *Reed v. Bullington*, 49 Miss. 223; *Waller's Lessee v. Best*, 3 How. 111, 11 L. Ed. 518; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403. The jurisdiction of the court is complete.

The allegations of the bill are very comprehensive and, for the purposes of the interlocutory decree sought, may be sufficiently gathered from the discussion following.

The original complainant is the National Bank of the Republic of New York. The Chicago Packing & Provision Company of Chicago, Ill., has intervened and joined as complainant; and subsequently the Chemical National Bank of New York and Mrs. Annie E. Hamlet, a citizen of the same state, were also made parties complainant by

intervention. The judgments held by these complainants aggregate \$37,966.22, principal and interest, besides costs. No question is made as to the validity or regularity of the judgments held by any of the complainants, save that of the National Bank of the Republic for \$5,050 principal, and \$2,668.92 interest. This judgment was rendered when the defendant Richard Hobbs, who is a member of the bar, was sole attorney for the complainant. It is now attacked as void on the ground that it was not taken in a proper way. It does not, however, appear to be invalid. It appears from the evidence that there are judgment debts held by other creditors, which, added to the claims of the complainants, principal and interest, amount to about \$116,000, exclusive of costs of court. The claims held by the complainants were sued to judgment several years ago,—that of the National Bank of the Republic and the Chicago Packing & Provision Company in 1894, of the Chemical National Bank in 1896, and that held by Mrs. Annie E. Hamlet in 1897. Proceedings have been pending to enforce these claims in the courts of the state, but have been met with many causes of delay, which have obstructed the efforts of complainants, all of which have proved abortive. This is fully set out in the testimony of D. H. Pope, one of the counsel for the complainants, which will be found in the record. This proceeding was filed on the 15th day of June, 1900, and since that time Hobbs & Tucker have instituted voluntary proceedings to obtain a discharge in bankruptcy. These are now pending. Discharges have not been granted. When the bill was originally presented, Merrel P. Callaway was appointed as temporary receiver. That officer proceeded with great diligence to ascertain and locate the assets of the insolvent firm. Subsequently important amendments were filed, largely as a result of the discoveries of fact ascertained by the investigations of the receiver. It was soon developed that the defendants Hobbs & Tucker and Henry A. Tarver, cashier of the firm, had not preserved the books, from which alone it could be ascertained what were the bank's assets and liabilities, what assets were good, and whether the assets had been applied to the payment of the liabilities, or had been retained by the defendants, or either of them, or by some person acting for them. The defendant Hobbs has answered that he considered the books as worthless; and Tarver, the cashier, that he regarded them as rubbish. These books have been missing since 1896, when there was a hearing, under the orders of the state court, before A. L. Hawes, acting as auditor. A number of books were retained, and are now in the possession of the receiver, but they are largely unimportant. The important books have all disappeared, and this has greatly embarrassed the court in the effort to determine the rights of the parties. The important books which, notwithstanding a drastic rule against the defendants to secure their production, have not been obtainable, are the general ledgers of the bank, the book of bills receivable, and the general cash book. These missing books extend from the year 1888 down to the failure in 1893, and the subsequent winding up of the business. All of those mentioned have disappeared. It may be said that nothing can be more absolutely important to honest banking than the preservation of the books.



Checks of depositors are returned to them; the notes paid by debtors are likewise returned to them on payment of their debts, together with such collateral as may have been given for security; and therefore nothing remains as evidence of that trust of high order undertaken by bank officers if the books which record these transactions are willfully or negligently lost or destroyed. It follows that if the books of an insolvent bank are absent, and not accounted for, it raises a presumption of fraud of the most damaging character against those who are responsible to creditors for the assets of the bank. "*Omnia præsumentur contra spoliatores.*" It has been long settled that "if a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted." 1 Smith, Lead. Cas. p. 308. The maxim applies to the spoliation of ship's papers. The Hunter, 1 Dod. 480, 486; The Johanna Emilie, 18 Jur. 703, 705. A more pertinent citation, perhaps, is found in 3 Starkie, Ev. (3d Ed.) 937:

"Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him."

In Wardour v. Berisford, 1 Vern. 452, cited in Broom, Leg. Max. p. \*903:

"An account of personal estate having been decreed in equity, the defendant charged the plaintiff with a debt as due to the estate. It was proved that the defendant had wrongfully opened a bundle of papers relating to the account, which had been sealed up and left in his hands. It further appeared that he had altered and displaced the papers, and that it could not be known what papers might have been abstracted. The court, upon proof of these facts, disallowed defendant's whole demand against the plaintiff, although the lord chancellor declared himself satisfied, as, indeed, the defendant swore, that all the papers intrusted to the defendant had been produced; the ground of this decision being that in odium spoliatoris omnia præsumentur."

Thus, "if a devisee under a first will destroy a subsequent will, it will be presumed, as against him, that the first will has been revoked." Harwood v. Goodright, Cowp. 87, decision by Lord Mansfield. It is true that this presumption only arises where there is suspicion of fraud, and it is also true that, where the deficiency of evidence arises from negligence of the party who ought to have produced it, he who is accountable for that negligence cannot be benefited by it. Powell, Ev. \*50. Nor can it be with justice concluded in this case that the members of the firm of Hobbs & Tucker were unaware of the importance of these books. The bank closed on June 10, 1893. The books were proven to be in existence on December 25th of the same year. The senior member of the firm, Richard Hobbs, has been for many years one of the most well known and experienced lawyers in the state; also over a large part of that time occupying judicial stations of importance. He had amassed a large fortune, and had multitudinous interests. The other member of the firm, A. W. Tucker, was an expert bookkeeper. Mr. Hobbs immediately after the failure was given possession of all the assets of the insolvent firm, all the individual property of A. W. Tucker, and was charged with the duty of winding up the affairs of the bank and of

liquidating its indebtedness. He naturally anticipated litigation, and immediately proceeded to employ counsel who shortly thereafter appeared to protect and defend the conveyances which it is alleged in the bill before the court that Mr. Hobbs made in order to defeat, hinder, and delay the creditors of the bank. How impossible, then, is it for the court to accept the statements of Hobbs and Tarver that these books were regarded as worthless and as rubbish. Had the transactions attacked by the bill and hereinafter considered been made with proper regard to the law, these books, if accurately kept,—and there is no pretense that they were kept otherwise,—would have been an absolute defense to every important charge made by the bill. It is probably true that never before did members of an insolvent banking firm more clearly understand the importance of the books to the proper and rightful adjustment of its liabilities, and perhaps never before was more distinctly illustrated the importance and necessity of that presumption against the wrongdoer, arising from the spoliation or the willful or negligent destruction of important evidence of this character. In the presence of the serious charges of fraud made by the bill, and guided by the imperative presumption created by the law under circumstances similar to those above enumerated, we must consider the immense mass of evidence offered by the parties, respectively, in order to determine the necessary issues presented by the bill, and involved in the application to make the receiver permanent.

What were the liabilities of the insolvent firm of Hobbs & Tucker on the date of the failure, namely, June 10, 1893? The answer of Richard Hobbs states the amount to be \$225,000. In the absence of the books, this statement can be neither verified or disproved. Next, what were the assets? It is not disputed that these were very large, but what they consisted of, or what disposition was made of them, or what was their aggregate amount, for the same reason, cannot be precisely determined. We have the right to presume that their face value must have exceeded the liabilities, for the banking firm continued to receive deposits up to the time of the failure, and, if its assets had been less than its liabilities, it would have been so plainly insolvent that to have received deposits would have made its officers guilty of felony. Pen. Code Ga. par. 207. Laws Ga. 1878-79, p. 170. And of the felony they are presumed to be innocent. There can be no doubt that deposits were received up to the last moment. This appears from the memorandum cash books. Besides, the defendants swear that they believed their assets were largely in excess of their liabilities. In fact, in March before the failure in June, the firm of Hobbs & Tucker wrote two letters, both of which are in evidence,—one of them to Charles E. Wilson, dated March 16th, and the other to Stedman, Stern & Wheeler, Boston, Mass., dated March 15th. In both of these letters they state that they had in the business at the time \$50,000, and the property owned by Richard Hobbs individually, outside of the business, on which there was no indebtedness at all, is stated to be \$200,000. This evidence is clearly admissible. The defendants cannot be heard to deny its truth. Besides, the general ledger was then in existence, and on this the

assets and liabilities might be brought down and balanced. Again, A. W. Tucker, in his testimony given before the referee in bankruptcy, stated that shortly before the doors were closed the books of the bank showed a considerable balance of assets over and above liabilities, and that at the latest period before the failure, when the profits were computed and passed to investment account, the capital invested, together with the accumulated profits passed over from year to year, amounted to \$44,000, and the books showed at the time gross assets of \$44,000 more than all the debts, and that the books were correctly kept. Adding interest after that time which might have been charged in advance, considered at the time the letters above quoted were written, the excess of values owned by the bank above liabilities would approximate \$50,000, as stated. Taking, then, the liabilities at \$225,000, and adding \$44,000, capital invested and accumulated profits, we find at the time of the failure the assets of the bank were \$269,000. It may be observed that the solicitors for respondents have not attempted to break down the theory upon which the complainants attempt to show the amount of assets of the insolvent bank, which the court ex necessitate is compelled to adopt, but they content themselves by attacking the values of these assets. In his answer to the rule by which it was attempted to compel the production of the books of the bank, Mr. Hobbs states that the value of the assets which proved worthless amounted to \$75,000. He does not specify the valueless items which made up this large statement of worthless assets. One, indeed, he did state. This was a claim against Ragan amounting to \$35,000 or \$40,000, which, according to the answer, resulted in a loss of \$25,000 to \$30,000; but it appears that the land, money, and other assets turned over by Ragan to Hobbs & Tucker were nearly or quite sufficient to pay off the entire indebtedness. Thirty-five hundred acres of land in Baker county, for a consideration of \$16,500, and 2,000 acres of land in Mitchell county, for a consideration of \$12,000 were conveyed to Hobbs & Tucker in settlement of this debt. These lands were conveyed by Richard Hobbs to H. H. Tarver, a hopelessly insolvent relative, who was by the conveyance created a trustee for a number of the creditors of Hobbs & Tucker; and this Tarver sold these lands to Mrs. Annie T. Hobbs, his sister, and the wife of Richard Hobbs. They were advertised and sold at public sale. Hobbs induced J. O. Perry to bid on them. Nobody knew Perry was a by-bidder. He ran the 3,300 acres up to the sum of \$1,100, and Hobbs had the deed made to his wife. It may be said that, of the creditors named in the trust deed, several had been paid in full out of the assets of Hobbs & Tucker months before the deed was made, and the others, except Mrs. Hobbs, who was named as a creditor, not only never heard of the trust deed, or so-called sale under it, but never received a dollar of the proceeds. In a sense, therefore, this asset proved valueless to creditors, but its intrinsic value was, as we have seen, quite considerable. Notwithstanding the large consideration mentioned in the deed, it is a statement of value by which they would seem to be bound, for they accepted the lands at that price. It further appears that these lands were left in the hands of J. O. Perry to return them for

taxation, and they were thereafter returned as the property of Richard Hobbs. This, however, it is claimed, was done by mistake. It will be observed that the values at which they were returned for taxation were much higher than the price bid for them at the sale. It is claimed that this was done in obedience to a rule enforced by tax receivers in that county,—that all lands, regardless of their value, whether 50 cents or \$10 an acre, had to be returned for taxation at \$2 an acre. It is obvious that tax receivers had no power to arbitrarily fix the taxable value in this way, and certainly that one so familiar with the law as was Mr. Hobbs would not have submitted to it, had he cared to resist it. While logically we should have discussed this Ragan item in this place merely as it related to the value of the assets, with what has been said we may now pass it as an illustration of the method by which it will appear that the valuable assets of the insolvent firm, after pursuing a circuitous path, finally finds a resting place among the possessions of Mrs. Annie T. Hobbs, the wife of the senior partner.

Estimating the Ragan properties at from \$25,000 to \$35,000 in value, the next inquiry will be, what has become of \$40,000 or \$50,000 of valueless assets which the defendant Richard Hobbs tells us was the amount which proved uncollectible? The assets having been shown to exist, the court cannot accept silence as to their disposition as proof of worthlessness, especially in the absence of the books which deprive the parties of all opportunity of examining the truthfulness of that allegation. If, however, we should accept \$75,000 as valueless, as stated by the defendant Hobbs, there would still remain a balance of assets of \$194,000. Much is said of losses to the insolvent firm on account of what are termed "rediscounts." This expression has represented throughout the hearing transactions of the following character: Hobbs & Tucker would sell in Eastern markets the notes and obligations made to them by their immediate customers. They indorsed such evidences of indebtedness, and, of course, in case the original maker failed to pay, became liable themselves to the purchaser. The creditors who hold now rediscounts are the National Bank of the Republic, Henry Talmage & Company, the Yale National Bank, the Chemical National Bank, and the Savannah Banking & Trust Company. The aggregate amount owing to all of these creditors, except the National Bank of the Republic, is \$26,651.70 principal. Of this, \$1,115.96 owing the Savannah Bank & Trust Company is an open account. With regard to the claim of the National Bank of the Republic, it appears that after the failure certain lands which stood in the name of A. W. Tucker in Worth county, and one-half interest in certain lands in Decatur county owned by Hines & Hobbs, a law firm composed of R. K. Hines and the defendant Hobbs, were conveyed to the bank as a further security for the debt. These lands were sold for \$2,961.81, and the amount credited on the debt, leaving a large balance due the bank. The evidences of this indebtedness on the part of the original makers and Hobbs & Tucker, guarantors, were sent by the National Bank of the Republic to Richard Hobbs, to be collected by him in the capacity of their attorney at law. The makers were principally

H. H. Tarver and the Ragans. The Tarver notes thus belonging to the National Bank of the Republic are secured by a mortgage on a large and valuable plantation. Tarver, it appears, is the brother-in-law of the attorney to whom these claims were sent for collection; and the same attorney, who in December, 1893, had been employed by Mr. Hobbs and his family and relatives, brought a bill for Mrs. E. G. Tarver, mother of Mrs. Annie T. Hobbs and of H. H. Tarver, to enjoin the foreclosure of the mortgage owned by the National Bank of the Republic, and which was the security for their debt. This bill was filed by the common attorney of his wife, Mrs. Hobbs, his mother-in-law, Mrs. E. G. Tarver, and his brother-in-law, H. H. Tarver. The bill was filed to the April term, 1897, and since that time it has been wholly impossible to bring it to trial. The Ragan transaction has already been discussed. The notes for which these lands were pledged were also placed in the hands of Attorney Richard Hobbs for collection. In the meantime Tucker, who originally held title to the lands, had made deeds to Hobbs, in order that he might pay the notes, and might apply the values of the lands to these debts. Having a double trust of this character reposed in him, Mr. Hobbs nevertheless conveyed the lands, which ought to have been subjected to the claims of his client, to H. H. Tarver, as trustee for creditors of Hobbs & Tucker; and Tarver, as we have seen, sold these lands for a triviality to a by-bidder designated by Richard Hobbs, and this by-bidder, under the direction of the same Richard Hobbs, attorney for these nonresident creditors, made the deed to the attorney's wife; and the National Bank of the Republic and other creditors owning Ragan notes were not only thus precluded from subjecting the values of these properties, but received nothing from the proceeds of the gratuitous trust deed. The fact is that not until the present bill before the court was filed had creditors ever known or heard of the trust created by their attorney for their benefit, or the sale, or any other part of the transaction resulting in the transfer of the trust fund which was their security to the attorney's wife. The Yale National Bank and Henry Talmage & Co., who had purchased the notes of H. H. Tarver, also secured by the same mortgage, were not more fortunate. They, too, intrusted their claims to Richard Hobbs as attorney. The foreclosure of their mortgage was likewise enjoined by Wooten & Jones, the attorneys who had been retained and paid by Richard Hobbs; and the title to the land which constituted the security to their debt finally reached the hands of Mrs. A. T. Hobbs, the wife of their attorney, who in the meantime did not apprise them of the manner in which their interests were being slaughtered. The Chemical National Bank was not more fortunate. All these assets of the bank, if worthless at all, were known by Hobbs & Tucker to be worthless at the time they were sold to the nonresident holders; but, so far from being worthless, it appears that they were amply secured by properties which might have been subjected to their payment. But if the rediscounts were all valueless, there would still remain assets of the bank, unaccounted for, which would amount to \$158,399.20; and the inquiry will obviously follow, what has become of this large sum, which under ordinary conditions

would have been appropriated to pay the creditors of the insolvent firm? On the hearing in this case before the special examiner the defendant Richard Hobbs produced a list entitled, "Debts of Hobbs and Tucker Settled with the Assets of the Bank after the Failure." This was in his own handwriting, and sets forth the names of the creditors, and the amounts paid; the aggregate being \$73,280.61. This list does not present an estimate, but a statement made with alleged exactitude. It otherwise appears that certain of these debts were paid in partial payments at different times, and a large number of them were settled, not in money, but by the transfer of negotiable paper held by the bank. It is noteworthy that this and another list now offered, which purports to be a statement of amounts paid to the creditors from individual property of Richard Hobbs, were not used or referred to on the hearing in the state court before Hawes, auditor. Indeed, on that hearing Richard Hobbs testified the assets of the bank were used in settlement of the debts of Hobbs & Tucker, as far as they went. He then estimated the assets at about \$90,000, and said that they were not worth more than \$20,000, the great bulk of them being totally insolvent. If this testimony was reliable, it is difficult to understand how from assets not exceeding \$20,000 in value he succeeded in paying off \$73,280.66 of debts, and there is no pretense that any of the debts were scaled. It further appears that, immediately after Col. Hobbs gave this testimony before the auditor, the judgment creditors in that case, who were attacking as fraudulent the conveyances of Richard Hobbs to his wife and other relatives, called for the production of the bills-receivable book of the bank, to be used in evidence, and it was then discovered for the first time that this most vital and important book had disappeared. In the absence of the book of bills receivable, the general ledger, and the general cash book of Hobbs & Tucker, the court has no adequate opportunity to test the accuracy of this list. It sufficiently appears, however, that it is not accurate in all particulars. Among the books of Hobbs & Tucker which did not disappear were found the personal or depositors' ledger and the memorandum cash book, and these show that on June 5, 1893, Hobbs & Tucker owed Mrs. Annie T. Hobbs \$2,155.14, and that on that day, which was five days before the failure, she drew out this amount, and, further, that at the time of the failure her account was balanced, and Hobbs & Tucker were not indebted to her in any amount; and yet next to the last item on the list above mentioned of debts paid after the failure appears the following: "Mrs. Annie T. Hobbs, \$2,155.14." An attempt is made by the respondents to show that Mrs. Hobbs was not paid this money in cash. They concede that it appears from the books that that amount was paid to her in cash, but they rely on her answer, and on the answer of Richard Hobbs, and on the affidavit of Richard Hobbs, and on the affidavit of H. A. Tarver to show that she was paid in notes. The upshot of this explanation is that Mrs. Hobbs was a depositor with Hobbs & Tucker, and that they had agreed to give her 8 per cent. interest on her deposits. Shortly before the failure, Mr. Hobbs, they contend, discounted for her certain notes, and drew checks on her account to pay for them, and left them

with Hobbs & Tucker for collection. One of said notes they collected a short time before the failure, and charged themselves with the proceeds as a deposit, and the other notes they used. The aggregate was in the neighborhood of \$4,000. About the time of the failure, or shortly afterwards, they turned over notes of their own to the amount of those they had used and had collected; and after the failure Hobbs had an examination made of her account, and it appeared that she had been charged with an item of \$2,000 which properly ought to have been charged to him. After giving her proper credit for that \$2,000, and giving her interest upon her deposits as agreed upon, it left them still indebted to her \$3,471.48. It would be unjustifiable for the court at this time to accept this indeterminate explanation, confronted as it is by the clear-cut evidence afforded by the contemporaneous entries on the books, made at a time when there was no opportunity for mistake, and no motive to recharge or otherwise falsify the account. If, however, it shall on the final trial be held proper to regard this list of debts paid as correct and satisfactory, there will still remain, of assets confessedly good and not accounted for, the sum of \$85,118.54. Accompanying the above statement there was produced another list, also in the handwriting of Richard Hobbs, entitled "Debts of Hobbs and Tucker Settled after the Failure of the Bank by Richard Hobbs Out of His Individual Property." These debts, which it is alleged were thus settled, amounted to \$57,058.58. It will be seen that all of these debts which Richard Hobbs claims to have paid out of his own property are offered as the justification of the numerous transfers of his property to his wife and to H. A. Tarver and Mrs. E. G. Tarver, which are attacked by the proceedings now before the court; and yet, accepting his own figures, all of these debts could have been paid out of the assets of Hobbs & Tucker not as yet accounted for, and there would remain still unexplained a balance of those assets amounting to nearly \$30,000.

It also appears that A. W. Tucker, one of the partners, owned certain property individually. Some of this was conveyed by him to the creditors of Hobbs & Tucker. The great bulk of his property, however, shortly after the failure of the bank, was conveyed to Richard Hobbs to be used in paying debts of the firm of Hobbs & Tucker. Among these were 5,300 acres of land lying in Baker and Mitchell counties, before referred to as the Ragan lands. Tucker also conveyed to Richard Hobbs about the same time 405 acres of land in Lee county, and an undivided half interest in 1,225 acres more. These 405 acres Richard Hobbs on October 20, 1893, conveyed to William H. Newsome for \$2,000; taking a mortgage to secure the purchase price, to be paid in five annual payments. Mr. Hobbs, in one of his affidavits, states that these Newsome notes were assigned to a Mrs. Du Pont and to Reich & Geiger. It appears, however, that only one of them (a note for \$350) was assigned to Mrs. Du Pont, and that to Reich & Geiger was for only \$237.91, as appears from the list of debts of Hobbs & Tucker "settled with the assets of the bank after the failure" referred to above. These two payments to Mrs. Du Pont and Reich & Geiger amounted to only

\$587.91, which leaves \$1,416.09 of the value of the 405 acres conveyed by Tucker to Hobbs for the benefit of creditors not yet accounted for. Nor was the half interest in the 1,225 acres in Lee county conveyed by Tucker to Hobbs for the same purpose more beneficial to the creditors. Hobbs suffered this to go to sale for taxes in the year 1893. These amounted to \$16.20, and at the instance of Hobbs, who was present at the sale, this land was knocked off to his son, Richard Hobbs, Jr., at the price of \$25. Under the law of Georgia, Hobbs might have redeemed this land in 12 months by paying the price for which it was sold at sheriff's sale, but he permitted this period to expire without redeeming it. Thus an attempt was made to benefit his son at the cost of creditors to whom he was indebted, and for whom he had accepted this land in trust, and to deprive them of the value of 612½ acres of land which was subject to their debts. These lands were afterwards levied upon under a mortgage *fi. fa.* in favor of Mrs. Annie E. Hamlet, and a claim was interposed by R. Hobbs for his son, R. Hobbs, Jr., and the claim was returned to Lee superior court to be tried. They were there finally subjected to the payment of the debts, but not until after Richard Hobbs had made a long and stubborn fight in favor of the manifestly fraudulent title which his son had acquired for the consideration of \$25, and to land which had been conveyed to Hobbs for the benefit of creditors of Hobbs & Tucker. It is interesting to observe, further, that notwithstanding Mr. Hobbs had permitted this land to go to tax sale, and his son to buy it, he continued to exercise personal control of it, for on March 30, 1894, he conveyed the same land to W. S. Tarver, the consideration being stated at \$750. It also appears that W. S. Tarver had not a dollar's worth of property, nor a dollar in bank. It also appears that Richard Hobbs owned at the time of the failure 2½ lots of land in Lee county, containing some 500 acres. This land he also suffered to go to tax sale for taxes for 1893, and at the sale the entire 2½ lots were sold to Mrs. Annie T. Hobbs for \$21.15, although it appears by the affidavit of the sheriff that the lands were worth \$2 an acre, or approximately \$1,000. The sheriff also testifies that he was instructed by Mr. Hobbs to levy on the lands and sell them for taxes, and to have somebody bid the lands in for Mrs. Annie T. Hobbs, all of which was done; that the deed was made accordingly; and that Mr. Hobbs, who was present at the sale, paid him the money. It follows that this land was also not redeemed.

At the time of the failure of Hobbs & Tucker, Mr. Hobbs owned in his own right a large amount of property. This included brick warehouses and other valuable property in the city of Albany, and many thousands of acres of plantation and timbered lands in Dougherty, Baker, Decatur, Mitchell, Lee, Worth, and Calhoun counties, and other counties in this state, and also some lands in Florida. Without enumerating in detail the numerous properties in several counties which he exclusively owned and in which he had a half interest, it plainly appears that his holdings were worth, on his tax valuation, \$89,641.50; and adding to this one-half interest in Florida lands, the worth of which appears from the consideration expressed



in the deeds, the value of his total real estate was \$92,141.51. The annual rentals of this property were about \$10,000; but this takes no account of large sums derivable from 6,525 acres of land exclusively owned by him, and a half interest in 1,790 acres, all lying in Baker county. These lands were valuable for timber, sawmill, and farm purposes. They were ostensibly sold to one Hudson, but not only did Hudson not collect the revenues or make any trades touching the sale of timber or leasing for turpentine, but the cotton raised on these lands was warehoused in the name of Mrs. Annie T. Hobbs, and when sold the proceeds were paid to her husband, acting in her name. When turpentine privileges were sold, the trades were made by Mr. Hobbs, and the drafts were drawn to his order, although Hudson signed the deeds or leases. Such a draft actually has been paid in this manner after this bill was filed. These facts are plainly apparent from the evidence, and yet the defendant Richard Hobbs in his answer states that Hudson had finished paying him for the land long before the filing of the original suit, and that "all interest that this defendant had in the said property by reason of said mortgage or for any other reason had been fully settled and satisfied, and that Hudson, so far as this defendant was concerned, was the full and complete owner of said property." He states further that he did not know of his own knowledge, but has it only on hearsay, that any turpentine or sawmill privileges had been sold on said lands. This recital is contradicted by the affidavits that Richard Hobbs himself made sales, fixed prices and terms, drew up the papers, and, in the presence of affiants, received the drafts given in payment. The original drafts made in payment of said sales, drawn to his order, or indorsed over to him, and indorsed by him in his own handwriting, and by him deposited to the credit of his wife, are also in evidence. Hudson, too, was a man of little means. All of these valuable properties were in the first instance the individual holdings of the defendant Richard Hobbs, and, in the ordinary course of legitimate business affairs, would have been available for the payment of the creditors of Hobbs & Tucker. While this is true, with the exception of a portion of his Worth county lands, returned for taxes at \$1,400, and a half interest in a tract of land owned in Decatur county, returned for taxes at \$750, which properties, as we have seen, were conveyed to the National Bank of the Republic, all the remainder of his real estate, amounting to  $\frac{49}{60}$ , according to the tax values, was soon found after the failure in the hands of his wife, Mrs. Annie T. Hobbs, or in the hands of her mother, Mrs. Tarver, or her brother, H. A. Tarver, or Hudson, the nature of whose holding has been above described.

These transfers to Mrs. Hobbs are supported by the respondents upon the grounds—First, that Hobbs & Tucker owed her money at the time of the failure; second, that Richard Hobbs owed her money at that time; third, that she paid or agreed to pay off the debts of the firm, and, under a circuitous and uniform system of transfers, became, as a result of such agreement and alleged payment, the purchaser of these properties, not from Richard Hobbs himself, but from the person or creditor to whom he should convey it as part of

the plan. In fact, however, the plan was as follows: Hobbs would convey a parcel of his property to some person, who would give a check or note, or both, for the purchase money, and at the same time the purchaser would enter into an obligation with Mrs. Hobbs to convey her the same property at some future time, when she should pay to him the same price he had just paid. Richard Hobbs would then take the money, or the money and note, and usually make an effort or pretended effort to pay a creditor. This effort ordinarily failed, with the result that he would pay the funds thus obtained on his alleged indebtedness to Mrs. Hobbs, and with the money or chose in action thus received she would satisfy the person who had bought the property from Richard Hobbs, and that person would then surrender to Mrs. Hobbs her note, and make her a deed to the property. This circuitous transaction, however, apparently efficacious to remove the property of the debtor from the reach of his creditors, to a court of equity, which looks through forms to substance, is nothing more than a voluntary conveyance of the insolvent respondent to his wife, with intent to hinder, delay, and defraud creditors, unless it appear that there was a valid and subsisting indebtedness from the respondent to the wife. In that event a direct conveyance to her in settlement of such indebtedness would have avoided many suspicious features which now thrust themselves upon the attention of the court.

This brings us to the inquiry, was there any such indebtedness on the part of Hobbs & Tucker to Mrs. Annie T. Hobbs as would support the conveyance of those large properties to her? The answer of Richard Hobbs directly and positively states that at the time of their failure Hobbs & Tucker were indebted to Mrs. Hobbs in the sum of \$7,550; that, of this sum \$2,140 was a note on Hayes & Heath, collected by Hobbs & Tucker "the very day that their doors were closed"; that Hobbs & Tucker used the money that day without the knowledge or consent of Mrs. Hobbs; that they did not pay her this money, but paid it by transferring to her a number of notes which belonged to them, and which they estimated to be worth \$4,150. If the original indebtedness was \$7,550, this payment of \$4,150 to settle a \$2,140 debt would leave, it seems, but \$3,471.98 due from Hobbs & Tucker to Mrs. Hobbs. This reduction of the firm's indebtedness to her is modified, however, by the further statement of Hobbs that the \$4,150 of notes which were given to her in lieu of the \$2,140 were used by him in paying up some creditors of Hobbs & Tucker. Who these creditors were, his evidence does not inform us, but he states that he gave Mrs. Hobbs another note of \$2,000 for the \$4,150 of notes. A court seeking the truth finds it difficult to accept any such statement as this, in the face of the balanced books of Hobbs & Tucker, which show that five days before the failure Mrs. Hobbs drew out every dollar she had in bank. It is true that Hobbs & Tucker did collect \$2,140 from Hayes & Heath for Mrs. Hobbs. This collection, however, was not on the day that the doors were closed, but it was collected on May 19th, more than three weeks before the day of failure. This in fact appears on the memorandum cash book of the bank. No bank officer would have

made such entry without the cash, for he would simply have charged himself with that amount. Besides, the affidavit of Heath shows that the payment was made in money at the date it appears on the memorandum cash book. It is plain from the personal ledger and memorandum cash book that, instead of being paid by transferring to her a number of notes, Mrs. Hobbs was credited on June 5th with \$2,155.14 in cash. This was made up of the Hayes & Heath item, \$2,140, and a balance of \$15.14 which already stood to her credit. Besides, Hobbs & Tucker's books do not show any indebtedness of \$7,550 to Mrs. Annie T. Hobbs at the time of the failure or at any other time, and the original list, in the handwriting of Richard Hobbs, of debts of Hobbs & Tucker "settled with the assets of the bank after the failure," states that the debt to Mrs. A. T. Hobbs was \$2,155.14. Besides, the testimony of Richard Hobbs himself is strongly conflicting on this subject. With regard to this particular debt due from the firm to his wife, in his examination before Hawes, auditor, in the state court, he testified that Hobbs & Tucker owed Mrs. Annie T. Hobbs at the time of the failure \$3,471.98; and at that hearing a pass book purporting to show the account of Mrs. Annie T. Hobbs with Hobbs & Tucker was offered, showing that there was due her by Hobbs & Tucker, June 10, 1893, \$3,471.98. With regard to this pass book, H. A. Tarver, Jr., testified that it was correct; that "it has been copied from the ledger since the failure." This was the personal ledger of depositors' accounts, with which every pass book ought to agree and balance, and yet a reference to this ledger shows that they owed her nothing. Then this item appeared to be a depositor's balance on a depositor's pass book copied from the ledger. Now it has increased to more than twice its former size, and it is claimed to be not a depositor's balance, but a trust resulting from the misappropriation, without her consent, of the funds of Mrs. Hobbs to pay other creditors, whose names are not given. How is this indebtedness made up? The pass book does not show \$7,550 owing to Mrs. Hobbs June 10, 1893. It does not show the subsequent payment of \$4,150. It nowhere appears that the bank, in its bookkeeping, ever recognized itself as indebted to Mrs. Hobbs in the sum of \$7,550. H. A. Tarver, Jr., it is true, testifies or makes affidavit that the pass book is made up by correcting errors of \$2,000 in the books, and by adding interest. When we compare this statement with his testimony that the pass book was copied from the ledger, and when the ledger shows a total absence of indebtedness, his testimony cannot be accepted as accurate. But if the pass book, as written up by Tarver, is accepted as accurate, it, at best, accounts for an indebtedness of only \$3,471.98. The difference between this sum and \$7,550, which it is now insisted by the defendants that Hobbs & Tucker owed to Mrs. Hobbs at the time of the failure, is wholly unaccounted for. To recapitulate: When we consider that by the books, before there was any likelihood of tampering or alteration, her debt was only \$2,155.14; that this was drawn out five days before the failure; that the original list, in the handwriting of Richard Hobbs, catalogues this debt, "Mrs. A. T. Hobbs, \$2,155.14;" that it was first treated as a depositor's balance; then that it was augmented largely in amount,

and treated as indebtedness for funds misappropriated by the bank; and that every effort on the part of the creditors has failed to compel the production of those bank books, by which the good faith of this claim that the bank owed Mrs. Hobbs \$7,550 could be accurately and satisfactorily tested,—we feel obliged to regard it, in the light of all the proof, as so unsatisfactory that it must be discredited altogether.

We must now consider the contention that Richard Hobbs individually owed his wife the sum of \$18,270.45, and that the conveyances to her should be sustained in consideration of this alleged indebtedness. This amount is made up largely of notes which it is claimed that Richard Hobbs collected at various times, and, instead of delivering the proceeds to his wife, retained them until after the failure of the bank, and then charged himself up with the aggregate sum, with the interest annually compounded on each note. It is to be observed that none of these notes were produced in evidence, and yet, with transactions so numerous, it would seem readily competent, by process directed to the various holders of these paid or canceled notes, to have produced them before the court. This might have afforded evidence of cogent and valuable import. Indeed, on the hearing in the state court before Hawes, auditor, Richard Hobbs, after enumerating certain notes, testifies as follows:

"These notes I have mentioned all appear on the bill book from time to time according to the dates. Wherever I bought a note for her, I put it down on the book in her name. The entries were all made on the book long before I had any intimation that there was any trouble coming. The indebtedness to my wife is positively correct."

It is, however, true that in the subsequent examination in bankruptcy before Shelby Myrick, referee,—had since the cause under consideration was begun,—the following examination, with the answers of Mr. Hobbs, appears, and is now in evidence before the court:

"Q. You said this morning that you owed your wife a good, large sum of money. Have you any book or record that would show accurately how much you owed her on the 10th of June, 1893? A. No, sir; I tried to make up a statement from memory at that time, and swore to it before the auditor, Mr. Hawes."

And further:

"Q. Where are the books that show your transactions with your wife? A. I told you that I did not keep any books with her. Mr. Wimberly, you are a funny fellow. Q. I understand you to say that when the auditor's hearing came on, in 1896, that you then sat down and figured up this account as to what you owed your wife from recollection? A. Yes, sir."

To demand that the court should accept this contradictory testimony to establish an alleged indebtedness between husband and wife, much of it covering a period of 13 years, all of it bearing compound interest, with no written evidence, in the nature of books, notes, or other evidences of indebtedness, is certainly unusual, and as certainly deserves the most critical scrutiny. The alleged principal due from Richard Hobbs to Mrs. Hobbs is \$13,372.99. Of interest alleged to be due there is \$4,897.46. The respondent contends that each sum of his wife's money which he invested for her by buying negotiable notes during all the period mentioned is to be charged against himself, from the date each note fell due to the date of the

failure of Hobbs & Tucker, with interest against himself annually compounded thereon. Thus the aggregate of the disputed indebtedness is created. There are two essential bases, both of which must exist to sustain this theory: The first is that he always invested her money for her, but that when the notes matured and were paid he never reinvested the proceeds; and, secondly, that every note in which he invested her funds was paid in full to him on the date of its maturity. Are these fundamental postulates themselves supported by the evidence? Mr. Hobbs, relatively to the great majority of people among whom he lived, was a wealthy man. His income from his properties was \$10,000 a year. He was, besides, a successful lawyer, in large practice. It appears that he had money of his own idle in bank during all this period. What induced him, then, in a manner wholly contradictory to the careful business methods by which he had amassed his large fortune, to leave his own money in bank, and take his wife's money, use it for some purposes, of which the evidence affords no explanation whatever, fail to account for any portion of it during all these years, and pay her 8 per cent. interest annually, compounded? He kept neither memorandum entry nor record of his dealings with the moneys he alleged to be his wife's. In his bank account the depositors' ledger does not show an entry corresponding with the payment of any of these notes or obligations alleged to belong to Mrs. Hobbs and paid to him. He gives us no explanation of the use to which he put this money, or where he kept it, or what his object was in keeping it. A most careful business man, and presumably devoted to his wife, according to his testimony he had given her large sums, and yet no memorandum was made by him which could be used by her in case of his death to show that he had appropriated the bulk of her estate to his own purposes. In view of these facts, the evidence offered by the respondent to show the existence of this debt is not such as the law requires. It is a settled doctrine that "the evidence upon which an indebtedness from a husband to his wife should be established in a case where the former is insolvent should be clear and convincing, in order to support a conveyance then made to her." *Bank v. Cowan*, 75 Fed. 145, 21 C. C. A. 279. Besides, a careful analysis of the account of Mrs. Hobbs with the banking firm of Hobbs & Tucker discloses that she has received certainly a very large portion of the proceeds of the investments which her husband made for her, some of which he catalogues as evidence of his alleged indebtedness to her. According to the testimony of Mr. Hobbs given before Hawes, auditor, his indebtedness to his wife began in 1886 with a loan of P. L. Hilsman. This is the first item of the detailed account of indebtedness of Richard Hobbs to Mrs. A. T. Hobbs which he has furnished and verified by his affidavit, and which amounts, with principal and interest compounded, to \$18,275.45, all of which was for her money that he alleges he used prior to the failure, and which is the alleged consideration of the transfers to her of various properties which are attacked by complainant's bill. It appears from the evidence this Hilsman debt, charged to be \$5,000 principal and \$1,200 interest, was not paid as stated in the account. It did not extend over a full period of five years, but

was settled in two payments. Hilsman sold the property mortgaged to secure the debt to M. C. Heath for \$6,000. This appears from the deed of Hilsman to Heath, dated April 2, 1887. This deed was given with the understanding that Heath was to pay Mrs. Hobbs the amount that Hilsman was due to her, and Heath executed a mortgage of the same date to Mrs. Hobbs in pursuance of that agreement. The books of Hobbs & Tucker show that on April 13, 1887, a few days after this transaction, Hobbs was credited with \$1,796.13, and that Hilsman was credited with \$1,208.87. Hilsman testifies that the amount placed to his credit was derived from Heath, and was a part of the transaction with Mrs. Hobbs, and that the \$1,796.13 placed to Hobbs' credit was the amount due by Hilsman to Mrs. Hobbs. In other words, Hilsman received from Heath \$3,005; that he deposited \$1,796.13 to the credit of Hobbs; and that he deposited \$1,287 to his own credit. This was half of the purchase price then due from Heath. It also appears that on the next day Mr. Hobbs was charged on the books of the bank with \$1,796.13, and Mrs. Hobbs was credited with \$1,267. The evidence relating to the Hilsman-Heath transaction shows that, for the balance due Mrs. Hobbs, Heath gave his note for \$3,000, secured by a mortgage. This mortgage is in evidence, and it appears that it was canceled June 4, 1890, and on that day Mrs. Hobbs is credited on the books of Hobbs & Tucker with a deposit of \$3,280. It is further shown that Heath was credited with a deposit, and the receiver found the two deposit slips pinned together, showing their intimate connection and their connection with Heath. It further appears that when we add \$1,796.13 received by Mr. Hobbs, and the \$3,200.80 received by Mr. Hobbs from Hilsman, we have \$4,996.93, or only \$3.07 less than the entire amount of the loan to Hilsman. This trivial discrepancy cannot, we think, rationally preclude or avoid the conclusion that this debt was paid in full to Mrs. Hobbs, and that, if Hobbs was indebted to her on that account, it could only be the difference between \$1,267 which he paid Mrs. Hobbs on April 14, 1887, and the \$1,796.13 which he received from Hilsman on the previous day; but since Mr. Hobbs testified with positiveness that none of this was paid, and that the entire amount is yet due, we feel obliged, in the presence of facts above recited, to conclude that his testimony on this point is altogether erroneous, and, as there is no other satisfactory evidence to support this item of his alleged indebtedness to his wife, we are forced to the conclusion that it does not, in fact, exist at all. It was, of course, impossible for the complainants to furnish the court with the material testimony relating to each item of the catalogue of indebtedness which Mr. Hobbs testifies he owes to his wife, but where it appears from the proof relating to a number of items that the list or catalogue is unreliable in large part, in view of the close scrutiny the law directs in such transactions between husband and wife, we feel obliged to disregard the statement of indebtedness altogether. To illustrate: In this statement Mr. Hobbs gives Mrs. Hobbs credit for the proceeds of a \$125 note paid to him by Sam Farkas on December 1, 1889. Now, Sam Farkas, in his affidavit, deposes that he never borrowed or owed Mrs. Hobbs any amount on note or otherwise, and did not pay Hobbs this sum for her. He

testifies, however, that in December, 1889, he bought from Hobbs himself certain lots in Albany, for which he paid him \$125 in cash; and there is in evidence a deed from Hobbs to Farkas, dated December 4, 1889, conveying, for the consideration of \$125, an undivided one-half interest in lots Nos. 63 and 65 on South street, the whole of each lot containing one-fourth of an acre, more or less. This is a deed of warranty, and is signed by Hobbs in his own right. This instance seems a material transaction, so distinct in its character that there could have been no mistake or misstatement about it whatever, plainly to discredit the reliability of the general statement made by Mr. Hobbs of his indebtedness to Mrs. Hobbs. Again, Mr. Hobbs claimed to have received from Mrs. Hobbs on May 14, 1890, a cash item of \$142, which he has not accounted for to her. And yet the books of Hobbs & Tucker show on February 16, 1891, Mrs. Hobbs was credited with \$142, and the original deposit slip, in the handwriting of Mr. Hobbs, shows the money was deposited by him for Mrs. Hobbs. He further claims that he owes Mrs. Hobbs \$1,522 for money paid him by G. E. Hoppie on a note dated December 4, 1890; and yet the books of Hobbs & Tucker show that Mrs. Hobbs is credited by Hoppie with \$1,522.50 principal, and interest \$122.70. This was done on December 8, 1891, and the interest is the exact interest for one year and four days at 8 per cent.

It will, perhaps, not be justifiable, in view of the necessarily great length of this opinion, to discuss in detail a number of other items in this account where Mr. Hobbs has charged himself with moneys alleged to be due to Mrs. Hobbs to make up the sum of his alleged indebtedness to her, in nearly all of which his inaccuracy, proceeding perhaps from infirmity of memory, is equally apparent. We, however, call attention to a few instances: With regard to the note of Hoyt, it appears from the books that Mrs. Hobbs was paid principal and interest. With regard to the note of Alford & Sloan, it appears that Mrs. Hobbs had only a half interest in the land sold, and one-half the purchase price, together with interest, is credited to her on the books of the banking firm. Hobbs charges himself with the proceeds of notes alleged to be due to Mrs. Hobbs by one M. M. Gambetti, when it clearly appears from the testimony that Mrs. Hobbs did not own the land sold to Gambetti. It further appears from an analysis of the interest charges Mr. Hobbs makes against himself in Mrs. Hobbs' favor that, even if it should be conceded that she did not receive the proceeds of the notes which appear in her deposit account, he has calculated interest upon a fallacious basis, and compounded it from the 1st of each January, when in fact the notes were paid at various periods throughout the years covered by the transactions referred to in his account. It further appears that the total deposits of Mrs. Hobbs with Hobbs & Tucker amounted to \$15,697.74, and that before the failure of Hobbs & Tucker the last balance on this account, amounting to \$2,155.14, as we have seen, was drawn by her from the bank. It is not contended that any of this money was paid by Mrs. Hobbs to Mr. Hobbs, but, on the contrary, he distinctly testifies that he collected various sums which he claimed to be due her in his statement, and kept the money in his

iron safe. On the whole of the moneys belonging to Mrs. Hobbs so many separate sums are accounted for as received and expended on her own account, which Mr. Hobbs now testified he appropriated for his own use and has never paid her, and this is so clearly shown by such books of the bank as the court has been able to obtain, and by the testimony of witnesses who, so far as the evidence discloses, are wholly disinterested that, in view of the exactitude of proof required in such transactions between husband and wife, we feel obliged to disregard and discredit as an entirety his alleged indebtedness to his wife of \$18,270.45.

The materiality of this inquiry, which has thus resulted in what seems a demonstration, under the law governing such cases, that this indebtedness claimed by Mr. Hobbs as due his wife was fictitious, will more distinctly appear from the subsequent inquiry into the validity of those transfers by which his great and valuable holdings of real estate finally reached the possession and control of Mrs. Hobbs, to the great injury of his creditors. Take, for instance, the transfer to C. W. Arnold of 2,166½ acres in settlement of certain debts amounting to \$6,343.96. Arnold on the same day agreed to convey these lands back to Mrs. Hobbs at the same price, but this is not the whole transaction. Hobbs had transferred to C. W. Arnold the Albany Inn and the Rawson Corner property, to which he held title, for \$5,000, and this Arnold also contemporaneously agreed to convey to Mrs. Hobbs at the same price; but in the latter transaction it is not pretended that Mrs. Hobbs paid any debt of Hobbs & Tucker. Mr. Hobbs contends that he paid \$5,000 for Mrs. Hobbs, but that it was paid by him on the alleged debt of \$18,270.14. We have seen, however, that there was no such debt. This transaction is a typical one. Nothing can more clearly demonstrate the propriety of this bill to redress the wrongs of the creditors than certain testimony of Arnold on cross-examination, and now in evidence here:

"Q. What was the agreement between you and Mrs. Hobbs at the time you bought this property as to who you should deed it to? A. I think that a day or two afterwards (I do not remember whether the same afternoon or the next day) I made Mrs. Hobbs a deed, and she made me her note. Q. Was it not agreed between you and Hobbs at the time you bought this property and took this deed that you should make a deed to it to Mrs. Hobbs, and that she should give you her notes and mortgage for it? A. I cannot swear positively that there was an agreement of that kind. Possibly the matter was discussed and talked about. Q. You sold it to her on credit for \$5,500? A. Yes, sir. Q. Was it not agreed at the time the sale was made to you, as a part of the sale, that you should sell this property to her, and deed it to her, and take her note and mortgage? A. I deeded it to her, and took her note. Q. Was not that the agreement at the time the trade was made with you? A. I do not think there was any agreement of that kind entered into. Q. Was not that the talk between you and him? A. There may have been some talk of that kind,—that I would deed it to her and she give me her notes,—but there was no absolute agreement. Q. Did you not sell it back to her on the same day? A. I do not remember whether it was the same day or the day after. The papers will show. Q. Why did you buy five thousand dollars' worth of property, and pay five thousand dollars cash on it, and then turn right around and sell it on long time for five thousand five hundred dollars? What was your object in doing this? A. I and Mrs. Hobbs and the Hobbs family had been friendly a long time, and I always try to help my friends when they get in a tight place in any way.



Q. You did it, then, to befriend Mrs. Hobbs? Was that it? A. That is the reason I purchased the property. Q. So she could get it? A. I do not know that I put it that way. I gave you the facts. We had been friendly,—Mrs. Hobbs and the Tarver family,—and I always try to help my friends when I can do it in a way that is right and proper. Q. You did this for that reason,—to help your friends? A. Well, five thousand dollars is some money, and I do not stick money down foolishly. Q. You did this because you were friends? A. You ask me my motive, and I give it to you. That is the reason I bought the property. Q. You say the city assessed the Rawson corner at eight thousand dollars? A. I said that was my recollection. I may be wrong. Q. Was your check on the bank for that money paid? A. I took the check up with the cash money. Q. It has never been paid back to you? A. No, sir; I hold Mrs. Hobbs' note for it yet. Q. Was it paid to anybody for you,—that five thousand dollars? Was it paid to anybody else, or your wife, for you or for them,—that five thousand dollars that you paid Hobbs? A. Not to my knowledge. Q. Would you know it if it had been paid to your wife? A. Possibly I might, and possibly I might not. Q. Was there any agreement that that money should be paid to anybody else, between you and Hobbs, or Mrs. Hobbs,—that five thousand dollars,—or between you and any one else for them, or any one else, that that money should be paid to your wife or any one else? A. You don't want me to state anything I have heard, do you? Q. Was there ever at any time any agreement? A. Define an 'agreement,' please. Q. It is just talking. (At this point defendants' counsel asked to be allowed to consult, which they did for several minutes.) Q. Do you want me to ask the question again? Was there ever any agreement or any talk or any incident at any time between you and Capt. Hobbs or Mrs. Hobbs, or any one for them, that this money that you paid for his city property should be refunded to any one? A. If I understand the word 'agreement,' it means that it takes two parties to constitute an agreement; that I must make a request, and the other party must make an assent to my proposition, and, if one requests and the other assents, that is an agreement. If I make a request of you, and you do not assent, or keep your mouth shut, say nothing, and a matter occurs, you do not understand that to be an agreement, do you? Q. Yes, I do, if I do not say anything. A. Have not you frequently had that occur when you were deceived? Q. Yes; and I have been deceived when they proposed, as well. Tell the court exactly what occurred on that line. A. I gave the money to Capt. Hobbs. Q. Tell what happened at that time. A. I gave the money to Hobbs, and took up the check. Q. What was he to do with the money? A. As far as an agreement between me and him that he was to do something with it, and on your definition of the word 'agreement,' I did not see him do anything with it. Q. What did he say to you he would do with it? A. I think he said he would eventually arrange the matter so the money would accrue to me. Q. How? A. By coming through some channel. Q. What channel? A. Through some of his folks or some of my folks. Q. How was he to do it? A. I presume I left that with him. Q. What did he say to you he would do with it? A. I think he left me to understand, without saying in so many exact words, what he would do. I think he left me to draw conclusions as to what he would do. Q. What was that? A. As I said to you, that the money would accrue to me in some way through some of his family or some of my family. Q. He was to deliver it to them for you? A. No, sir; I do not think that he was absolutely to deliver it. Q. Did you pay him the money to keep, or was it to come back to you? A. I paid him the money for that check. Q. Was he to keep it, or was it to come back to you or your family? A. I presume it was to come back to me in some way. Q. Was not that the understanding? A. There might have been that understanding. Q. Do you know now what became of that amount of money? Have you been without it ever since then? A. I have not been without an equal amount of money since then. Q. I mean this particular five thousand dollars. Where has that been since you paid it to him? A. I have had some money since that date. Q. Representing that five thousand dollars? A. I get some money every once in a while from my wife. Q. Have you told all you know about that five thousand dollars, and where it went to, and has

been ever since? A. No, sir; I do not think I have. Q. Tell it all. You are sworn to tell the whole truth. A. I have had the use of the money, or a large portion of the money. I cannot tell you where it is now. The money is invested and loaned out. Q. By you? A. Some of it has been. Q. What have you done with the balance of it? A. My wife has got a little, there is some in the bank, and a little in the guano business. Q. You and your wife have had the use of it ever since? A. Yes, sir. Q. What are you holding that note and mortgage for? You have the money, you say. What was the understanding about your holding the note and mortgage? A. There has been no understanding about my holding the note and mortgage. Q. They have never called on you for the note and mortgage? A. No, sir; they have not. Q. Have you got the note and mortgage yet? A. I know I have the note, and I think I have the mortgage. Q. They do not owe you anything on it? A. I think the note could be collected. Q. You have got the money that it represented? A. I have got some money. Q. Have not you got some money that that note and mortgage represents? A. Do you mean entirely? Q. The money you let go that covers that transaction. What you are holding that note and mortgage open for? A. The note has not been paid. Q. You have answered that you and your wife had had that five thousand dollars all the time. A. I did not say all the time. I said some time since then. Q. How long since then? A. I do not remember exactly. Q. Was it a day? A. It may have been a day, or it may have been longer. Q. What are you holding them for? A. It never has been paid. Q. Yet you have had the five thousand dollars from within a day of the time you paid it out. What would you call payment of it? A. A note is not paid until it is canceled. Q. If I have got your note, and you give me the money, have not you paid it? A. It is a negotiable paper. Q. Your construction is that if the note is not canceled it is not paid? A. I believe that is the legal construction. Q. Do you hold any bona fide debt against Mrs. Hobbs that you expect to collect? A. I should not press it. Q. Do you hold any bona fide debt against her that you expect to collect? A. I cannot answer that. Q. It is a plain question. Do you hold any bona fide debt against Mrs. Hobbs that you expect to collect from her? A. No, sir; I do not."

It, perhaps, did not occur to this witness, in his effort to aid his friends, that he was lending his assistance to hinder, delay, and defraud creditors, and that, however amiable may have been his motive, the transaction could not be deemed amiable by a court intrusted with the administration of justice.

There were two transactions with John A. Davis. Hobbs & Tucker were indebted to Carhart, an intimate friend and a favored creditor of Mr. Hobbs. A valuable piece of property was conveyed to Mr. Davis by Mr. Hobbs for \$5,000. Davis paid \$3,000 in money, and gave his note, payable to Capt. Hobbs, for \$2,000. This was done with the understanding that Mrs. Hobbs should buy the property from Mr. Davis. This arrangement was carried out, and repayment was made to Davis to the extent of \$2,000 by returning him his note for that amount. This note, it was contended, was given to Mrs. Hobbs by Mr. Hobbs as a partial payment on his suppositious debt of \$18,000. In the other transaction between the same parties, Mr. Davis paid to Mrs. Hobbs \$4,000, which Mr. Hobbs ostensibly paid to Mrs. Hobbs on the alleged debt of more than \$18,000, and this money Mrs. Hobbs handed back to Davis, whereupon Davis reconveyed to her. It will be observed by these transactions while one favored creditor may have been paid \$3,000, yet Mrs. Hobbs is made to receive \$6,000 on an indebtedness to her which is not shown to exist, and highly valuable properties, which ordinarily would be subject to the creditors of Mr. Hobbs, have been hitherto protected from

their every effort to enforce their claims against it. Again, Mr. Hobbs, after the failure, conveyed to Askew city property in Albany, termed the "Welch Corner." The consideration named in the deed was \$6,453.10, and yet it appears from Askew's affidavit that Mrs. Hobbs repurchased from him this property for less than \$3,000. It is true that his debt against Hobbs & Tucker, less a discount he conceded of \$800, was paid to him, and in the deal Mrs. Hobbs received \$2,300, also to be credited on a debt due her, the existence and validity of which is not, as we have seen, satisfactorily demonstrated. Again, with regard to what is termed the "Odum Transaction," it appears that Mr. Hobbs conveyed to Mrs. Hobbs certain farm lands owned by him in Baker county; the consideration of the conveyance being \$1,391, represented by 17 shares of the stock of the Albany Fertilizer & Improvement Company. This stock, with \$25 in cash, was conveyed to Mrs. R. B. Odum to settle a debt of Hobbs & Tucker to her. The stock finally turns up in the possession of Mrs. Hobbs. When the transaction is ended, Mrs. Hobbs is in possession of the Baker lands. She is also in possession of the stock of the Albany Fertilizer & Improvement Company, which was delivered to Mrs. Odum for the Baker lands. Thus, while the debt to Mrs. Odum is adjusted, Mrs. Hobbs receives its twofold value, and the creditors of Hobbs & Tucker are injured by at least one-half of her gain by the transaction. A final transaction of this general character was that of F. F. Putney, who was president of the Albany Fertilizer & Farm Improvement Company; this being the company in which Mrs. Hobbs became the owner of  $141\frac{24}{100}$  shares of stock which had been owned by A. W. Tucker prior to the failure. Mr. Putney also appears to be a close friend of the family. A body of land was conveyed to Putney by Mr. Hobbs, and on the very day it was reconveyed to Mrs. Annie T. Hobbs for identically the same consideration; and it is plain from the evidence that it was the understanding in advance that Mrs. Hobbs was to become the owner at the same price. It appears further that part of the place was sold by Mrs. Hobbs for almost enough to pay the entire price, leaving her the bulk of this property for a trivial outlay. When these transactions are summed up, it will be observed that a very small sum of the indebtedness of Hobbs & Tucker was settled, when it is compared with the total amount of property which is thus circuitously conveyed to Mrs. Hobbs and the other relatives. The Welch corner was conveyed for \$6,453.10. The amount received by the creditor was less than \$3,000. The consideration of the two lots conveyed to John A. Davis aggregated \$9,000. Of this amount, according to the testimony of defendants themselves, \$3,000 was paid to a creditor, namely, Carhart, and \$7,000 of collateral held by Carhart was released to them. In the two Arnold transactions the values aggregated \$11,343.96. In the one it is not contended that any money was paid to creditors, and in the other it is claimed that Arnold was paid, individually and as treasurer of the Albany Fertilizer Company, \$6,343.96. In the Putney transaction the value conveyed was \$——, and the amount paid to creditors was \$3,237.89. Carhart & Bros. were paid \$3,000, and thus collateral was saved to Mrs. Hobbs which was actually worth, on the basis of the

dividends paid in liquidation, the full amount of that sum. Including the debt to Mrs. Odum, the total amount paid creditors by all these transactions was \$13,972.85, from which should be deducted the amount paid to Carhart, which was nothing more than a redemption of collateral of the full value; and it further appears from the evidence that the real estate and stock above mentioned which resulted to Mrs. Hobbs, estimated at taxable values at the time of these conveyances, amounted to \$——.

A most vital inquiry in this connection is to ascertain the source of the fund with which these partial payments to favored creditors were made, with results so beneficial to Mrs. Hobbs, and, as a consequence, to her husband. It nowhere appears in the evidence that Mrs. Hobbs at the time of the failure had any such sums of money as were paid out in these transactions. She returned no money for taxes as the law requires. She realized no money from the sale or mortgage of property by her individually. The rentals of her property amounted to only about \$1,400 per annum, from which must have been deducted taxes, insurance, etc. On the contrary, Mr. Hobbs had not only his professional income, but an income of \$10,000 per annum from his properties; and it will be seen that the considerable sums realized by him from turpentine leases, sales of sawmill timber, farm operations, etc., his professional fees, and salary as judge, went into the account of Mrs. Annie T. Hobbs. Nor can it be forgotten that the surplus of assets of Hobbs & Tucker remaining unaccounted for were not only ample to have paid every dollar which Mrs. Hobbs may have offered to obtain the title of Mr. Hobbs' real estate in these circuitous transactions, but are, indeed, sufficient to pay every debt which the parties complaining are now seeking to enforce. It is, however, said that the creditors refused to take the lands, which, as we have seen, were finally transferred to Mrs. Hobbs, and that the plan he adopted was the only feasible method by which he could hope to pay the debts of Hobbs & Tucker. Upon this subject it will suffice to say that they were under no obligation to accept a tender of real estate in satisfaction of their debts. Nor does it appear that the price at which he made the offers was anything like as moderate as that for which it is alleged Mrs. Hobbs secured these lands. For instance, it appears from the evidence of Askew that he offered the Malone place to him at \$3 an acre. Mrs. Hobbs afterward bought this at 33 $\frac{1}{3}$  cents per acre. Nor does it appear from Askew's affidavit that he refused to take the land unless Mrs. Hobbs would agree to buy it back at the same price, but he swears that this was suggested to him by Mr. Hobbs, and he was compelled to assent to this condition in order to obtain a settlement of his debt. Nor does it appear that the larger creditors of Mr. Hobbs, some of whom are parties to this bill, were disposed to be grasping with him in his difficulties. We find some of these leaving their claims in his hands as their attorney, and there they remained until the members of his family brought legal proceedings to defeat the enforcement of the claims which they had intrusted to him for collection. During all this period of trustfulness and indulgence on the part of his creditors, it is clear that he was diligently putting every value he pos-

sessed beyond their reach. This he did, as we have seen, by various transfers to members of his family,—some of them by tax sales at ridiculously inadequate prices; at another time, by the conveyance of large and valuable properties to H. H. Tarver as nominal trustee for certain creditors, who, as we have seen, did not receive a cent from the proceeds of the alleged trust, the value of which, as we have seen, is now possessed by Mrs. Hobbs. For all the purposes of the present hearing, it is plain that the ramifications of this entire scheme were made to hinder, delay, and defraud creditors. His entire bank account was transferred. He thus strips himself of every available asset, and admits that he did so to prevent garnishment. Entering into this account are the proceeds arising from the sale of property which he owned, and which he does not pretend were ever applied as a credit on his alleged debt to his wife. Besides, since the abortive effort in the state court to subject these properties to his indebtedness, other property has been discovered, which was transferred to his wife, the existence of which was unknown to the creditors at that time.

With regard to the conveyances of valuable city lots in Albany to Mrs. E. G. Tarver, it will suffice to say that, for the purposes of this hearing, the evidence seems clearly to indicate that they belong to the same general scheme to hinder, defraud, and delay creditors. This property is described in a deed from Richard Hobbs to Mrs. E. G. Tarver dated August 14, 1893, and comprises half of north lot No. 88, also lots 90, 92, three-fourths of lot 94, all of lot 95 on South street, and lots 53, 55, 57, and 59 on Mercer street. The consideration of this deed was ostensibly \$5,000. Contemporaneously with its execution Mrs. E. G. Tarver executed to Richard Hobbs a mortgage upon the same property to secure notes of even date, payable to Richard Hobbs or bearer, in the sum of \$1,666.66 each, with interest from date, payable one, two, and three years from date, respectively. Two of these notes were sent to the Yale National Bank September 28, 1895, and neither of them, or any part thereof, has been paid. It is claimed by the defendant Mrs. Tarver that the other note has been paid by her, but it is not shown how or when payment was made. It clearly appears from the evidence that, at the time of the failure of Hobbs & Tucker, Mrs. Tarver had no money to her credit in any of the Albany banks, and had never had a deposit with either of them, although Albany had been her home for a number of years. Her entire deposits with Hobbs & Tucker for two years prior to the failure had amounted to only \$409.55, and at no time after October 28, 1891, had she to her credit with Hobbs & Tucker more than \$140.05. She returned no money for taxes in 1893. If she had made any payment on this alleged purchase from Richard Hobbs, it never got into his bank account. The execution of this conveyance was a little more than a month after the failure of Hobbs & Tucker, and Mrs. Tarver's failure to pay either one of the notes given for the purchase of this property, and her close relationship with Richard Hobbs,—she being his mother-in-law,—taken in connection with what follows, seem to indicate with distinctness that this transaction was a part of the same general scheme to defraud. The other transaction with

Mrs. E. G. Tarver may be termed the John T. Davis conveyance. Two days after the deed we have just described, namely, on August 16, 1893, Richard Hobbs conveyed to Mrs. E. G. Tarver, by deed, for the apparent consideration of \$7,945, a large number of lots in Albany, which may be termed wild or unimproved lots. Mrs. Tarver contends that this conveyance was made to her under the following conditions: Hobbs & Tucker were indebted to John T. Davis, a banker of Columbia, Ala., for \$7,945. Richard Hobbs had exhausted his resources, and was unable to raise money to pay Davis. Her son H. H. Tarver was largely indebted to Hobbs & Tucker, and Davis finally agreed to accept a note made by H. H. Tarver, if the defendant would indorse the same, in settlement of the said debt, and, owing to her relationship to Hobbs and her son, she consented to make said notes, provided she was secure, and Hobbs gave her the lands for her indorsement; that she duly indorsed said notes in accordance with her agreement; and that neither Hobbs nor Tarver have ever paid one dollar thereof, but that said notes fell upon her, and she paid them. Hobbs and Tarver testify to substantially the same facts. Hobbs testified that Davis took the note for her indorsement, and receipted the debt of Hobbs & Tucker. This testimony was given before Hawes, auditor, in the proceeding in the state court. In this proceeding, for the first time, John T. Davis himself is called as a witness. It appears clearly from his testimony that not only did Mrs. Tarver not pay the notes to him as she has testified, but that he was compelled to place his notes for collection with the First National Bank of Albany, Ga., and when the note became due the same was not paid, and affiant made inquiry and found that the said H. H. Tarver was bankrupt at the time the note was made, and that Mrs. Tarver, the indorser, refused to pay the same. He took the advice of counsel, who advised him, Mrs. E. G. Tarver being a married woman, that her indorsement could not be enforced, and after much difficulty he secured a compromise of about 30 cents on the dollar; and the evidence very strongly points to the conclusion that the money paid on the compromise was paid, not by Mrs. Tarver, but by Hobbs himself. It therefore appears that Mrs. Tarver continues to hold the property transferred to her in consideration of her indorsement, which, at her own valuation, is worth \$7,945, and which was given in for city taxes in Albany the year of its conveyance for \$11,500; and in the year 1894, when the note which she did not pay fell due, it appears that she returned this property for city taxes at \$12,000. From this recital it seems obvious that this is merely another incident in the general scheme to dispose of the property of the respondent Hobbs so that it could not be subjected to the payment of his debts. Another transaction in the same general scheme is the conveyance of lots 2, 4, and 5 on State street, and 1, 2, 3, 5, 7, 9, and 11 on South street, a small lot on southeast of Front street to the river, and a lot between said street and South street, lots 95 and 97 on South street, lot 54 on Mercer street, and one-half of lot 50 on Tift street, all in the city of Albany. These lots were conveyed by Richard Hobbs to O. F. Tarver January 5, 1894, with three other lots. O. F. Tarver, the grantee, was absolutely penniless. He returned only his poll tax. He had never had a deposit in an Albany bank. The fact that he

had purchased landed property of such value seems to have attracted general attention, although not the attention of O. F. Tarver himself. This is developed in the testimony of S. W. Smith, ordinary of the county, now before the court. Smith stated that, about a year after the conveyance to O. F. Tarver, that individual came to his office and wanted to borrow some money. Smith told him that he could only lend money on real estate, whereupon Tarver said that he did not have any real estate. Smith states:

"I told him he must be mistaken; that there was some on the records in his name. He asked me to let him see it, and I took him to the book and showed it to him. He seemed to be surprised, and went away whistling, and said no more about it. He said he did not have any real estate, and I took him to the records and showed him the deeds. I think it was some city property. If I remember right, Capt. Hobbs made the deed to him, though it may have been Hobbs & Tucker."

There are other transactions with other parties, relatives, friends, and business associates, fully described in the bill and amendments, to the same general character, all marked by the same general features, and all of which the evidence, we think, plainly indicates that they were conveyances made to hinder, delay, and defraud creditors of Hobbs & Tucker and of Richard Hobbs.

There is a great deal of evidence in the extensive record which relates to the particular transactions. This evidence bears out in almost every particular the conclusions which the court has drawn from the general survey of the case hereinbefore taken. It is not deemed essential upon this hearing to examine more in detail than we have already done the evidence relating to each transfer attacked as fraudulent, and intended to hinder and delay creditors. The opinion of the court, indeed, upon this hearing, is not conclusive of the rights of the parties, except in so far as the appointment of a permanent receiver may affect them. We have very anxiously and carefully considered the evidence, the comprehensive and painstaking oral arguments of counsel and the elaborate briefs and reply briefs which have been filed. With every disposition to accord the distinguished and aged lawyer, soldier, and jurist who is the principal defendant in this case every right to which he is entitled, we are nevertheless, by the overwhelming character of this evidence, constrained to conclude that the great mass of his property has been conveyed to his wife with the intent to hinder, delay, and defraud his creditors, and that such consideration as was nominally paid for such conveyances was, in the main, derivable from the assets of the insolvent firm of Hobbs & Tucker, which assets the creditors were equitably entitled to apply to the payment of their debts. The appointment of a receiver is tantamount to an equitable levy upon all of the property thus subject, or which in contemplation of equity should be subjected, to the satisfaction of the demands of creditors. No other remedy, under such circumstances, is so adequate; no other, indeed, adequate at all. It may be possible that upon the final hearing of the cause, if that stage in the proceeding is reached, the examination of all the witnesses on oath, and the production of evidence now not before the court, may induce a different conclusion. As our duty, however, now appears, the appointment of a permanent

receiver to take charge of all the properties alleged in the bill to be fraudulently transferred to each and every one of the parties defendant is inexorably demanded by the evidence, and an interlocutory decree will be entered to that effect.

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ARNOLD MONOPHASE ELECTRIC CO. v. WAGNER ELECTRIC MFG. CO.

(Circuit Court, S. D. New York. August 11, 1902.)

1. EVIDENCE—WITNESSES—PREMATURE EXAMINATION.

Where, in an action to restrain infringement of a patent, its validity and the infringement are not disputed, and complainant claims as an assignee, and proves such assignment, its prima facie case is complete, and an application by it to examine witnesses as to defendant's knowledge of the assignment is premature.

Louis C. Raegener, for the motion.

Lawrence E. Sexton, opposed.

LACOMBE, Circuit Judge. The pleadings are not now before the court, but, from the statements which have been as to their contents, this application to examine witnesses as to the defendant's knowledge of the assignment to the complainant seems to be premature. Validity of the patent and infringement are not disputed. All that complainant has to do is to prove assignment to it. Its prima facie case is then complete, whether or not such assignment was duly recorded in the patent office or not. It is for defendant to show that it was a purchaser for value, without notice, if it wishes to avoid the assignment to complainant on the ground that it was not duly recorded. Complainant has not changed the situation by inserting in the bill unnecessary averments to the effect that defendant had notice of the prior unrecorded assignment.

For this reason, the motion is denied.

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McINERNEY v. VIRGINIA-CAROLINA CHEMICAL CO.

(Circuit Court, D. South Carolina. November 12, 1902.)

1. CONTRIBUTORY NEGLIGENCE—PLEADING.

Under the rule of code pleading that the facts relied on be stated in a clear and concise manner, an answer alleging that the injuries causing the death of plaintiff's intestate arose from his carelessness, negligence, and fault may be required to be made more definite.

Legare & Holman and B. A. Hagood, for plaintiff.

Mitchell & Smith and Mordecai & Gadsden, for defendant.

SIMONTON, Circuit Judge. These are motions to make the answer and the amended answer more definite and certain. The complaint seeks damages for personal injuries to the plaintiff's intestate caused by the alleged negligence of defendant. It states that the intestate was a stevedore at work unloading cargo from



a steamship at defendant's wharves; that defendant undertook to furnish all appliances and machinery for unloading the vessel, and did in fact furnish them; that while the intestate was engaged in discharge of his duty, unloading the vessel, standing in front of the hatch, the chain used in raising the tub out of the hatch broke from the derrick, fell, and struck the intestate on the head, inflicting a fatal injury; that the chain broke because of a defective link, worn, rusted, and rotten, used through the negligence of defendant. The answer denied all the allegations of the complaint which sought to hold defendant liable for this accident, and, as a further defense, alleged that the injuries received and suffered by the intestate at the time and place mentioned in the complaint, and from which it is alleged that he had died, were suffered and received in consequence of, and were due to and arose from, the carelessness, negligence, and fault of the intestate. The answer was subsequently amended by adding a further defense; that is to say, that the intestate was a minor son of plaintiff, and in his care and custody, and that the injuries suffered by the intestate at the time and place mentioned in the complaint, and from the effects of which it is alleged that the intestate died, were suffered and received in consequence of, and were due to the carelessness and negligence of, his father, the present plaintiff, his administrator. The motions now are that the defendant make its answer and amended answer more definite and certain, by specifying and setting forth the particular act or acts of negligence charged to have been committed by the intestate and by his father, the present plaintiff.

The mode of presenting the defense of contributory negligence used by the defendant in this case is in accordance with the practice which has prevailed in South Carolina since the adoption of code pleading, in 1870. No question has been made of it at any time,—at least, none which has been passed upon in any reported case. It is therefore *res integra* in this jurisdiction. But if the practice be tested by the rules of code pleading, it will appear that it is defective. The rule governing all code pleading—complaint and answer—is that the facts relied upon be stated in a clear and concise manner, and from the facts so stated the legal conclusion is drawn. If a defendant charged with negligence relies on contributory negligence on the part of the plaintiff, he must plead it specially, and when pleaded the burden of proof is on him to maintain it. *Railroad Co. v. Horst*, 93 U. S. 298, 23 L. Ed. 898. It is an affirmative defense in the nature of a plea of confession and avoidance. This defense goes farther than a general denial. Under the defense of a general denial, the plaintiff must prove that the negligence of the defendant was the proximate cause of the injury. And the defendant can introduce any evidence contradicting that. He may show that his conduct in no wise contributed to the injury, and may go farther, and show that the injury was caused wholly by the act of the plaintiff. But where he sets up the defense of contributory negligence, he, in effect, says: "It may be true that I was negligent, but at the same time I can show that you also were negligent, and so notwithstanding my negligence you cannot recover." In other

words, by inserting this defense he introduces new matter,—other facts, which, if they do not justify him, debar the plaintiff. And under the rule of code pleading he must set out concisely these facts from which the legal conclusion can be drawn. Before the plaintiff can recover, he must set out, as well as prove, the specific acts of defendant by which negligence will appear; and so, when defendant relies for his defense on the cotemporaneous negligence of plaintiff, he must set out the facts,—the specific acts of plaintiff by which his negligence will appear. To put it in another way: If a defendant wishes to rely upon the rule that the plaintiff must prove his case, the general denial would accomplish his purpose. But if he intends to go beyond this, and to avail himself of a defense, notwithstanding that negligence may be proved against him, by showing contributory negligence on the part of the plaintiff, he must state his facts upon which he relies, from which negligence could be inferred.

I am of the opinion, notwithstanding the prevalence of the practice in the state of South Carolina of barely averring that plaintiff was guilty of contributory negligence, that when that practice is examined it is found erroneous; that the plaintiff is entitled to his motion that the answer, in the respects complained of, be made more definite and certain. It is so ordered.

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PRINGLE v. GUILD et al.

(Circuit Court, D. South Carolina. November 14, 1902.)

1. MUNICIPALITY—GARNISHMENT—CONTRACTOR—BENEFICIAL PUBLIC WORK.

An attachment issued against a city, as garnishee, to reach money owing by it on a contract for the construction of a necessary and beneficial public work, will be set aside as to so much of the attachment as seeks to reach funds payable to the contractors during the performance of their contract with the city.

At Law. Motion to set aside an attachment.

Wm. H. Lyles and D. W. Robinson, for plaintiff.

R. W. Shand and P. H. Nelson, for defendants.

SIMONTON, Circuit Judge. This cause originated in the court of common pleas for Richland county, and has been regularly and properly removed into this court. The action is for personal injuries to the intestate of the plaintiff, alleged to have been caused by the negligence of the defendants. The defendants are under contract with the city of Columbia, a municipal corporation, for putting in a sewerage system in said city, which system is of great value and importance to the public health. In carrying out their contract, the defendants necessarily made excavations in the soil; and the injury sustained by plaintiff's intestate was caused by his falling into one of these excavations, his life being the forfeit. Upon suing out the summons and complaint, the plaintiff in the state court obtained a warrant of attachment, directed, among others, to the city of Colum-

¶ 1. See Garnishment, vol. 24, Cent. Dig. § 32.

bia, its officers and agents, attaching in their hands all moneys due or to become due to the defendants under this contract. A motion is now made in this court to set aside this attachment on several grounds. Some of these grounds go to the sufficiency of the complaint; others to the case on its merits; one to the small amount required in the undertaking; one upon the issuance of the attachment; yet another to the excessive demand for damages in the complaint, and the consequent necessity for a heavy bond in releasing the attachment. It is unnecessary at this time, and in the mode of presenting the case to the court, to anticipate many of these questions, which will properly come up for decision on trial of the cause.

The grave question to be met is that presented by defendant in his third exception:

"The tools and implements used by defendants, being used in fulfilling a contract with the city of Columbia for a public work affecting the public health, and the moneys due and to be due by the city of Columbia, a municipality of this state, being payable for such public work, the same could not be legally attached, to the embarrassment and delay of such work."

Or to put it more generally, a public municipal corporation cannot be subjected to the process of garnishment, at least for moneys appropriated to a public work for the public health, unless it be so provided by statute.

Among the papers presented with this motion is a return made by the city of Columbia to process of garnishment, vigorously protesting its illegality, and taking substantially the same position as defendants on this point.

The course of decision on this point in the several states of the Union is by no means uniform. But the great preponderance of authority sustain the position stated. See cases on both sides of the question cited in 14 Am. & Eng. Enc. Law (2d Ed.) pp. 811, 812. The exemption of a municipal corporation from process of garnishment is broadly sustained in *Mayor, etc., v. Rowland*, 26 Ala. 498; in *Leake v. Lacey*, 95 Ga. 747, 22 S. E. 655, 51 Am. St. Rep. 112; in *Hardware Co. v. Perdue*, 105 Ala. 293, 16 South. 713, 53 Am. St. Rep. 124; in *State v. Tyler* (Wash.) 45 Pac. 31, 37 L. R. A. 207, 53 Am. St. Rep. 878; *Boone Co. v. Keck*, 31 Ark. 387. It is also discussed and followed in an able opinion in *Merwin v. City of Chicago*, 45 Ill. 133, 92 Am. Dec. 204. The rule and the reason for the rule are well stated in *Wade, Attachm.* § 345; and Judge Dillon, in his able work on *Municipal Corporations*, whilst he thinks it not reasonable, admits the existence of the rule.

I am of the opinion, therefore, that so much of the attachment as seeks to reach funds payable to the defendants during the performance of their contract with the city of Columbia, and whilst engaged in its performance, must be set aside. Decision on all other points is reserved.

ENOCH MORGAN'S SONS CO. v. WHITTIER-COBURN CO.

(Circuit Court, N. D. California. August 18, 1902.)

No. 13,012.

1. TRADE-NAMES—INFRINGEMENT—"SAPOLIO."

The word "Sapho" sufficiently resembles "Sapolio" to constitute an infringement of the latter as a trade-name, where it is used as the name of a similar article, put up in packages which are identical in form, size, and color of wrapper, and having a label in similitude of that used on packages of Sapolio.

2. SAME—UNFAIR COMPETITION—IMITATION OF PACKAGES.

It is within the discretion of the court to enjoin an imitation of another's goods in the matter of form, color, or lettering of packages when it is proven directly, or by strong inferential evidence, that the imitation was willfully made, or when such imitation, though innocently made, results in damage to the one whose rights are infringed.

3. SAME.

A manufacturer who so dresses his goods as to enable retail dealers to sell them to customers as those of a competitor earlier in the market is chargeable with unfair competition, although he is careful himself to sell them as his own.

In Equity. Suit for infringement of trade-name and for unfair competition.

Archibald Cox and Wright & Lukens, for complainant.  
Lloyd & Wood, for defendant.

MORROW, Circuit Judge. This is a suit in equity brought by the complainant, a corporation existing under the laws of the state of New York, to protect its trade-mark and trade-name "Sapolio," and to restrain the defendant, a California corporation, from certain acts of unfair competition. It is alleged that many years ago the firm of Enoch Morgan's Sons, in New York City, prepared and put upon the market a superior manufacture in the shape of a soap especially designed for cleansing, scouring, and polishing, and appropriated, applied thereto, and used as a trade-mark and trade-name to distinguish and identify their said manufacture the word "Sapolio"; that the said firm also originated and devised a radically new and distinctive form or style of package for said "Sapolio," of unusual size, color, and shape, in connection with such manufactures, in order that the said "Sapolio" might be more readily recognized by consumers and the public, and become more widely and generally known and more effectually popularized; that many thousands of dollars were expended by said firm in advertising and placing upon the market said manufacture, resulting in the creation of a large demand for the said "Sapolio." It is further alleged that on or about the 4th day of November, 1876, the complainant herein succeeded to all the right, title, and interest of the said Enoch Morgan's Sons, and has continued to carry on the said business ever since, though in a greatly enlarged and extended form, including the use of the trade-mark "Sapolio" and the distinctive form of package indicating that product; that for a period

¶2. Unfair competition, see notes to *Scheuer v. Miller*, 20 C. C. A. 165; *Lare v. Harper*, 30 C. C. A. 376.

of more than 30 years the complainant and its predecessors have been in the sole and exclusive use of said trade-name and style of package, and the right to such use has become of great value to complainant. The defendant is charged with infringement of complainant's rights in the use of said package and trade-mark, and with inequitable competition in business, in that it has fraudulently prepared and sold a cleaning and polishing substance in imitation of complainant's manufacture, with form and wrapping in simulation of that used by complainant, and applied thereto the descriptive title "Sapho." It is alleged that the defendant's preparation is easily mistaken for that of the complainant, and that the substitution therefor, whether by design or mistake, results in great loss and injury to complainant. The defendant denies generally the charges of the bill, and avers that its acts in connection with the product "Sapho" have been entirely fair, and in legitimate competition with the business of complainant.

It appears from the evidence that the complainant's predecessors coined and adopted the word "Sapolio" in 1869 as a trade-name for the scouring soap prepared by them, and that the name has been used as a trade-mark for such preparation continuously since that time. It is not denied that the said name and product to which it is attached have become of great value to complainant, and that it is entitled to such protection of its rights therein as the law affords. The controversy therefore presents two questions for determination: Does the word "Sapho," as applied by defendant to its product, infringe the rights of complainant in and to its trade-name "Sapolio"? And have the defendant's acts in preparing and placing upon the market the said "Sapho" soap constituted unfair competition in trade? The determination of the first question necessarily involves a consideration of the second, and the two will therefore be dealt with together.

The acts constituting infringement of a trade-mark cannot be specifically defined in form applicable to all cases, and general rules only can be resorted to for the guidance of the courts in determining the existence or nonexistence of infringement. The supreme court of the United States, in the case of *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, in this connection states:

"It is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes reasonable measures to assert his rights, and to prevent their continued invasion."

And further in the decision, emphasizing this opinion, it says:

"Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser, giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other."

In applying the test furnished by this rule, the question becomes one of fact, to be deduced from the evidence.

It appears that the defendant was for many years the agent of the complainant in marketing "Sapolio," and was therefore familiar with the salability of the complainant's product. About the time of terminating this agency the defendant commenced the manufacture of the alleged infringing product, "Sapho" soap, of size and shape identical with that known as "Sapolio," and bearing the imprint of the name and owner in similar style, as appears by the following facsimiles of the two products:



The complainant's packages were wrapped in paper having the appearance of silver, while lengthwise around this wrapper was placed a band of dark blue paper, bordered with two narrow gilt lines, there appearing within the borders certain collocations of words, as represented by the following:



The defendant wrapped its packages in the same kind of paper, placed lengthwise around the wrapper a band of very dark-colored paper, of the same width as that used by complainant, bordered with the two narrow gilt lines, and containing collocations of words arranged in similar position to those of complainant's packages, as illustrated by the following:



The labels placed upon the boxes in which the packages were packed for delivery to dealers were also of the same colors, and similar in arrangement of letters. For about one month sales were made by the defendant of their product so prepared, when it was learned that objection was being made by the complainant to the wrapper label. The defendant consulted its attorney, and upon his advice designed new labels for the wrappers, removed the old ones from the packages on hand, and substituted the new in place thereof, also changing the color of the box labels. The complainant contends, however, that it is entitled to an injunction against the use of the former labels, regardless of their present discontinuance by defendant, and that the defendant should be restrained from the use of the word "Sapho" in connection with a scouring soap, and from the use of any package calculated to deceive.

In the opinion of the court, the first labels and style of wrapper were so closely in imitation of those used by the complainant (which by extensive advertising and the virtues of the product had become of great value) as to constitute the counterfeiting of an article with a reputation already established, and therefore a violation of complainant's rights in its trade-mark and trade-name.

The labels now in use by the defendant are the following:



As will be observed, the color of the paper is the same and the width of the band. A solid gilt line is substituted for the two narrow ones, but occupying the same space and inclosing the lettering in exactly the same manner as the two lines of the former labels. The scroll is removed from the words "Scouring, Polishing, and Cleaning," and those words placed in a straight line instead of a curve, and in reversed position. In place of the words "Manufactured by" the word "Soap" appears. No other differences are apparent. The packages of defendant's product are still of the same size and form as those of complainant; they are still wrapped in the silver-colored paper, and at a distance of a few feet present a remarkably similar appearance to the well-known packages of "Sapolio." The word "Sapho," commencing and ending with the same letters as "Sapolio," and arranged in the same position upon the packages of soap, presents so similar an appearance to the eye in an ordinary glance that, in my opinion, it could easily be mistaken for "Sapolio." A minute and careful inspection will, of course, reveal the fact that it is a different preparation; but, in legal contemplation, infringement occurs when "the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives." *McLean v. Fleming*, supra; *Sterling Remedy Co. v. Eureka Chemical & Mfg. Co.*, 80 Fed. 105, 25 C. C. A. 314; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 41, 21 Sup. Ct. 7, 45 L. Ed. 60.

While it is true that no one has a monopoly of form, of color, or of the shape of letters, it has repeatedly been held that one may not use the color that another has selected as a distinguishing mark of his goods, or use the same arrangement of letters and of marks, when such use is with the design to market his goods as the goods of another. *Hires Co. v. Consumers' Co.*, 100 Fed. 809, 41 C. C. A. 71. It is within the discretion of the court to enjoin such an imitation of another's goods, when it is proven directly or by strong inferential evidence that the imitation was willfully made, or when such imitation, even though innocently made, results in damage to the one whose rights are infringed. In the present case the evidence shows that the goods of the defendant have been mistaken by purchasers for those of the complainant, probably by the design of the dealer. And, though there is no evidence connecting such dishonest dealing with the defendant in any way, the fact that it so dresses its goods as to give an easy opportunity to the unscrupulous dealer to delude the consuming purchaser is very persuasive evidence that an intention existed to enter into competition with the manufacturer whose goods were already well established, and to carry on such competition in a manner which courts of equity hold to be unfair. In the case of *Fairbank Co. v. R. W. Bell Mfg. Co.*, 23 C. C. A. 554, 77 Fed. 869, complainant introduced to the public a soap powder under the title of "Gold Dust," and devised a distinctive form of package to contain the powder. It expended upward of \$300,000 in advertising this article, and thereby created a large demand for it throughout the United States. The defendant later introduced a similar preparation to the public, packed in boxes resembling those of the complainant in size, form, and coloring, but



having the name "Buffalo" in place of "Gold Dust." This preparation was offered to the trade at a lower price than that of the complainant, and proved a sharp competitor. It was shown that no effort was ever made by the defendant or its salesmen to deceive customers by inducing them to purchase the defendant's goods believing them to be those of the complainant, but the court held that in equity the consumer should be regarded as well as the middleman. It was shown that in many cases when consumers asked for the complainant's goods the dealers would hand them those of the defendant, and that by reason of the close resemblance in general appearance of the packages most customers were deceived. The court said:

"It may be conceded that the defendant never, by any of its officers or agents, intimated to its salesmen that they should recommend the defendant's packages as being readily disposed of to consumers who asked for and wished to have complainant's. But such oral commendation was certainly unnecessary. A survey of the two packages, placed side by side, would sufficiently suggest this possibility to a dishonest dealer. We have, then, the case of a manufacturer who is careful always to sell its goods as its own, but who puts them up in a style of package so similar to that used by one of its competitors, earlier in the market, that unscrupulous dealers, who purchase from the manufacturer in order to sell at retail to consumers, are enabled to delude a large number of such retail purchasers by palming off upon them the goods of the manufacturer as those of its competitor. That this is unfair competition seems apparent, both on reason and authority. In a similar case the court says: 'It is argued that the defendant has nothing to do with the deception of the public. The answer is obvious. Every person who, intending to buy a bottle of the plaintiff's sauce, gets, instead, a bottle of the defendant's, is a customer taken from the plaintiff by this deceit, and, if this is extensively done, the damage to the plaintiff's trade would be serious. *Powell v. Brewery Co.* [1896] 1 Ch. 88.' See, also, *Read v. Richardson*, 45 Law T. (N. S.) 54; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265; *Manufacturing Co. v. Loog*, 18 Ch. Div. 412; *Lever v. Goodwin*, 36 Ch. Div. 1. In the latter case the rule is well stated, as follows: 'It has been said more than once in this case that the manufacturer ought not to be held liable for the fraud of the ultimate seller; that is, the shopkeeper or the shopkeeper's assistant. But that is not the true view of the case. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers.'"

The case at bar presents even stronger evidence of unlawful imitation than the case just cited; for here not only are the form, size, color, and manner of lettering of the packages similar, but the name adopted as a distinguishing feature by complainant is also readily confused with that of the competing manufacturer, and there is really no differentiation in the general appearance of the two preparations.

It follows that the rights of the complainant in and to its trade-name are infringed by the acts of the defendant, and that the imitation of complainant's packages by defendant is unlawful, in that it tends to create confusion in the trade, and work a fraud upon the public by inducing it to accept the goods of defendant for those of the complainant.

Let a decree be entered in accordance with this opinion.

## UNITED STATES v. MULLAN FUEL CO.

(District Court, D. Montana. November 13, 1902.)

## No. 40.

## 1. PUBLIC LANDS—ACTION FOR UNLAWFUL CUTTING OF TIMBER—LANDS WITHIN RAILROAD GRANT.

The United States cannot maintain an action to recover the value of timber cut and removed from unsurveyed land within the limits of a railroad grant, and which, when surveyed, would be within the limits of an odd-numbered section, to which the government had parted with its title.

## 2. SAME—DEFENSES—PLEADING.

To authorize the cutting of timber on public lands, under Act June 3, 1878 [U. S. Comp. St. p. 1528], which permits the cutting of timber from mineral lands in certain states and territories by bona fide residents thereof for building, agricultural, mining, and other domestic purposes, under regulations prescribed by the secretary of the interior, a compliance with such rules and regulations as the secretary had power to adopt is necessary, and one relying upon the license given by said act as a defense to an action for the unlawful cutting of timber should set out in his answer the acts done in compliance with such regulations, and all the facts necessary to constitute the license.

## 3. SAME—ACT PERMITTING CUTTING OF TIMBER FOR DOMESTIC PURPOSES—REGULATIONS OF SECRETARY.

The limits of the power of the secretary of the interior to make rules and regulations governing the cutting of timber from public mineral lands for certain purposes, authorized by Act June 3, 1878 [U. S. Comp. St. p. 1528], subject to such rules and regulations as the secretary may prescribe "for the protection of the timber and of the undergrowth growing upon such lands and for other purposes," have never been judicially determined, but the act should be liberally construed, and the regulations must be reasonable, and not such as to annul or limit its effect.

## 4. SAME—PLEADING FACTS IN MITIGATION OF DAMAGES.

Under Code Civ. Proc. Mont. § 700, a defendant, in an action in a federal court in that state to recover the value of timber alleged to have been unlawfully cut from public lands, who desires to prove his good faith in mitigation of damages, must plead such defense and such facts as he expects to prove in support of it.

## 5. SAME—ADVICE OF COUNSEL.

An action by the United States for an alleged willful trespass in the cutting and removal of timber from public lands is one in which exemplary as well as actual damages may be recovered; and it is competent for the defendant, in support of a plea of good faith and to prevent such damages, to show that he acted under the advice of counsel.

At Law. Action of trespass by the United States for the unlawful cutting of timber from public lands. On motion for new trial.

William B. Rodgers and Carl Rasch, U. S. Attys.

Cullen, Day & Cullen, for defendant.

KNOWLES, District Judge. In this action the plaintiff seeks to recover from defendant the sum of \$30,000 as damages for cutting timber upon sections 29 and 30, in township 11 N., range 6 W. of the principal meridian in Montana, situated in Powell county, in said state. The plaintiff alleges that it was the owner of this land. The defendant admits that plaintiff is the owner of said section 30, but denies that it is the owner of said section 29, and avers that this last-

mentioned section is the property of the Northern Pacific Railway Company. Defendant also admits that during the period named in plaintiff's complaint it entered upon what, when surveyed, would be section 30, above described; but it denies that its entry upon said land was unlawful or wrongful, or that it unlawfully or wrongfully cut down the timber growing thereon, or that at any time it cut 15,000 cords of wood, or any other number of cords of wood in excess of 500, or that it converted to its own use any timber growing upon said lands in excess of 500 cords, or that the wood so cut or converted by the defendant was of the value of \$30,000 or any other value, and denies that the plaintiff was damaged in the sum of \$30,000 or in any sum whatever. Defendant also alleges in its answer that said section 30, at the time said wood was cut, was public mineral land, not subject to entry under any of the existing laws of the United States, except mineral entries, and defendant cut said wood for mining and domestic use in the state of Montana, and no part of said wood was used for any other than the said mining and domestic purposes by bona fide residents of said state of Montana. The plaintiff in its replication joins issue as to the affirmative matters alleged in defendant's answer.

It appears from the evidence that the section 29 described in plaintiff's complaint was an odd section of unsurveyed land, and that if surveyed it would be within the limits of the Northern Pacific Railway Company's land grant. The government had therefore parted with its title to that section. It is difficult, under the decisions of the federal courts, to understand why a suit should have been brought for damages to that section of land, as the government had parted with its legal title to the same. The following cases establish this doctrine: *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 741, 23 L. Ed. 634; *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491, 24 L. Ed. 1095; *Wood v. Railroad Co.*, 104 U. S. 329, 26 L. Ed. 772; *Buttz v. Railroad Co.*, 119 U. S. 66, 7 Sup. Ct. 100, 30 L. Ed. 330; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 509, 10 Sup. Ct. 341, 33 L. Ed. 687; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992; *Denny v. Dodson*, 13 Sawy. 66, Fed. Cas. No. 899; *Railroad Co. v. Cannon* (C. C.) 46 Fed. 224. Other cases might be cited to the same effect.

As to said section 30, there is no contention but that the title to the same is in the government, and plaintiff would be entitled to damages for wood cut upon the same, unless the defendant could present facts showing that it had a license to enter upon the same and cut wood thereon. In the amended answer in this case the defendant admits that it entered upon said section and cut some 500 cords of wood therefrom and converted the same to its own use. The evidence, however, shows that the amount cut and appropriated by defendant from said section was some 4,500 cords. There is a denial in the answer that the defendant unlawfully or wrongfully cut any of this wood. This, however, is a denial of a legal conclusion, and is of no avail. The defendant also alleges as a defense that said section 30 was public mineral land of the United States, not subject to entry under any of the existing laws of the United States except mineral entries, and that defendant cut said wood for mining and domestic use in said

state of Montana, and no part of said wood was used for any other than mining and domestic purposes by bona fide residents of the state of Montana. Defendant presented evidence to prove this fact, and also to prove that it entered upon said premises in good faith, believing that the same were mineral land, and that it cut this wood under that belief. Plaintiff objected to this evidence upon the ground that it was not justified by any pleading in the case: (1) That, if said land was mineral land as alleged, defendant did not plead and show that it had complied with the rules and regulations established by the secretary of the interior upon the subject of cutting timber upon the mineral lands of the United States in the states and territories named in the act of congress; (2) that the plea of the defendant having entered upon the land in good faith was one in mitigation of damages, and should have been set forth in the answer.

The statute—20 Stat. 88 [U. S. Comp. St. pt. 1528]—which gives the right to cut timber upon the mineral lands in the states and territories aforesaid reads as follows:

“Section 1. That all citizens of the United States and other persons, bona fide residents of the state of Colorado, or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: provided, the provisions of this act shall not extend to railroad corporations. \* \* \*

It will be seen by this section that trees may be cut “under such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and the undergrowth growing upon such lands, *and for other purposes.*” (The italics are mine.) Compliance with such rules and regulations as the secretary of the interior had power to make and adopt is necessary in order to give a license to cut trees, and this license, and all the facts necessary to constitute this license, should be specially set forth in the answer.

There is much doubt, I conceive, as to what rules and regulations the secretary of the interior was authorized to adopt under this statute. First, these rules and regulations were to pertain to the protection of the trees and undergrowth growing upon such mineral lands, and next for other purposes. What could be included under this term “other purposes” has never been fully determined by the courts. The secretary of the interior passed beyond the authority given him by the statute, and in his rules and regulations has undertaken to describe the land from which timber may be cut, and designated it as “strictly mineral.” What is meant by this description we are not enlightened by any judicial authority. If there is any difference between mineral land and strictly mineral land we have not been informed. The courts have determined, to some extent, as to what evidence will be sufficient to determine what are mineral lands. In *U. S. v. Edwards* (D. C.) 38 Fed. 812, the court says:

"Land returned on the government survey as mineral land, of broken and rugged surface, with every indication of mineral ground, but on which no mines have been located, though in the vicinity of valuable mines, and which is unfit for cultivation and entry as agricultural lands, is within the meaning of Act Cong. June 3, 1878 [U. S. Comp. St. p. 1528], allowing timber to be taken from mineral lands on the public domain for building, agricultural, mining, or other domestic purposes."

In *U. S. v. Richmond Min. Co. (C. C.)* 40 Fed. 415, the court says:

"The defendant, a corporation engaged in mining, reducing ores, and refining bullion, purchased wood and charcoal for use at its reduction works. The cord wood, and the wood from which the charcoal was manufactured, were cut upon unsurveyed public mineral lands, mineral in character, of little or no value except for the mineral therein, and within organized mining districts, or not far remote from known mines. This was mineral land, within the meaning of the act of congress of June 3, 1878, permitting timber to be taken therefrom for 'building, agricultural, mining, or other domestic purposes,' and that defendant could lawfully purchase such wood and coal for said use under the license given by said act."

The mode of determining what is mineral lands adopted in the foregoing decisions was probably considered and approved by congress, in its legislation contained in 28 Stat. 683, entitled "An act to provide for the examination and classification of certain mineral lands in the states of Montana and Idaho." In that act the commissioners were to determine the mineral character of lands from the character of adjacent lands, and their mineral character and geological formation, etc., and the reasonable probability of such land containing valuable mineral deposits. These, I think, are better criterions for determining what is meant in the act of congress of June 3, 1878 [U. S. Comp. St. p. 1528], as to the lands upon which license was given to cut trees or timber. In *U. S. v. Price Trading Co.*, 48 C. C. A. 331, 109 Fed. 239, it was held that the regulations prescribed by the secretary of the interior, under and pursuant to Act June 3, 1878, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], authorizing the cutting of timber from public mineral lands in certain states and territories for building, agricultural, mining, or other domestic purposes, which regulations require "every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this act," to keep a record showing by whom such timber was cut, from what lands, evidence of mineral character, to whom the timber was sold, and for what purpose, etc., and to take from such purchaser a written certificate, under oath, that the purchase is made for his own use, and for an authorized purpose, contemplate the keeping of such records only by persons who, like the proprietors of sawmills, make a business of cutting timber on mineral lands and selling it, or who are engaged to a considerable extent in such business, and they do not apply to settlers engaged chiefly in other pursuits, who cut small quantities of timber from mineral lands which they occupy, and who barter the same to a trader, with the understanding that it will be resold to other farmers or ranchmen in the vicinity for domestic uses, so as to render such cutting or sale unlawful, although the prescribed conditions are not complied with.

It is not at all certain what power was granted to the secretary of the interior to make rules and regulations for other purposes than the

protection of timber upon the public domain and the undergrowth growing thereon. The statute giving the right to cut timber upon the public mineral lands of the United States is one which concerns the public good or the general welfare; it pertains to the citizens and bona fide residents of the states and territories named therein, and should be liberally construed. 1 *Suth. St. Const.* § 408. It is not to be supposed that congress intended to give the secretary of the interior the power, by rules and regulations, to annul or limit its effect; hence it is difficult to say just what facts the defendant should have pleaded to show that it had a license to go upon this land and cut the trees named, or what it should have alleged in mitigation of damages. I think, however, that, under section 700 of the Code of Civil Procedure of Montana, the defendant should have set up whatever facts it expected to prove in mitigation of damages, and should have complied with the statute by stating that it was for that purpose.

I do not feel called upon at this time and in this case to determine whether the secretary of the interior had, under the authority above named, the right to regulate the sale or disposal of cord wood cut from trees standing on the public mineral lands, and to require that the person selling such wood should obtain an affidavit from the purchaser as to the use to which he intends to put such wood, or to prescribe a system of bookkeeping for those engaged in that business. Rules and regulations upon the subject of cutting and disposing of cord wood should be reasonable and designed to promote the policy of congress in the statute under consideration. *Anchor v. Howe* (C. C.) 50 Fed. 366.

It is also claimed that it was error on the part of the court to admit in evidence the advice of counsel learned in the law, given to the defendant upon the question of a compliance by it with the rules and regulations of the secretary of the interior, with reference to the keeping of a record of sales and other regulations pertaining to the sale of its cord wood, and in this connection the plaintiff contends that in this action the plaintiff is not seeking to recover punitive or exemplary damages, and that only in cases of this character is the defendant permitted to introduce such evidence. In this case, however, plaintiff does seek to recover punitive or exemplary damages. It seeks to recover more than a compensation for the injury done. It is alleged in the complaint that the defendant willfully committed the trespass. In a case somewhat of the nature of this (*U. S. v. Eccles* [C. C.] 111 Fed. 490) the advice of an attorney was held to be proper to be given in evidence and was considered in mitigation of damages. In 1 *Suth. Dam.* p. 747, it is held that the advice of counsel in such cases is admissible in evidence at least to prevent exemplary damages. The advice of counsel as to the scope of the statute we are considering is proper to be considered. Reputable attorneys might well differ as to the power conferred upon the secretary of the interior under the act of June 3, 1878, in the clause "and other purposes," as contained in said act.

Defendant has asked for leave to amend its pleadings so as to conform to the evidence adduced at the trial; but this evidence was given and received under the objection of the plaintiff, and I think, under

such circumstances, the right to so amend is not proper. *Brewer v. Jacobs* (C. C.) 22 Fed. 244; 1 Enc. Pl. & Prac. 585, and cases cited in the note.

The view that evidence in mitigation of damages could be given without being pleaded was the error of both the court and counsel for the defendant. Under the rules of the common law and in some of the states under the code practice, such evidence could be given under the general issue. Pom. Rem. & Rem. Rights, § 693; 1 Suth. Dam. pp. 256-258; 5 Enc. Pl. & Prac. p. 776, and cases cited in the note; *Beckwith v. Bean*, 98 U. S. 279, 25 L. Ed. 124.

In conclusion, for the error above named I think a new trial should be awarded, and defendant be granted leave to amend its answer in accordance with the views above expressed; and it is so ordered.

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### GURAS v. PORTER.

(District Court, N. D. California. November 10, 1902.)

No. 279.

#### 1. BANKRUPTCY—VALIDITY OF LIENS—UNRECORDED CHATTEL MORTGAGE.

Under Civ. Code Cal. §§ 2959, 2962, which provide that chattel mortgages shall be recorded in the county where the property is situated, and that a single mortgage embracing several things so situated that separate mortgages thereon would be required to be recorded in different places shall be valid only in respect to the property where recorded, a mortgage covering property in two counties and only recorded in one is void as to the property in the other county as against the trustee of the mortgagor in bankruptcy.

#### 2. CONVERSION—DAMAGES—BURDEN OF PROOF.

In an action by a chattel mortgagee against the trustee in bankruptcy of the mortgagor to recover for the conversion of the mortgaged property, where the mortgage was void for want of record as to a portion of the property, the burden rests upon the plaintiff to prove the amount and value of the property as to which the mortgage was valid; such proof not having been prevented by any act of the defendant.

At Law. Action for conversion.

Lindsay & Netherton, for plaintiff.

Bishop, Wheeler & Hoefler, for defendant.

DE HAVEN, District Judge. This action is brought by the plaintiff against the defendant, as trustee of the estate of N. Banaz, bankrupt, to recover damages in the sum of \$1,326 for the alleged conversion by defendant of apples and other fruit growing upon two tracts of land, one situate in the county of Monterey and the other in the county of Santa Cruz, state of California. It appears from the evidence that on March 2, 1900, the bankrupt executed to plaintiff a chattel mortgage upon the apples and other fruit growing upon the parcels of land above referred to, and that this mortgage was recorded on March 5, 1900, in the recorder's office of Santa Cruz county, but was never recorded in the office of the recorder of Monterey county.

¶ 1. See Chattel Mortgages, vol. 9, Cent. Dig. §§ 162, 165.

On March 12, 1900, the mortgagor filed his petition in bankruptcy, and was on that day adjudged bankrupt, and thereafter the defendant was appointed trustee of the estate in bankruptcy, and as such trustee, prior to the commencement of this action, without paying or tendering to plaintiff the amount of the debt secured by the mortgage referred to, and against the will and consent of plaintiff, took the whole of said mortgaged property into his possession, and sold the same.

1. In one of the defenses set out in defendant's answer it is alleged that the mortgage referred to in the complaint was made without consideration, and with intent to defraud the creditors of the mortgagor. Upon consideration of the evidence, my conclusion is that this defense is not sustained, but, on the contrary, I find that the mortgage was made in good faith, and the indebtedness it purports to secure was a bona fide indebtedness due from the bankrupt to the plaintiff.

2. By section 2959 of the Civil Code of California it is provided that a mortgage of personal property must be recorded in the office of the county recorder of the county in which the mortgagor resides, and also in the county in which the property mortgaged is situated, or to which it may be removed; and section 2962 of the same Code provides:

"A single mortgage of personal property, embracing several things of such character or so situated that by the provisions of this article separate mortgages upon them would be required to be recorded in different places, is only valid in respect to the things to which it is duly recorded."

As before stated, the property covered by plaintiff's mortgage consisted of two separate crops of growing fruit, one upon land in the county of Santa Cruz and the other upon land in the county of Monterey. The plaintiff's mortgage, having been recorded in the county of Santa Cruz, was valid in respect to the crop growing upon the land situate in that county, but was void as to creditors of the bankrupt in so far as it relates to the crop growing upon the land situate in the county of Monterey. The evidence does not show what portion of the apples and other fruit which defendant is alleged to have converted grew upon the land situate in Santa Cruz county and what portion in Monterey county, and it is contended by plaintiff that he was not required to offer proof in relation to such fact; that the burden was upon defendant to show this, if he desired, to mitigate the damages claimed in this action. I am unable to assent to this proposition. There is no evidence that the two crops were intermixed by defendant, and their separate identity thus destroyed; and it is not claimed that the quantity and value of the apples and other fruit which grew upon the land situate in Santa Cruz county was not susceptible of proof, and, when the nature of such an inquiry is considered, it is apparent that such facts could have been easily shown. This being so, and in view of the fact that the mortgage was only valid as to a part of the fruit taken and sold by the defendant, it was, in my opinion, incumbent upon the plaintiff to introduce evidence showing how much of the fruit so taken and sold was subject to the lien of his mortgage and its value. Without such evidence, it is impossible to determine the amount of damages to



which plaintiff is entitled, and his recovery must be restricted to nominal damages.

In accordance with these views, judgment will be entered in favor of the plaintiff for damages in the nominal sum of \$1 and costs.

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In re WOOTEN.

(District Court, E. D. North Carolina. November 3, 1902.)

1. BANKRUPTCY—PROOF OF DEBTS—BURDEN OF PROOF.

The burden of proof rests upon every creditor of a bankrupt to establish his claim by a preponderance of evidence. If no objection is made to its allowance, the formal proof prescribed is accepted as sufficient, but a claim objected to must be proved under the rules governing other legal proceedings, and the fact that a claimant is a near relative of the bankrupt should be given the same effect as in other cases.

2. SAME—ATTORNEYS—INCONSISTENT EMPLOYMENT.

The attorney for a bankrupt should not also act for a creditor whose claim is contested.

3. SAME—OBJECTION TO CLAIMS.

Objections to a claim should be specific, but they are not required to be under oath.

4. SAME—LIMITATIONS.

The scheduling by a bankrupt of a debt which is absolutely barred by limitation under the statute of the state does not make it a provable claim, and it is the duty of the trustee to plead the statute on behalf of other creditors.

5. SAME—SEPARATE LOANS OF MONEY.

A claim for sums of money lent to the bankrupt at different times, for which no notes were taken, does not constitute a running account; but each item is a separate and distinct transaction, unaffected by any other, so far as relates to the running of limitation against it.

In Bankruptcy. On certificate from referee.

PURNELL, District Judge. The referee certifies that on March 24, 1902, J. M. Wooten, son of the bankrupt, filed a claim against the bankrupt estate for \$2,291.35, attaching to the certificate a copy of the claim, consisting of cash loaned June 1, 1897, and interest \$287; same, December 4, 1897, \$200, interest \$51.30; same, January 1, 1900, \$500, and interest \$66; same, January 6, 1900, \$175, and interest \$12.50,—which claim was objected to by the attorney for creditors. The referee ruled that on account of the near relationship existing between the bankrupt and claimant the burden of proof is upon claimant to establish his claim by a preponderance of evidence. To this ruling attorney for claimant (who is also attorney for bankrupt) objects, excepts and appeals to the judge.

The referee is affirmed. Every creditor of a bankrupt estate must establish his claim by a preponderance of evidence,—facts proved or admitted. This claim is not evidenced by any note, bond, or memorandum, and there are many circumstances which should put the trustee and referee on inquiry. The fact that both the claimant and

¶ 4. See Bankruptcy, vol. 6, Cent. Dig. § 473; Limitation of Actions, vol. 33, Cent. Dig. § 589.

bankrupt are represented by the same attorney would bar such attorney from making admissions in favor of his client the claimant to bind his client the bankrupt. Representing adverse interests, to say the least, is against the ethics of the profession, and should not be permitted. It is not in accordance with the high standard which every lawyer should seek to maintain.

The proof of a claim in bankruptcy does not differ in any material particular from the proof of debt required in other proceedings in court. Such proof is provided for in section 57 [U. S. Comp. Stat. 1901, p. 3443], and form 31 (32 C. C. A. lxvi, 89 Fed. xlii). It should be sufficient to enable the officer passing on the claim to do so intelligently and judicially. See *In re Eagles*, 3 Am. Bankr. R. 733, 99 Fed. 695, where this court at some length pointed out the proceedings as to proof of claims.

No question is presented which requires argument orally by counsel, and the official engagements of the judge are such that this would be impossible for at least two months, which would be delay without benefit; hence the regular practice of setting these cases down for hearing and notifying counsel will not be followed. Being the claim of a son against his father, aside from other circumstances, the rule governing the dealings between near relations applies. This rule is familiar learning,—well settled,—and need not be here discussed or any of the abundant authorities cited.

The referee further intimates an opinion that as the "claim is made under oath and contains an itemized statement of the consideration of the debt the objection should also be under oath, and should definitely state the grounds of objection, in order that the claimant may know just what proof he will be called upon to make." Objections to a claim should be specific, but, the burden being upon claimant, he must first prove his claim, and cannot require an oath to support objections. Such objections may be legal, and are expressly allowed in the statute, section 57d [U. S. Comp. Stat. 1901, p. 3443]. No layman and few attorneys would be willing to make oath to a legal objection or proposition. Though confident of the soundness of their opinion, all would hesitate to support it under oath. Lawyers differ,—the courts must decide; and, under our judicial system, it frequently happens that several courts are called upon to decide a question before the law is settled and the attorney satisfied, if they ever are satisfied. True, the claim at bar is under oath, but on its face there appears to be valid objections to its being allowed as a claim against the estate. For instance, the two items of cash loaned in 1897, and interest thereon, not being evidenced by bond under seal, are barred by the statute of limitations. If it be said or claimed the subsequent credits stopped the running of the statute, these items were barred at the date of the next credit. This is not what is termed a running account, but each item as presented is a separate and distinct transaction, and neither is effected by the other,—each is independent. This objection, if sustained, would reduce the claim \$1,538.30, leaving a claim of only \$753.05.

It is the duty of the trustee to plead the statute of limitations, especially when required by creditors whom he represents, and the schedul-

ing of a claim barred by the statute does not make it a provable claim. There is some apparent conflict of authority on this question, but this arises from the difference in the state laws. In this jurisdiction the statute is an absolute bar. These items in the claim cannot be proved or allowed if the facts are as understood.

The cause is remanded, that further proof may be heard in accordance with the foregoing suggestions.

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In re BAILL.

(District Court, D. Vermont. November 28, 1902.)

**1. BANKRUPTCY—JURISDICTION OF BANKRUPTCY COURTS—INJUNCTION—RESTRAINING SALE UNDER BANKRUPT'S MORTGAGES.**

Bankr. Act 1898, § 2, cl. 7 [U. S. Comp. St. 1901, p. 3421], conferring on the courts of bankruptcy the power to cause estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as otherwise provided, which exception is by section 23 of suits at law [U. S. Comp. St. 1901, p. 3431], as distinguished from proceedings in bankruptcy, authorizes a bankruptcy court to enjoin, pending the bankruptcy proceedings, the sale of a stock of merchandise by a mortgagee under mortgages executed by the bankrupt more than four months before his bankruptcy, where the value of the stock greatly exceeds the amount of the mortgages, and where, though conceding their validity, their effect in covering old and new goods may be questioned.

**In Bankruptcy.**

Porter & Thompson, for creditors and trustee.

Cook & Norton, for petitioner.

WHEELER, District Judge. This cause has been heard upon a petition of creditors for an injunction against the sale by Josephine Lee of a stock of hardware goods in a store occupied by the bankrupt, on mortgages more than four months old, pending the appointment of a trustee, on which a temporary stay was granted pending the motion. The value of the stock greatly exceeds the amount of the mortgages. The validity of these mortgages is not denied, but their effect and extent in covering old and new goods may come in question. This brings them well within the jurisdiction of the court of bankruptcy, as provided in section 2, cl. 7 [U. S. Comp. St. 1901, p. 3421], to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The exception is by section 23 of suits at law [U. S. Comp. St. 1901, p. 3431], "as distinguished from proceedings in bankruptcy." *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. This stock of goods is a part of the estate to be administered by the trustee, upon which the petitioner has only a lien, which, to its lawful extent, is to be respected and adjusted in the proceedings. A sale by her upon the mortgages, as threatened, would defeat this right, and confessedly waste the estate and wrong the general creditors, while in administration by the trustee her claims will be saved to her, by being left

to rest upon the proceeds. The injunction should therefore be continued pending the administration, which will leave the goods for the trustee, as a part of the estate, to be proceeded with under direction of the referee.

A motion is made for a direction for delivery to the trustee, but that is not deemed necessary, for it is not to be presumed or expected that the petitionee or any one will attempt to stand in the way of the trustee in taking possession of any of the estate.

Stay continued pending the proceedings.

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In re JONES et al.

(District Court, D. South Carolina. November 8, 1902.)

**I. BANKRUPTCY—PARTNERSHIP—LIENS—PREFERENCE.**

Under Bankr. Act 1898, § 3a, subd. 2 [U. S. Comp. St. 1901, p. 3422], declaring it to be an act of bankruptcy for a person to transfer, while insolvent, any portion of his property to a creditor with intent to make a preference, section 60a [U. S. Comp. St. 1901, p. 3445], providing that the person shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property which will enable a creditor to obtain a greater percentage of his debt than other creditors of the same class, and section 67e [U. S. Comp. St. 1901, p. 3449], declaring that conveyances or incumbrances of property made by a person adjudged bankrupt within four months thereof shall be void if made with the intent to hinder, delay, or defraud other creditors,—a mortgage, given by an insolvent firm, within four months of bankruptcy proceedings against it, to secure a past indebtedness, and which conveys all the firm property, is void as giving to the creditor a preference.

**In Bankruptcy.**

N. W. Hardin and Haynesworth, Parker & Patterson, for Pollock. Hall & Willis, for trustee.

BRAWLEY, District Judge. This case is before me on exceptions of A. H. Pollock to the report of the referee disallowing a chattel mortgage of two thousand (\$2,000) dollars against the bankrupt estate.

Jones and Duff were partners engaged in a general mercantile business in the town of Blacksburg, S. C. They were also dealers in cotton in a small way. The business was conducted by Duff; Jones, the partner who furnished most of the capital, living in the country, and not giving much personal attention to it. The testimony shows that Duff bought 26 bales of cotton from A. H. Pollock in February, of the value of one thousand and forty (\$1,040) dollars, the purchase being for cash, but the same was not paid, Pollock not pressing for the money and receiving no security, as he considered Jones & Duff perfectly safe. In April, Duff informed Pollock that he had the money to pay him for the cotton, but that he needed some money and wanted to borrow two thousand (\$2,000) dollars, and Pollock loaned him nine hundred and sixty (\$960) dollars, which, with the amount then due for the cotton, made the sum of two thousand (\$2,000) dol-

lars, and on April 19th Jones & Duff gave Pollock four notes, each for the sum of five hundred (\$500) dollars, payable, respectively, June 25, 1902, July 25, 1902, September 25, 1902, and October 25, 1902. These notes were all made by Duff in the name of the firm, and Jones had no knowledge of them. On May 28, 1902, Jones & Duff gave Pollock a note, of which the following is a copy:

"\$2000.00.

Blacksburg, S. C., May 28, 1902.

"On or before June 25, 1902, for value received, we promise to pay A. H. Pollock \$500.00; on July 25, 1902, \$500.00; on Sept. 25, 1902, \$500.00; on Oct. 25, 1902, \$500.00, or order \$2000.00, as aforesaid, with interest from date at eight per cent. per annum payable annually until paid in full. After maturity interest to become part of the principal. And should this note be placed in the hands of an attorney for collection we agree to pay ten per cent. attorney's fee.

"Witness our hands and seals.

Jones and Duff. [L. S.]

"J. W. Duff."

To secure this note a chattel mortgage was executed on the same day by Duff, in the name of Jones & Duff, with a seal attached, conveying to A. H. Pollock all the stock of dry goods, groceries, etc., in the storehouse described, and all that might be added thereto, a bay horse and a one-horse wagon, also all open accounts that appeared on the books of Jones & Duff, and all notes, liens, and mortgages payable to said Jones & Duff, a list of which was attached. Duff died suddenly on July 14th, and on the same day this chattel mortgage was recorded. On July 22d the firm of Jones & Duff and J. D. Jones were adjudicated bankrupts on the petition of Jones, the surviving partner, and the estate has been administered in this court. The debts proved amount to something over twelve thousand (\$12,000) dollars. The stock of goods covered by the mortgage has been sold and brought three thousand five hundred and eighty-eight (\$3,588) dollars, and other assets about two hundred (\$200) dollars. There are open accounts outstanding of the face value of between two and three thousand dollars. A list of the notes, liens, and other securities was turned over to Pollock, but no claim is made by him on that account. There is a life insurance policy of Duff of twenty-five hundred (\$2,500) dollars, which is claimed to be a part of the bankrupt estate, but nothing has yet been collected thereon. There seems no doubt, therefore, that the firm of Jones & Duff is insolvent, and was insolvent at the time of the execution of the chattel mortgage, but there is no ground to believe that Pollock knew that the firm was insolvent, and he claims payment of the amount due him out of the estate in the hands of the trustee. The other creditors, who are mainly merchandise creditors, resist the payment on several grounds. The first is that one partner could not bind the copartnership by a sealed instrument. The second is that one partner could not, without the consent of his copartner, mortgage the goods of the copartnership. It is clear from the testimony that Jones, the surviving partner, did not know or ratify the acts of his partner, Duff, in the giving of the notes or the execution of the chattel mortgage.

These questions have been fully and ably argued, but I do not consider it necessary to decide them, for, in my opinion, the mortgage is void under the bankrupt law. The sections of the bankrupt act of

July 1, 1898 [U. S. Comp. St. 1901, p. 3418], that relate to the point under consideration, are section 3a, subd. 2 [U. S. Comp. St. 1901, p. 3422], wherein it is declared to be an act of bankruptcy for a person to "transfer, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors"; section 60a [U. S. Comp. St. 1901, p. 3445] which provides that the "person shall be deemed to have given a preference if, being insolvent, he has \* \* \* made a transfer of any of his property, and the effect of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class"; and section 67e [U. S. Comp. St. 1901, p. 3449] which provides that "all conveyances, transfers, assignments or incumbrances of his property, or any part thereof made or given by the person adjudged a bankrupt, under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor."

If the mortgage had been given at the time the cotton was bought or the money loaned, it would have been protected under subdivision d of section 67 [U. S. Comp. St. 1901, p. 3449], which provides that "liens given or accepted in good faith and for a present consideration should not be affected by the act." But such is not the fact. When Pollock accepted the notes on April 19, 1902, without security, he became simply a creditor standing on the same plane with other creditors who had sold merchandise or loaned money to Jones & Duff. So when Duff in the name of Jones & Duff gave him the mortgage of that date, whereby all of the visible property of every nature and kind belonging to the firm of Jones & Duff was conveyed to Pollock, I cannot see how there can be any other conclusion than that the transaction was void because it enabled one of his creditors to obtain a greater percentage of his debt than any other of the same class. For it seems clear that at that time the firm of Jones & Duff was insolvent. Within less than two months from that date it was adjudicated bankrupt. The intent to prefer is to be assumed because it is the necessary consequence of the act, and the transfer to one creditor of all of the assets of the firm, without making any provision for its equal distribution, operates necessarily as a preference to the creditor, and must be taken as conclusive evidence that the preference was intended. Duff being dead, there is now no means of ascertaining whether he was, at the time of this transfer, conscious of the insolvency of the firm, but the fact being that within less than two months the firm was adjudicated bankrupt upon the petition of the surviving partner, and the assets having proved to be entirely insufficient to pay the debts of the firm, there seems to be no other conclusion than that it was insolvent at the date of the transfer, and it can make no difference that Pollock was ignorant of the fact, although his conduct in failing to put the mortgage on record until after Duff's death is a suspicious circumstance. There are certain expressions in the opinion of the court

in *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, cited by the court of appeals of this circuit in *McNair v. McIntyre*, 7 Am. Bankr. R. 638, 113 Fed. 113,—that “although a creditor may have received the preference within four months of the adjudication of bankruptcy, he may retain it if he did not have cause to believe it was intended as a preference, or with knowledge of his insolvency,”—which counsel for the petitioner rely upon to sustain their contention that this mortgage should be sustained by reason of the fact that the creditor was ignorant of the insolvency of the debtor at the time the transfer was made; but it seems to me that a careful consideration of these cases and of the law makes it impossible to uphold this mortgage. To do so would be in violation of the whole spirit and intent of the bankrupt law, which is designed to provide for an equal distribution among creditors of the estates of bankrupts.

I therefore sustain the referee in holding that the mortgage is void, but there seems to be no reason why he should not be allowed to prove his claim against the bankrupt estate, and to receive a dividend thereon equally with other creditors of the same class.

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In re CONRADER.

(District Court, W. D. Pennsylvania. July 15, 1902.)

No. 1,279.

1. BANKRUPTCY—PARTNERSHIP CREDITORS—RIGHT TO SHARE IN INDIVIDUAL ESTATE.

Partnership creditors are entitled to share ratably with individual creditors in the individual assets of a bankrupt, where the partnership became insolvent and its assets were exhausted prior to the bankruptcy, and before the individual debts were contracted.

In Bankruptcy. On question certified by referee.

J. R. Brotherton, Geo. A. Allen, and L. Rosenzweig, for Kate A. Conrader and others.

John S. Rilling and Henry A. Fish, for Bert Young.

BUFFINGTON, District Judge. W. A. Jenkins and Charles A. Conrader, partners doing business as Jenkins & Conrader, contracted prior to September, 1895, the firm debts here involved. In that month the entire property of the partnership was sold at sheriff's sale, and the firm and both members thereof became insolvent. Subsequently Jenkins left the state, has since remained away, and there is no proof that he is other than insolvent. Meanwhile Conrader entered the hotel business, incurred debts aggregating \$987.36, and on December 10, 1900, was adjudged bankrupt. From the sale of Conrader's individual property the fund in controversy, \$1,201, was realized. The referee awarded it pro rata to firm and individual creditors. On request of the latter, he certified the question now before us, viz.:

“Whether Mehl & Sapper and other creditors of the late firm of Jenkins & Conrader, of which firm Charles A. Conrader, the bankrupt, was a mem-

ber, are entitled to take pro rata with the individual creditors of said bankrupt in the distribution of the funds in the hands of the trustee, derived from the sale of the personal property of bankrupt; there being no assets for the payment of partnership debts."

Where firm and individual assets are for distribution, the bankrupt law (section 5, cl. "f") defines the order, viz.:

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts."

—And as to the surplus, enacts:

"Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus should be added to the assets of the individual partners in proportion to their respective interests in the partnership."

This statutory provision merely expresses the general rule governing the equitable distribution of such funds. In many cases it has been held that such rule only applies where both partnership and individual estates are before the court for distribution. While the decisions are not uniform in that regard, yet in this circuit the rulings under the act of 1867 (and the provisions of the present law are substantially the same) recognize the sufficiency of the exception stated to avoid the rule. In *Re Lloyd* (D. C.) 22 Fed. 89, it was held by Judge Acheson, in the district court, that "the rule that the joint estate must be applied to pay the joint debts, and the separate estate to pay the separate debts, is only applicable where the joint estate, as well as the separate estate, is before the court for distribution." This was but a restatement of what was held by Mr. Justice Strong, of the supreme court, sitting at circuit with Judge McKennan, in the case of *U. S. v. Lewis*, Fed. Cas. No. 15,595. In the present case the insolvency of both partners, and the fact that no firm assets exist, or, indeed, have existed since the individual indebtedness of Conrader was contracted, bring the case within the exception. Apart from the constraining force of these decisions, we see no reason why, under the facts of this case, the partnership debts should not participate in this fund. Personal liability for them arose when they were incurred. Exhaustion of the firm's assets made this personal liability and the property of the individual partners the sole source to which recourse could be had for payment. Under these conditions, and with this individual liability of Conrader impending, the complaining creditors chose to grant him further credit. Such being the case, there is no equitable reason why the individual liability then resting on Conrader to pay these pre-existing firm debts should be postponed in enjoyment or affected in realization because thereafter he created other and purely individual ones.

The question submitted is answered in the affirmative.



## RAPHAEL v. TRASK et al.

(Circuit Court, S. D. New York. October 28, 1902.)

## 1. EQUITY—LEAVE TO AMEND BILL—EFFECT OF PRIOR ADJUDICATION.

An order made by a federal court dismissing a bill against the members of a partnership on the ground that some of the partners were citizens of the same state as complainant necessarily determined that such defendants were necessary parties, and so long as it remains unreversed complainant will not be granted leave to amend by striking out their names, so that the suit may proceed against the remaining defendants.

In Equity. On motion of complainant for leave to amend bill and for leave to file supplemental bill.

Charles L. Easton, for complainant.

Edward M. Shepard, for defendants.

COXE, Circuit Judge. The firm of Spencer Trask & Co. is, and during all the time in controversy was, composed of five members, three of them being citizens of the state of New York and two of them being citizens of the state of New Jersey, of which state the complainant is also a citizen. The original bill was filed against all of the members of the firm. The defendants thereafter filed a plea to the jurisdiction alleging the above facts. After full consideration the plea was sustained by Judge Thomas, who directed that an order be entered dismissing the bill. The complainant now asks to amend the bill by dropping the defendants who are citizens of New Jersey so that the suit may proceed against the three remaining defendants who are citizens of New York. If the court be convinced that, as the law is now declared, the amended bill cannot be maintained it should say so in limine without putting the parties to the expense and delay of a hearing upon a plea to the amended bill. The decision upon the plea established the following propositions:

First. That the facts whether as stated in the original bill or in the proposed amended bill cannot be regarded as constituting a cause of action ancillary to the foreclosure action pending in Utah, and that upon the facts, which are unquestioned, it is impossible so to consider it.

Second. That all of the members of the firm of Spencer Trask & Co. are interested in the fund which complainant seeks to impound, and are necessary parties to the determination of the questions involved.

If the court had been of the opinion that the action could have proceeded without the New Jersey defendants it would not have ordered the dismissal of the bill. The present motions cannot be granted without ignoring the law as thus stated. If the complainant be dissatisfied with the present status of the law his remedy is by appeal and not by presenting the old facts with new inferences and conclusions based thereon.

The motions are denied.

## In re BLALOCK.

(District Court, D. South Carolina. November 8, 1902.)

## 1. BANKRUPTS—DISCHARGE—GROUNDS FOR DENIAL.

Bankr. Act, § 14 [U. S. Comp. St. 1901, p. 3427], provides, as a ground for refusing to discharge a bankrupt, that he has "committed an offense punishable by imprisonment as herein provided." Section 29, subd. b (2) [U. S. Comp. St. 1901, p. 3433], provides for punishment by imprisonment if one "has made a false oath or account in, or relation to, any proceeding in bankruptcy." *Held*, that the making of a false oath by a bankrupt in a proceeding in bankruptcy, not against him, but against the corporation of which he was an officer and stockholder, was not ground for refusing his discharge.

## 2. SAME—SPECIFICATION IN OPPOSITION TO DISCHARGE—SUFFICIENCY.

The specification in opposition to the discharge of a bankrupt, for making a false oath, should aver that it was done "knowingly and fraudulently"; those words being used in Bankr. Act, §§ 14, 29 [U. S. Comp. St. 1901, pp. 3427, 3433], which, taken together, make that a ground for refusing a discharge.

## 3. SAME—FAILURE TO SCHEDULE ASSETS—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* not to warrant the court in refusing to discharge a bankrupt on the ground that at the time of his petition he was in the possession of certain funds which he had failed to schedule as part of his assets.

## 4. SAME—FRAUD.

Evidence examined, and *held* insufficient to show that a bankrupt "knowingly and fraudulently" omitted to schedule as a part of his assets his beneficial interest in certain policies of insurance, and therefore the omission was not ground for refusing his discharge.

## 5. SAME—INCORRECT ENTRY OF ASSETS.

The fact that a bankrupt in his schedule showed that he had a one-half interest in certain land, whereas he only held a life interest therein, was not ground for refusing his discharge, where he testified that he did not know exactly what his interest was.

## 6. SAME—SPECIFICATION IN OPPOSITION TO DISCHARGE—SUFFICIENCY.

A specification in opposition to the discharge of a bankrupt, which recites that he "has neglected to keep books and accounts showing his financial condition, \* \* \* hence the true status of his affairs cannot be ascertained," states no offense within Bankr. Act, § 14 [U. S. Comp. St. 1901, p. 3427], which provides as one of the grounds for refusing the discharge that the bankrupt has, "with fraudulent intent to conceal his true financial condition, \* \* \* destroyed, concealed, or failed to keep books of account."

## 7. SAME—GROUNDS FOR REFUSING DISCHARGE.

Omission of creditors from the schedule of a bankrupt is not ground for refusing his discharge.

## 8. SAME—SPECIFICATION IN OPPOSITION TO DISCHARGE—INDEFINITENESS.

A specification in opposition to the discharge of a bankrupt, which recited that he made "various contradictory statements" in a certain other bankruptcy case, naming it, "and also the case herein, and that he gave unsatisfactory and indefinite accounts of the proceeds of his crop for the year 1901, and reference is hereby craved to testimony taken in both of said cases," is bad for indefiniteness.

Ed. Johnstone, for bankrupt.  
N. B. Dial, for creditors.

**BRAWLEY, District Judge.** Certain creditors of L. W. C. Blalock have filed specifications in opposition to his discharge. The first specification is in the words following:

"That heretofore, during the year 1902, the said L. W. C. Blalock, bankrupt, swore in the United States court at Charleston, S. C., before his honor, Judge W. H. Brawley, in proceedings in bankruptcy, relating to the Goldville Manufacturing Company, that he, the said Blalock, owned, in addition to other property, lots in the city of Newberry, and another tract of land in the edge of Laurens county, which was unincumbered, and that no such property appears in his list of assets filed in bankruptcy proceedings by himself."

It appears that, in testimony taken before me in a case wherein certain petitioners sought to have the Goldville Manufacturing Company adjudicated a bankrupt in involuntary proceedings, L. W. C. Blalock, an officer and a large stockholder in said company, was a witness, and certain claims being presented against said company, which denied its insolvency, were contested by the attorneys for the corporation on the ground that they were not debts of the corporation, but were debts of L. W. C. Blalock and J. S. Blalock, who, as partners, had been conducting business under the name of the Goldville Manufacturing Company, before the corporation was organized, and it was pertinent to that inquiry whether said L. W. C. Blalock and J. S. Blalock were solvent; for, if so, the claims which were primarily obligations of the said Blalocks should not be considered in determining the amount of indebtedness of the corporation, and it was upon that inquiry that the alleged false oath was made. Subsequent to that date L. W. C. Blalock filed his petition in bankruptcy, and the schedule of his assets did not include any lands in the city of Newberry, and it now appears that he owned no such lands. He did at one time own some property there, but it had been sold prior to the time when he was examined. The question for decision is whether the making of the oath in those proceedings, assuming it to be false, is a ground for refusing a discharge. One of the grounds enumerated in section 14 [U. S. Comp. St. 1901, p. 3427] for a refusal of a discharge of the applicant is that he has "committed an offense punishable by imprisonment, as herein provided." Section 29 [U. S. Comp. St. 1901, p. 3433] enumerates the offenses punishable by imprisonment, and subdivision b (2) provides for the punishment by imprisonment if one has "made a false oath or account in, or in relation to, any proceeding in bankruptcy." The ground of objection to a discharge under this specification is not that the bankrupt has concealed assets which should have been enumerated in the schedule, for it appears to be conceded that he did not own the property described, and the simple question is whether a false oath made in another proceeding furnishes ground for a refusal to discharge. I am of opinion that it does not. It is true that the proceeding in which the alleged false oath was made was a proceeding in bankruptcy, but it was not a proceeding in this case. It was held in *Re Marx*, 4 Am. Bankr. R., 522, 102 Fed. 676, that the "false oath" as a ground for refusal of a discharge could not be predicated upon an examination of the bankrupt, under section 7 [U. S. Comp. St. 1901, p. 3425], prior to the specifications in opposition to discharge

being filed, inasmuch as that section in terms provided "that no testimony given by him shall be offered in evidence against him in any criminal proceedings," and therefore that was not an offense punishable by imprisonment, as specified in section 14 [U. S. Comp. St. 1901, p. 3427]. And the same ruling was made in *Re Logan*, reported in the same volume. The present case does not require any opinion as to these rulings, but it seems to me clear that it was not the intent of the statute to make any misconduct prior to his adjudication in bankruptcy a ground for refusal to discharge. The "proceeding in bankruptcy" therein referred to must be limited to some proceedings in the case of bankruptcy now before the court. The specification is defective in failing to charge that the offense specified was committed "knowingly and fraudulently," and, while it may not be necessary to require specifications in opposition to discharge to be framed as strictly as is required in a criminal indictment, yet when the statute in its terms defines what shall be ground for refusal, and uses the words "knowingly and fraudulently" in describing the offense, the specifications should have followed the words of the statute.

The second specification is in the words following:

"That in proceedings in this case before R. H. Welch, Esq., referee, the said Blalock testified that he leased his plantation in Laurens county, in said state, for the year 1902, and that he hypothecated a contract for said rent with G. W. Childs as collateral, and had drawn money from time to time, some of which was at least collected since he filed his petition in bankruptcy in this case, and that he did not schedule either the contract or proceeds thereof."

The bankrupt has been examined before me on this specification, and testified that he did "hypothecate his contract for rent, as charged," but he testifies that at the time when his petition was filed he had spent the money received from Childs, and that he had borrowed other money from his sister to pay his expenses, and that he did not have any money at that time belonging to his estate, and at the time of the examination before the referee he had only \$6, the greater part of which he had to pay out for his hotel bill. The proof under this specification is insufficient to justify me in withholding the discharge on the ground that he was in possession of funds at the time he filed his petition which he failed to put in his schedule.

The third specification is that "he failed to make a true inventory of his assets, in that it appears that he has an interest in a large number of policies held upon his father's life, and no such assets appear upon his schedules." The testimony shows that his father, J. S. Blalock, had insured his life for the benefit of L. W. C. Blalock, the bankrupt, and his sister, and that the bankrupt arranged to keep these policies alive by borrowing their paid-up value, and also by borrowing some money from his sister to pay the premiums as they fell due. Unquestionably they should have been included in his schedule of assets, but the bankrupt's attorney, Mr. Johnstone, stated upon the hearing that the bankrupt had referred to these policies of insurance when he was about to prepare his petition in bankruptcy, and that he was of the impression that the policies of insurance need not be scheduled as part of the bankrupt's estate. He further stated that, being under

engagements at that time which prevented his personal attention to the preparation of the schedules, he requested his partner to prepare the schedules, and the bankrupt testified that the subject of these policies was mentioned to Mr. Johnstone's partner, and, as the interest of the bankrupt therein seemed to be of little or no value, they were omitted. I am of opinion that the proof is not sufficient to show that these policies were "knowingly and fraudulently" omitted from the schedule. The trustee in bankruptcy should be directed to take such steps as may be necessary to obtain for the bankrupt's estate whatever of value there is in these policies to which the bankrupt is entitled, be it much or little.

The fourth specification is that "upon the schedules which he filed in the case he shows that he had one-half interest in certain lands aggregating something like six hundred acres, whereas he only held a life interest therein." There does not appear to be anything in this specification to justify the withholding of the discharge. The bankrupt has testified that he did not know exactly what his interest was in these lands. As they are enumerated in his schedule, the estate will have the benefit of his interest, whatever it may be.

The fifth specification is in these words: "That the said Blalock has neglected to keep books and accounts showing his financial condition, both before and since the filing of his application to be adjudged a bankrupt in this cause; hence the true status of his affairs cannot be ascertained." The neglect to keep books and accounts showing his financial condition is not a ground for refusal to discharge, and the specification does not charge properly any offense under the bankrupt law. One of the grounds for refusal to discharge under section 14 [U. S. Comp. St. 1901, p. 3427] is that the bankrupt, "with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or record from which his true condition might be ascertained." The specification charges no offense, and therefore requires no consideration.

The sixth specification is that "in the first schedule filed by said Blalock he omitted the names of a large number of creditors, and that after he was examined he filed a second schedule, adding thereto the names of a large number of merchants, including Johnstone, Crews & Co., C. Wulbern & Co., and others." It appears from the statement made by one of the counsel for the bankrupt upon the hearing that there was a question as to whether the creditors referred to were the creditors of Blalock personally, or of the Goldville Manufacturing Company, and that after the schedule was filed by the bankrupt he thought proper to amend the schedule by enumerating the parties named as creditors of the bankrupt. The ground for refusal to discharge under the present bankrupt law are limited in number. They specify what shall be the causes for such refusal, and the omission of creditors from the schedule is not enumerated as one of the grounds. There is nothing of substance in this specification.

The seventh specification is "that said Blalock made various contradictory statements in the Goldville Manufacturing Company's case, and also the case herein, and that he gave unsatisfactory and in-

definite accounts of the proceeds of his crop for the year 1901, and reference is hereby craved to testimony taken in both of said cases." This is a vague and unsatisfactory specification. If the objectors wish to charge that the bankrupt has concealed his assets, they should have done so in precise terms. The court is required to discharge the bankrupt unless there is clear and convincing proof of the commission or omission of some act which the law prescribes as a ground for withholding discharge.

Upon the whole case, I am not satisfied that there is any good ground under the law for refusing a discharge, and it will be granted.

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### HUNTINGTON v. CITY OF NEW YORK et al.

(Circuit Court, S. D. New York. August 28, 1902.)

#### 1. PRELIMINARY INJUNCTION—SUFFICIENCY OF SHOWING—QUESTION OF JURISDICTION.

While the question of jurisdiction will not be summarily disposed of by a federal court on a motion for a preliminary injunction, yet the burden rests on complainant on such a motion to satisfy the court that there is at least a reasonable probability of ultimate success on the question of jurisdiction as well as upon the merits.

#### 2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—AGENCIES OF STATE.

Trespasses on the property rights of an individual, committed by public officers or agents professedly acting under authority of a state law, but which are not only not authorized by such law, but by a fair construction of it are prohibited, cannot be imputed to the state so as to bring them within the constitutional inhibition to deprive persons of property without due process of law, and on that ground to confer jurisdiction on a federal court to grant relief.

#### 3. SAME—UNAUTHORIZED ACTS OF STATE OR MUNICIPAL OFFICERS.

The New York rapid transit act provides that the general plan of railroad lines to be constructed thereunder, which, with a statement of the route or routes, is to be submitted for the approval of the local authorities and of the abutting owners or of the state court, shall show not only the general mode of operation, but also "such details as to the manner of construction as may be necessary to show the extent to which any street, avenue, or other public place is to be encroached upon, and the property abutting thereon affected," and that, once approved, no change shall be made in the plans without the further consent and approval of the same authorities. *Held*, that the action of the rapid transit commissioners in locating a tunnel within 7 feet of the building line on one side of an avenue, and entirely outside the limits of the location shown by the general plan which was approved, and the drawings attached, which required the tunnel to be placed under the center of the avenue, and showed its exterior walls 37½ feet distant from the lot line, was without authority of law, and could not be considered an act of the state for the purpose of conferring upon a federal court jurisdiction to grant a preliminary injunction against the construction of such tunnel on the ground that it deprived an abutting property owner, who was a citizen of the state, of property without due process of law.

In Equity. On motion for preliminary injunction.

Arthur H. Masten and Maxwell Evarts, for the motion.  
Edward M. Shepard and DeLancey Nicoll, opposed.

LACOMBE, Circuit Judge. This suit is brought to enjoin the defendants from proceeding with the construction of the so-called "Rapid Transit Railroad" in front of complainant's premises on Park avenue, southeast corner of Thirty-Eighth street, "until such time as the city shall have obtained the fee in said avenue"; and, in the event of the city's obtaining such fee, then from constructing such railroad otherwise than in accordance with the route and general plan heretofore approved by the local authorities and by the state court, undertaking under the statute to give consent in lieu of the consent of abutting owners.

The rapid transit act (chapter 4, Laws N. Y. 1891, as amended Laws N. Y. 1895, c. 519) provides that the general plan, which, with a statement of the route or routes, is to be submitted for approval, shall show not only the general mode of operation, but also "such details as to the manner of construction as may be necessary to show the extent to which any street, avenue, or other public place is to be encroached upon, and the property abutting thereon affected." Once approved, no change is to be made in the plans without the further consent and authorization of the local authorities and of the abutting owners, or, in lieu thereof, of the state court.

The complainant's brief thus epitomizes the "route and general plan," which was duly approved, and under which alone, under the statute, the commissioners have authority to construct:

"They provided that the proposed railroad should consist of four parallel tracks, and should run under Park avenue; that, with certain exceptions not now material, the tracks should in all cases be placed in tunnels, and that the said tracks, wherever passing over or under the street, should be placed over or under the central part of the street; that under Park avenue the width of the tunnel should be fifty feet, with a permissible width of sixty-five feet; that the roof of the tunnel should be as near to the surface of the street as street conditions and grades would permit. Certain drawings, known as 'Drawings 1-60,' illustrative of said 'details of construction,' were incorporated into the said general plan as a part thereof. According to the drawings so adopted, it appeared that under Park avenue at the point in question there was to be a single tunnel containing four tracks, that the center line of the said tunnel was to be under the center line of Park avenue, and that the extreme width of excavation required was to be 65 feet or thereabouts, thus bringing the exterior surface of the easterly wall of such tunnel to about 37 feet 6 inches from the building line of the houses on the east side of Park avenue."

Inspection of the record shows that below the existing tunnel of the existing street railroad there were to be three tunnels, the central one holding two tracks, and the eastern and western tunnels one track each. They were to be located centrally, and within the space of 65 feet, above indicated. The general plan further provided as follows:

"The route should include suitable tracks and connections from the portion of the route near the corner of Park avenue and Forty-Second street to the yard and tracks of the Grand Central Station. All of the tracks and connections last mentioned shall be under Park avenue and Forty-Second street and private property to be acquired. \* \* \* The tracks wherever passing over or under the street shall be placed over or under the central part of the street, except that no tunnel or viaduct, or any wall or part thereof, under or along a street, shall, except at the stations, station approaches, curves, and at places of access to subsurface structures, as hereinafter provided, be within a distance of five feet of the exterior line or side

of the street. \* \* \* Adjacent tracks shall be connected by necessary and suitable switches and connections, and an additional track for siding accommodation may be constructed, not to exceed in length one-quarter of a mile for each mile of roadway; but provided always that the side of the tunnel shall not, by the enlargement of the tunnel for that purpose, be brought within five feet of the exterior line or side of the street."

The work now being prosecuted at the place in question consists of two tunnels beneath the existing street railroad tunnel. The westerly tunnel is substantially in accord with the general plan as to encroachment upon the avenue and effect upon abutting property. Its westerly line is but 5 feet west of the westerly line shown in the drawing. The easterly tunnel is wholly outside of the 65 foot central strip there shown. Its westerly line lies east of the easterly line of the original strip, and its easterly line is about 7 feet from the building line of the houses on the east side of Park avenue. It encroaches on Park avenue to an extent not shown in the "details as to manner of construction," which the statute provided should be shown to local authorities and to property owners, and the court in advance of adoption. That it affects abutting property to an extent greater than was shown is conclusively established by the collapse of the front walls of buildings nearly adjoining complainant's.

All parties are citizens of New York, and the complainant contends that this court has jurisdiction because—

"The board of rapid transit commissioners has been clothed with authority by the rapid transit act to build a subway, and that, acting under such authority and in the course of constructing the tunnel, it is depriving her of property without due process of law, in contravention of the fourteenth amendment, which provides that no state 'shall deprive any person of life, liberty, or property, without due process of law.'"

The illegal acts complained of are stated to be:

"(1) By constructing a railroad under a street, the fee in which is owned by complainant; and (2) \* \* \* by constructing a railroad in accordance with an unauthorized route and general plan of construction, and thus wrongfully depriving the complainant of her easements as an abutting property owner, and usurping her consent to this unauthorized mode of construction."

It is quite correctly contended by complainant that the question of jurisdiction will not be summarily disposed of here. It is properly to be presented by a plea, and thus decided under conditions which will permit of its review on appeal. Nevertheless, upon a motion for preliminary injunction, the burden is upon the complainant to satisfy the court that there is at least a reasonable probability of ultimate success upon the question of jurisdiction as well as upon the merits of the controversy.

As to the ownership of the fee of Park avenue at the place in question, complainant's contention is based upon the proposition that the city never acquired the fee, because a proceeding duly instituted to open the avenue was never completed by entry of final order. The question thus presented need not be discussed, because, upon the papers now before the court, it is not shown that complainant owns the fee, and, that being so, it is immaterial who does own it. Long after the lines of Park avenue were established on the city map, long



after proceedings to open it were instituted and apparently terminated, long after it had been regulated, graded, and paved and used for years as a public thoroughfare, the complainant bought her property at the corner of Thirty-Eighth street. The deed conveyed to her two lots, Nos. 63 and 65 Park avenue, described as bounded upon the west by "the easterly line of Park (or Fourth) avenue," and running 80 feet in depth along Thirty-Eighth street, easterly from said line. Upon her rights as abutting owner only can the complainant rely to press this application.

It is understood that no complaint is made or relief asked for against the centrally located triple tunnel of the general plan as affecting her rights. If it were, the long delay in applying would preclude the granting of preliminary injunctive relief.

The substantial questions here presented are as to the extent of abutting owner's rights or easements, how far they are property within the meaning of the constitution, to what extent they are affected, and, if invaded, what is the appropriate remedy. These points have been exhaustively discussed by both sides, but they are not to be considered unless the court is reasonably satisfied that the alleged interference with complainant's rights is an interference by the state. The inhibition of the fourteenth amendment is against action by a state depriving an individual of his property. The amendment is to be liberally construed. It is not to be confined to a legislative act specifically appropriating the property of A. or B. to some public use. A state acts by agents, and the inhibition runs against all who are in fact such agents, acting within the scope of an authority conferred upon them by the state. In *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, it is said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'"

A final judgment of a state court construing a state statute so as to make it, although apparently innocuous, actually an interference with property rights, has been held to be the act of a state. So, too, a state law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid law may so act under it as to work an illegal trespass upon the rights of individuals. *Reagan v. Trust Co.*, 154 U. S. 390, 14 Sup. Ct. 1047, 38 L. Ed. 1014. But in all such cases—and many have been cited in argument—the officers have acted under authority actually conferred upon them by the statute, there has been some measure of discretion confided to them, and they have abused such discretion.

Now, in the case at bar, the first question to be considered is whether the state, through its legislature, has given or undertaken

to give authority to the rapid transit commissioners to construct this eastern tunnel, which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing. It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be "due process of law," all to be carried on to a conclusion which should determine upon a route and general plan sufficiently detailed to show the "extent to which any avenue is to be encroached upon and the property abutting thereon affected." Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit.

If this court were persuaded to assent to the contention of defendants that this easterly tunnel is within the description in the approved route and general plan, as a mere "connection" or "siding" or what not, then it would take jurisdiction, because the action of commissioners, engineer, and contractors being in conformity to the general plan, which the legislature had provided for and sanctioned, would be action by persons acting under state authority, and thus constituted agents of the state to contravene the provisions of the constitutional amendment. But a different conclusion has been reached. It seems unnecessary to discuss this branch of the case at length, for the reason that the precise point has been considered in a decision handed down this week in a similar cause pending in the state court. This court entirely concurs in the reasoning and in the conclusion most tersely and forcibly expressed in the following excerpt from the opinion in *Barney v. Board*, 77 N. Y. Supp. 1085:

"These necessary details the 'routes and general plan' undertook to show for the advisement of all persons interested, and in order that intelligent action might be taken by them to conserve their best interests in the subsequent proceedings for the confirmation and approval of the plan. Taking the words used in the 'routes and general plan' with the plans or drawings to which they referred, no person could be expected to apprehend that the fixed position of the tunnel, as under the central portion of the street, was subject to such a change as would bring it for about ten blocks to a point thirty feet nearer the building or house line than was indicated, merely because 'suitable connections' were to be made near Forty-Second street. A civil engineer might have found that something was omitted, or that there was a variance between the plan, which showed the means of making connections, and the specifications, which mentioned the proposed connections; but a layman, for whose advisement the 'routes and general plan' had been prepared under the statute, could properly assume that, in some way best known to engineering science, these 'suitable connections' were to be made from a tunnel under the middle of the street. Certainly he could rely upon the general proposition that the scientific construction of a railway, with the necessary curves for the approach toward a given point, does not depend upon guesswork or chance; and I think, therefore, that no reasonable interpretation of the 'routes and general plan' would afford room for justifying the extraordinary change in the position of the tunnel, as constructed, from the line described in the lawfully approved plan of construction as to

this particular locality. \* \* \* The work of building the tunnel at the point in question is prosecuted without legal authority."

The complainant, therefore, has failed to persuade this court that there is reasonable probability that she will be able upon the trial to show that the state of New York, by any of its instrumentalities or agents, has deprived, or is threatening to deprive, her of her easements as an abutting property owner; and for that reason, without examining into the extent of such easements, her application for preliminary injunction is denied.

The stay in this case is vacated, and the filing of this opinion shall be sufficient evidence of such vacation.

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COFFIN v. PHILADELPHIA, W. & B. R. CO.

(Circuit Court, S. D. New York. October 11, 1902.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—AMOUNT IN CONTROVERSY.

An action for personal injuries commenced in a state court by service of summons, and removed by defendant before the filing of a complaint, will not be remanded because the complaint subsequently filed prays for damages in less than the jurisdictional amount.

On Motion to Remand to State Court.

John J. Crawford, for the motion.  
Robinson, Biddle & Ward, opposed.

LACOMBE, Circuit Judge. This action was begun in the state court by service of summons without complaint on September 3, 1902. On September 19th defendant removed the cause to this court, its petition averring that the matter in dispute was in excess of \$2,000. The complaint has since been served. It sets out a cause of action against defendant for personal injuries resulting from a collision, and asks damages to the amount of \$2,000. Under similar circumstances it was held in *Zinkeisen v. Hufschmidt*, Fed. Cas. No. 18,214, that a motion to remand should be denied. It would seem, however, that such a ruling deprives the plaintiff of his undoubted right to elect for what amount of damages he will sue. If he is content to ask for a measure of relief so small that the federal courts cannot take jurisdiction, in order to keep the cause in the state court, there is no good reason why he should not do so. In this circuit, with its overcrowded calendars, the removal of controversies which can be tried in the state courts is a practice to be discouraged.

Motion denied.

## HUME v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 18, 1902.)

No. 1,109.

## 1. APPEAL—WRIT OF ERROR—SCOPE OF REVIEW.

In cases coming to the circuit court of appeals on writ of error, only questions of law are to be examined.

## 2. POST OFFICE—FRAUDULENT USE OF MAIL—INDICTMENT.

Rev. St. U. S. § 5480 [U. S. Comp. St. 1901, p. 3696], makes it an offense for any person to place any letter in a post office in furtherance of any scheme to defraud. An indictment under the statute charged that S., acting for himself and "in conjunction with H.," placed a letter, etc. *Held*, that a contention that the indictment did not charge H. with any participation was of no merit.

## 3. SAME—SETTING OUT LETTERS.

An indictment under the statute, charging a scheme to defraud, and the mailing of letters in furtherance thereof, is sufficient, though the letters are not set out.

## 4. SAME—ALLEGATION AS TO MAILING.

An indictment under the statute alleged the deposit of certain letters in a post office. Such allegation was not followed by any averment that the letters were deposited to be sent, but, after a further allegation as to the deposit of other letters, it was averred, "all of which said above-mentioned letters" were so deposited for the purpose of being carried and delivered through the mail. *Held*, that the words "all of which said above-mentioned letters" included all of the letters which had been previously mentioned in the indictment.

## 5. SAME—DATE OF OFFENSE—ALLEGATIONS.

An indictment under the statute alleged that defendants on the 30th of September, 1896, having "theretofore fraudulently devised" a scheme to defraud, and then averred the scheme and the deposit of letters, and gave the dates of deposit as prior to September 30, 1896. Defendant contended that the indictment was insufficient, in that it showed the letters were mailed prior to the fraudulent scheme. *Held* of no merit, since the indictment did not charge anything done on September 30th, but that the scheme was formed theretofore.

## 6. SAME—ALLEGATIONS OF TIME—EFFECT.

The date of an alleged offense as stated in an indictment is not binding on the United States, and is only material in reference to the bar of limitation, and to show that the offense was committed anterior to the presentment of the indictment.

## 7. SAME—DEFECT OF FORM.

Rev. St. U. S. § 1025 [U. S. Comp. St. 1901, p. 720], provides that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. *Held*, that an indictment is not to be deemed insufficient, though not entirely grammatical, where it contains a substantial accusation of crime, and its averments furnish the accused with such a description of the charge against him as would enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause.

## 8. SAME—PRINCIPALS IN OFFENSE.

Rev. St. U. S. § 5480 [U. S. Comp. St. 1901, p. 3696], makes it an offense for any person to place any letter in a post office in furtherance of any scheme to defraud. *Held*, that if the offense, under the statute, be a

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¶ 2. Use of mails in furtherance of fraud or counterfeiting, see note to *Timmons v. U. S.*, 30 C. C. A. 86.

¶ 6. See Indictment and Information, vol. 27, Cent. Dig. § 548.

felony, so as to render the doctrine of principal and accessory applicable, one who performs a part of the scheme, or who is a party to the scheme or plan, is a principal, though he is not present when the letters are mailed.

Pardee, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Texas.

Omitting the caption and indorsements, the indictment is as follows:

"The grand jurors of the United States, within and for the district aforesaid, at Dallas, in said district, duly selected, impaneled, sworn, and charged to inquire into, and true presentment make of, all crimes and offenses cognizable under the authority of the United States, committed within said Northern district of Texas, upon their oaths present in open court that on September 30th, 1896, in Limestone county, Texas, in the Northern district of Texas, and within the jurisdiction of this court, L. J. Guynes, D. J. Taylor, A. Effron, Jake Effron, W. J. Hume, George E. Tirney, and H. D. Markham, having theretofore unlawfully, knowingly, and fraudulently devised a scheme and artifice to defraud Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and various other persons whose names are to the grand jurors aforesaid unknown, which said scheme and artifice to defraud was to be carried on and affected by the use and means of the post-office establishment of the United States of America, and which said use and misuse of the post-office establishment of the United States was then and there a part of said scheme to defraud, and which said scheme and artifice to defraud was to be effected as aforesaid by opening communication as aforesaid by and through the post-office establishment of the United States, and by inciting said Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and various other persons unknown to the grand jury, to open communication with them through said post-office establishment, and which said scheme and artifice to defraud as aforesaid was to be carried out by the said L. J. Guynes, A. Effron, D. J. Taylor, Jake Effron, W. J. Hume, George E. Tirney, and H. D. Markham, doing and pretending to be doing business and buying and selling cotton under their names individually, and which said scheme to defraud, to be effected, aforesaid, consisted in, and was, in substance, as follows, to wit: The said L. J. Guynes, A. Effron, Jake Effron, D. J. Taylor, and H. D. Markham were to pretend to be in a legitimate business of buying and selling cotton, and shipping the same to foreign countries, at and from Mexia, Limestone county, Texas, and from New Orleans, Louisiana; that they were to contract and engage with Reinhard Strauss, Wilhelm Holoch, and C. F. Meith, and other persons to the grand jurors unknown, to purchase from them, or sell on commission for them, such cotton as might be shipped by the said L. J. Guynes, A. Effron, Jake Effron, D. J. Taylor, and H. D. Markham, to the said Reinhard Strauss, Wilhelm Holoch, and C. F. Meith, and that said Reinhard Strauss and Wilhelm Holoch and C. F. Meith were to pay drafts drawn on them and their bankers, or either of them, or the bankers of either of them, or the banker of either of them, for such amounts as might be indicated in said draft or drafts drawn against cotton so to be shipped by said L. J. Guynes, A. Effron, Jake Effron, D. J. Taylor, and H. D. Markham, from Mexia, Texas, or New Orleans, Louisiana, with bills of lading attached; the said draft or drafts so drawn to properly be for the amount that such shipment of cotton was to bring, according to the quality and price of said cotton; that, when said agreement and arrangement should be made between the parties named, that they, L. J. Guynes, A. Effron, Jake Effron, D. J. Taylor, and H. D. Markham, should buy from the said George E. Tirney and W. J. Hume cotton of a very inferior and cheap grade, commonly known as 'linters,' and the said George E. Tirney and William J. Hume, under the name of Tirney, Hume & Co., were to furnish said linters for the purpose of shipping same to the said Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and to the other persons unknown to the grand jury, and, when so shipped, bills of lading were to be made out, and drafts drawn against said linters, indicating cotton of a higher and better grade

and price than the said linters, and the drafts being drawn for amounts indicating such shipments of said linters to be a grade of cotton much higher and better than said linters, and which said drafts were to be guarantied and cashed by the aforesaid Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and other persons to the grand jurors unknown; said Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and other persons to the grand jurors unknown, believing that such drafts and bills of lading were true, and were in fact for cotton of a higher and better grade than linters, and the said Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and other persons to the grand jurors unknown, thus actually paying for cotton of a higher and better grade than linters, and of a higher and better price than linters, when, in fact and truth, only cotton of a very inferior grade and lower price, commonly known as 'linters,' were actually and in reality shipped, and thus drawn against, as above stated, thus defrauding and with the intent to defraud the said Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and other persons to the grand jurors unknown, of the difference between the price and value of the higher and better grade of cotton and higher and better-priced cotton so indicated by said drafts drawn and bills of lading attached, and the low grade of cotton commonly known as 'linters,' which was actually shipped; and in furtherance of said artifice and scheme to defraud, to be so effected as above alleged, the said L. J. Guynes, acting for himself, and in conjunction with the said A. Effron, Jake Effron, D. J. Taylor, H. D. Markham, George E. Tirney, and William J. Hume, as aforesaid, in pursuance of such schemes and artifice to defraud, did on April 6th, 1896, wrongfully and unlawfully deposit in a certain post office of the United States, to wit, the post office at Mexia, Limestone county, Texas, in the Northern district of Texas, a certain letter addressed to Mr. William Holoch, Chemnitz, Germany, which letter was in words and figures and letters as follows, to wit:

"L. J. Guynes, Cotton Buyer.

"Mexia, Texas, April 6th, 1896.

"Mr. Wilhelm Holoch, Chemnitz—Dear Sir: I should like to introduce my shipments of cotton in your markets, and take the liberty of addressing you on this subject. I have never done any export business direct, but am, nevertheless, thoroughly familiar with it, and feel hopeful that after a few trial shipments I shall work up a good business. For any information concerning me, I beg to refer you to my bankers, Messrs. Prendergast, Smith & Co., of this place, who have known me all my life. Should you desire it, however, I would be willing to secure you with ample margin against claims until you acquaint yourselves, through mutual transactions, with my abilities and manner of business. I ask for no large business at once,—as mentioned before, to work up a good trade is my aim. Our cottons are slightly, and of good staple, and, no doubt, will please you. Awaiting your early reply and pleasure in the premises, I beg to remain,

"Yours very truly,

L. J. Guynes."

"And the said L. J. Guynes, acting as aforesaid in pursuance of such scheme and artifice to defraud as aforesaid, did, acting for himself and in conjunction with A. Effron, Jake Effron, D. J. Taylor, H. D. Markham, George E. Tirney, and William J. Hume, on June 26, 1896, wrongfully and unlawfully deposit in a certain post office of the United States, to wit, the post office at Mexia, Limestone county, Texas, in the said Northern district of Texas, a certain letter addressed to C. F. Meith, Leipzig, Germany, which said letter was in words and figures and letters as follows, to-wit:

"L. J. Guynes, Cotton Buyer.

"Mexia, Texas, June 26th, 1901.

"Mr. C. F. Meith, Leipzig—Dear Sir: Your esteemed favor of the 6th reached me in due course, and have given contents my careful attention. Acting on your kind suggestion, I tried to arrange with Messrs. Prendergast, Smith & Co. to guaranty the out-turn of my shipments to you, but regret my efforts were in vain. They assure me that it is contrary to their rules,

and that, while they feel they would be safe in guarantying my shipments, yet they don't care to make such a precedent, and hence I see no other way of securing you than proposed in my last letter; i. e., either I will deduct from each invoice, or remit in a bank draft, \$3.00 or \$4.00 per bale, which shall remain in your hands until shipments are approved, when you will refund same to me. As stated in my last letter, I have not lost sight of the fact that I am entirely unknown in your market, and it is precisely for that reason that I am offering security which I consider equally as good as a bank guaranty. I now beg to confirm that all offers and sales shall be based upon the Bremen classification and arbitration; also that all offers shall be in force for twenty-four hours and understood even running grades, good color, and staple. When a staple of 28 m/m and 28/30 m/m can be guaranteed, it shall be mentioned in the cables. Shipments by direct steamers to Hamburg and Bremen, buyer's option against port; bills of lading from Galveston or New Orleans, my option. Prices in pence cif and 6 per cent., if the buyers wish to insure you are authorized to sell at 1/32d. less. Insurance, if covered by me, to be with a good company, and to include 10 per cent. imaginary profit, country damage and until warehoused in Europe. Reimbursement at 90 d./s. on English or German bankers, if the latter in M20.40 per £1; Shepperdson's Code 1881 to be used in cabling, and I await your private code and the list of spinners and bankers. I understand that your commission is 1½ per cent. of the net amount of the invoice. Please advise if I am to remit same with each invoice or monthly. As to your inquiry concerning Lewis Bros., of Ennis, I beg to state that they had a business here, but they failed some time during last fall. I understand that the senior of that firm died about two months ago, and the other still resides in Ennis. If I can, in any way, serve you, please command me. Crop prospects are very good, though rain will soon be needed. Awaiting your further favors, and hoping to do a profitable business together, I remain,

"Yours very truly,

L. J. Guynes.

"My cable address is 'Guynes.'

"P. S. Will advise you in due time the name of my controller of weight and sampling at Bremen and Hamburg."

"And the same L. J. Guynes, A. Effron, Jake Effron, D. H. Taylor, H. D. Markham, George E. Tirney, and William J. Hume did thereafter, in Limestone county, Texas, and at the post office of the United States in said city of Mexia, deposit and cause to be deposited in the said post office, at other dates too numerous for the grand jurors to here mention and set out, a large number of other letters, drafts, bills of lading, circulars, and other documents, all of which are too numerous, lengthy, and unfit to be inserted in this instrument, and too voluminous to be herein copied, and the said L. J. Guynes, A. Effron, Jake Effron, D. J. Taylor, H. D. Markham, George E. Tirney, and William J. Hume, acting as aforesaid, in pursuance of said scheme and artifice to defraud, to be so effected and carried out by means of the post-office establishment of the United States, did, at other places and other post offices of the United States, to the grand jurors unknown, deposit various other circulars, letters, drafts, and bills of lading, directed to said Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and other persons to the grand jurors unknown, all of which said above-mentioned letters, drafts and bills of lading so deposited in the post office of the United States were so deposited for the purpose of being carried and delivered through the mail to the said Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and other persons to the grand jurors unknown; and the said L. J. Guynes, A. Effron, Jake Effron, D. J. Taylor, H. D. Markham, George E. Tirney, and William J. Hume did, in pursuance of and in accordance with said scheme and artifice to defraud, so carried on as above alleged, actually defraud and swindle of a large amount of money, to wit, the sum of fifty thousand dollars, Reinhard Strauss and Wilhelm Holoch and C. F. Meith, the particular amount of which each was defrauded and swindled by the said L. J. Guynes, A. Effron, Jake Effron, D. J. Taylor, H. D. Markham, George E. Tirney, and William J. Hume is to the grand jurors unknown; all of which aforesaid scheme and artifice to defraud was with the intent on the part of said L. J. Guynes, A. Effron, Jake Effron, D. J. Taylor, H.

D. Markham, George E. Tirney, and William J. Hume to defraud the said Reinhard Strauss and Wilhelm Holoch and C. F. Meith, and other persons to the grand jurors unknown, and such scheme and artifice to defraud to be so carried on as above alleged was in fact and reality actually carried out by the aforesaid means to the extent that said Reinhard Strauss and Wilhelm Holoch and C. F. Meith were defrauded and swindled of a large amount of money, to wit, the sum of fifty thousand dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The defendants L. J. Guynes and William J. Hume were arraigned and pleaded "Not guilty." The jury found them both "guilty as charged in the indictment." Judgment was entered on the verdict, a motion in arrest of judgment being overruled, and each of the two defendants were sentenced to pay a fine of \$500 and costs, and each to imprisonment for one year and one day at hard labor.

Exceptions were reserved to a part of the charge of the court. The plaintiff in error, W. J. Hume, sued out this writ of error, and filed in the court below an assignment of errors as follows: "(1) The court erred in instructing the jury, as set forth in bill of exceptions, that if the jury found from the evidence that the defendants mailed the letters and unmailable matter as charged in the indictment at the United States post office at Mexia, Texas, then they would find the defendants guilty, because the evidence failed to show that the defendant Hume was present and participated in the act charged in the indictment, and in law was not liable for the acts of his codefendants in improperly using the United States mails, as charged in the indictment, in that the defendant Hume was not present or participated in the mailing of the said letters, and there was no charge of conspiracy in the indictment. (2) The court erred in overruling the motion in arrest of judgment upon the part of defendant W. J. Hume, because said indictment failed to allege that said defendant Hume did unlawfully and wrongfully deposit in the post office of the United States at Mexia, Texas, two certain letters set out in said indictment, and because said indictment failed to describe any letter, draft, or bill of lading, or other document, alleged to have been placed in the mail by said Hume, and because said indictment set forth and charged the defendant Hume with the commission and offense of placing in the United States post offices certain packets and letters, and packets in other places other than the Northern district of Texas, and beyond the jurisdiction of this court, a quo, and for other reasons set forth in said motion in arrest of judgment." In the brief filed here, an additional assignment of errors is made, as follows: "(3) That said indictment fails to charge the plaintiff in error with any offense under said statute. (4) That said court erred in charging the jury as follows: 'The testimony shows the residence of the defendant W. J. Hume to have been in New Orleans. He was not present at Mexia at the time the letters in evidence were deposited in the post office of the United States at that point. However, if he was a party to the scheme or artifice to defraud, at the time of its inception, if such there was, he would be as guilty as one who, with guilty knowledge of the scheme or artifice to defraud, might have placed with his own hands letters in the post office of the United States in furtherance thereof. If he was ignorant of the scheme or artifice to defraud, and had no part in devising or assisting in it at the time of its inception, and you should so find, it would be your duty to acquit him.' (5) That said court erred in refusing to instruct the jury 'that the evidence failed to show that the defendant Hume was present or participated in the act charged in the indictment against his co-defendants, and, in the law, was not liable for the acts of his co-defendants in improperly using the United States mails as charged in the indictment.'"

J. D. Rouse and William Grant, for plaintiff in error.  
William H. Atwell, U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.



SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

In this, as in every case coming to this court on writ of error, we are only to examine questions of law. The evidence is not brought here to be reviewed. We must assume, therefore, that the evidence was sufficient to substantiate the charges in the indictment that the plaintiff in error, with others, fraudulently devised the scheme to defraud, and that this scheme was to be carried on and effected by the use and means of the post-office establishment of the United States, and that the scheme was carried out with the intention and purposes as charged. So far, therefore, as the moral element is concerned, it must be taken in this court that the guilt of the plaintiff in error was established. The record and assignment of errors raise three questions to be decided: (1) Is the indictment fatally defective because it fails to charge W. J. Hume with the commission of any offense? (2) Is the indictment fatally defective because the dates therein stated are repugnant and contradictory? (3) Did the court err in instructing the jury as stated in the bill of exceptions? If any one of these questions is answered in the affirmative, it would be our duty to reverse the judgment; but if they are all properly answered in the negative, and the trial court has not erred, it is equally our duty to affirm the judgment.

1. Section 5480 of the United States Revised Statutes, as amended by the act of March 2, 1889 (25 Stat. 873 [U. S. Comp. St. 1901, p. 3696]), so far as it is applicable to this case, is as follows:

"If any person, having devised or intended to devise any scheme or artifice to defraud \* \* \* to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the postoffice establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or caused to be placed any letter \* \* \* in any postoffice \* \* \* of the United States, to be sent or delivered by the said postoffice establishment, \* \* \* such person so misusing the postoffice establishment shall, upon conviction, be punishable by a fine of not more than \$500 and by imprisonment for not more than 18 months, or by both," etc.

The indictment is found under this statute. The scheme to defraud is well averred, and then it is alleged that L. J. Guynes, acting for himself, and in conjunction with A. Effron and others, including the plaintiff in error, in pursuance of such scheme and artifice to defraud, did on April 6, 1896, wrongfully and unlawfully deposit in a certain post office of the United States, to wit, the post office at Mexia, Limestone county, Tex., in the Northern district of Texas, a certain letter, the address and contents of which are given. A like charge is made as to another letter deposited in the same post office on June 26, 1896. It is contended that as the indictment charges that L. J. Guynes, in depositing the letters, was "acting for himself," it charges no offense against Hume. The indictment, of course, must be construed as a whole. It had already been alleged that Hume participated in the scheme or artifice to defraud, and that the depositing of the letters was in pursuance of this scheme. And the in-

dictment goes further than to say that Guynes was acting for himself. It adds, "and in conjunction with A. Effron and \* \* \* W. J. Hume." It is urged by counsel that it is "difficult to determine" just what is meant. But we must take it that the word "conjunction" was used with its ordinary meaning,—“the state of being conjoined, united, or associated”; “union, association, league.” Webst. Dict. Placing that meaning on the word, it seems clear that the grand jury charged that Guynes, in posting the letters, was acting for himself, in union with the other defendants who concocted the scheme to defraud. But had we concluded otherwise, by another paragraph in the indictment the defect would have been obviated, for it is charged that the defendants, including W. J. Hume, “did deposit and cause to be deposited” in the same post office, in pursuance of the same scheme and artifice to defraud, a large number of other letters, drafts, bills of lading, circulars, and other documents, which are not copied or described. While it would have been better pleading to have given the contents of these letters, also, the omission does not constitute a fatal defect. *Durland v. U. S.*, 161 U. S. 306, 315, 16 Sup. Ct. 508, 40 L. Ed. 709. A conviction could be properly predicated on this charge as to letters not embodied, which of itself makes the indictment good, so far as this point is concerned. It is also claimed that the indictment is fatally defective because it does not aver that the letters were “so deposited to be sent or delivered by the said post-office establishment.” It is true that neither this averment nor its equivalent immediately follows the allegation of the posting of the letters that are set out in the indictment; but after averring the depositing of other drafts, letters, bills of lading, etc., we find the words “all of which said above-mentioned letters, drafts and bills of lading so deposited in the post office of the United States were so deposited for the purpose of being carried and delivered through the mail.” This averment is not overlooked by the distinguished counsel for the plaintiff in error, but it is contended that “the grammar requires it to be restricted to the letters enumerated in the same sentence.” We think the words “all of which said above-mentioned letters” were intended to include and do include all of the letters which had been previously mentioned in the indictment. But if it be conceded that punctuation and grammatical construction would confine the reference to the letters last above mentioned, it must be held that an indictment may be ungrammatical, and yet good as matter of law.

2. It is contended that the indictment charges that the scheme or artifice to defraud was devised September 30, 1896, and that it also avers that the letters which are set out were deposited, respectively, on April 6, 1896, and June 26, 1896, and that their deposit, therefore, could not have been in furtherance of the scheme devised in the following September. The contention is that the dates as given in the indictment cause a repugnancy that is fatal to it; that the deposit of the letters could not have been pursuant to a scheme to defraud which was concocted after the letters were posted. This contention, we think, is not sustained by the language of the indictment. It charges that on the 30th day of September, 1896, L. J. Guynes and others, including W. J. Hume, “having theretofore un-

lawfully, knowingly, and fraudulently devised a scheme and artifice to defraud," etc. Then the indictment proceeds to describe the scheme, and aver the posting of the letters, and in alleging the depositing of the letters the other dates are given. It will be observed that it is not averred that anything was done on the 30th day of September, 1896. That date is given, followed by the expression that the defendants named in the indictment "theretofore unlawfully, knowingly," etc. The charge, therefore, is that the things averred were done before the 30th day of September, "theretofore" meaning "before then." It was probable the pleader, in inserting this first date at the place where, in the forms of indictment which are usual in the federal courts, dates are inserted, intended at first to allege it as the date of the posting of the letters, and then to make the averment that theretofore, or before the time the letters were posted, the scheme to defraud was formed. But later, when the posting of the letters is described, the actual dates are given on which they were posted. The indictment certainly does not aver that the scheme was concocted on the 30th day of September, 1896. If that date can be made to relate to the formation of the scheme, it is followed by an averment that it was theretofore devised; that is, devised before that date. However this may be, it is a well-settled rule of criminal practice that the date of an alleged offense, as stated in an indictment, is not binding on the United States, and is only material in reference to the bar of limitation, and to show that the offense was committed anterior to the presentment of the indictment. It is the practice to name in the indictment a date on which the offense was committed, "but, in the absence of a special reason rendering it important, this allegation is mere form, and the time proved need not be the same as laid." 1 Bish. New Cr. Proc. § 386. The supreme court has recently said that the "date named in an indictment for the commission of the crime of murder is not an essential averment. Proof that the crime was committed days before or days after the date named is no variance." *Hardy v. U. S.* (Oct. term, 1901) 22 Sup. Ct. 889. As the averment of time need not be proved as laid, it is clearly matter of form. *U. S. v. Jackson* (C. C.) 2 Fed. 502; *Crass v. State*, 30 Tex. App. 480, 17 S. W. 1096. It appears from the record that the indictment in this case was filed in court on January 13, 1899. Whether it be construed as averring that the offense was committed in September or in April of 1896 is immaterial. Both dates were before the finding of the indictment. The government would be permitted to prove that the offense was committed on any day within the statute of limitations prior to that on which the indictment is found. It is true that the indictment is subject to criticism. It is not entirely grammatical, and its statements are not clear and orderly. It could be abbreviated and made clearer. But its defects are all matter of form. It contains a substantial accusation of crime, and its averments furnish the accused with such a description of the charge against him as would enable him to make his defense, and avail himself of his conviction or acquittal for protection against further prosecution for the same cause. From it the court can determine that the facts alleged are such that they are sufficient in law to sup-

port a conviction. We find no defect in it that would tend to prejudice the defendant. By the words of the statute, no indictment shall be deemed "insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." Rev. St. U. S. § 1025 [U. S. Comp. St. 1901, p. 720]. The court should see to it that the whole proceeding is such as to do justice to the defendant; that the charge against him is sufficient, and his trial fair. But no one should be permitted to escape the just penalties of the law upon nice questions of parsing or grammatical construction, or upon questions involving "matter of form, only, that do not prejudice the defendant."

3. On the following excerpts from the bill of exceptions two of the assignments of error are based:

"After the United States of America had introduced evidence tending to prove that the defendants Effron and Guynes had deposited nonmailable matter in the United States post office at Mexia, Texas, at or about the time laid in the indictment, and that the defendant Hume had never been at the town of Mexia, Texas, and had not with his own hands deposited any such nonmailable matter in the United States post office at said place, but that the evidence tended to show that the defendant Hume, at and during the mailing of said nonmailable letters and mail matter by his codefendants at Mexia, Texas, was in the city of New Orleans, where he resided, and was not present at the time of mailing of said nonmailable matter at Mexia, \* \* \* the court, of its own motion, and in its general charge, instructed the jury upon the law, as it related to the defendant W. J. Hume, as follows: 'The testimony shows the residence of the defendant W. J. Hume to have been in New Orleans. He was not present at Mexia at the time the letters in evidence were deposited in the post office of the United States at that point. However, if he was a party to the scheme or artifice to defraud at the time of its inception, if such there was, he would be as guilty as one who, with guilty knowledge of the scheme or artifice to defraud, might have placed with his own hands letters in the post office of the United States in furtherance thereof. If he was ignorant of the scheme or artifice to defraud, and had no part in devising or assisting in it at the time of its inception, and you should so find, it would be your duty to acquit him.' Whereupon, before the retirement of the jury, the defendant Hume, by counsel, excepted to the charge of the court as stated above, on the ground that the evidence failed to show that the defendant Hume was present and participated in the act charged in the indictment against his codefendants, and, in the law, was not liable for the acts of his codefendants in improperly using the United States mails as charged in the indictment; and the defendant Hume, by counsel, moved the court to instruct the jury to that effect, which the court refused to do."

The objection to this instruction, and the request by which it is followed, are based on the theory that the defendant Hume could not be convicted as a principal in the offense charged; he being absent and in Louisiana when the letters were posted in Texas. The contention must have been that Hume, if connected with the crime, could not be a principal, but would be an accessory before the fact. This contention, we think, cannot prevail. If the offense charged in the indictment is a misdemeanor, all who aid and abet or participate in its commission are principals, and are to be indicted and prosecuted as such; the doctrine of principal and accessory being applicable only to felonies. *U. S. v. Gooding*, 12 Wheat. 475, 6 L. Ed. 693; *U. S. v. Mills*, 7 Pet. 137, 8 L. Ed. 636; 1 Bish. New Cr. Law,

§ 656. A crime may be "infamous," within the meaning of the fifth amendment of the constitution, and yet not be a felony. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. There is no general definition in the federal statutes separating and defining felonies and misdemeanors. When a statute, therefore, creates an offense, and does not define it to be either a felony or a misdemeanor, we must look at the common law to determine which it is; and, although the old tests are obsolete, an offense is held to be a felony which was such when those tests were operative. But usually where a statute creates a noncapital offense, not declaring it to be a felony, it will be deemed a misdemeanor. 1 Bish. New Cr. Law, § 616. In the absence of a legislative determination of the grade of the offense by the statute creating it, and of a general statute defining felonies, it has been said by the supreme court "that the word is used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender." *Bannon v. U. S.*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; 1 Bish. New Cr. Law, §§ 615, 616. But if the offense were a felony to which the doctrine of principal and accessory was applicable, the result, we think, would be the same. As all the evidence has not been preserved, we must assume that it was proved that the plaintiff in error, with others named, did devise the scheme and artifice described in the indictment in which Hume was to perform, and did perform, a certain part,—that is, to furnish linters for the purpose of shipping the same, —and, when so shipped, bills of lading were to be made out, and drafts drawn against the linters, indicating cotton of a higher and better grade, and that by this means the scheme was to be carried, and was carried, into effect. *Durland v. U. S.*, 161 U. S. 306, 312, 16 Sup. Ct. 508, 40 L. Ed. 709. Now, assuming, as we must, that it had been proved that Hume performed his part as alleged in carrying out this scheme, it was not necessary, to make him a principal in the crime,—assuming it to be a felony,—that he should have been present in the Northern district of Texas when Guynes posted the letters, for, "where several acts constitute together one crime, if each is separately performed by a different individual in the absence of the rest, all are principals as to the whole." 1 Bish. New Cr. Law, § 650. Again, there is nothing in the bill of exceptions to show that it was not proved, as charged, that W. J. Hume caused the letters to be deposited in the post office pursuant to the scheme to defraud, or that they were not deposited by Guynes, in conjunction or association with Hume, pursuant to the fraudulent scheme. The objection is based solely on the unsound theory that Hume's personal presence at the time the letters were posted was necessary, to make him guilty. If he caused the letters to be deposited, or if they were posted pursuant to a scheme to which he was a party, he is properly convicted, although he was not present when the letters were posted.

The record not disclosing any error, the judgment of the district court must be affirmed.

PARDEE, Circuit Judge, dissents.

## NEALL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 27, 1902.)

No. 773.

1. CRIMINAL OFFENSE BY ARMY OFFICER—JURISDICTION OF CIVIL COURTS—  
FORGERY.

A district court has jurisdiction to indict and try a person charged with having forged an obligation of the United States with intent to defraud, which is made an offense against the United States by Rev. St. § 5414 [U. S. Comp. St. 1901, p. 3662], although he was at the time an officer of the army, and the alleged offense was committed at a military post, and with intent to defraud an enlisted soldier, where the accused has since been discharged from the army without any action against him having been taken by the military authorities; there being no provision, either constitutional or statutory, conferring exclusive jurisdiction on courts-martial to punish such offense.

## 2. FORGERY—SUFFICIENCY OF INDICTMENT—DUPLICITY.

An indictment under Rev. St. § 5414 [U. S. Comp. St. 1901, p. 3662], for the forgery of an obligation of the United States with intent to defraud, is not bad for duplicity because it charges in a single count an intent to defraud both the United States and a soldier in the army, where the instrument charged to have been forged purported to be a certificate of deposit issued by the United States to the soldier; it being impossible in such case to aver or prove with certainty a specific intent to defraud either one rather than the other, the law will impute to the act an intent to defraud all who might have been thereby defrauded.

## 3. SAME—DESCRIPTION OF OFFENSE.

An indictment for forging a certificate of deposit purporting to have been issued on behalf of the United States to an enlisted soldier, by signing thereto the name of a person described as an officer and deputy paymaster general, with intent to defraud the depositor named therein, need not aver that the person whose name was signed was in fact the officer he was represented to be in the instrument.

## 4. SAME—OBLIGATION OF UNITED STATES—CERTIFICATE OF DEPOSIT.

A certificate issued by an army paymaster to an enlisted man, acknowledging the receipt of money deposited under the provisions of Rev. St. § 1305 [U. S. Comp. St. 1901, p. 925], is a certificate of deposit, and "an obligation or security of the United States," as defined in Rev. St. § 5413 [U. S. Comp. St. p. 3662], the forgery of which is made a criminal offense by the following section.

## 5. SAME—PROOF OF HANDWRITING—OPINION OF EXPERT.

In a prosecution for forgery a witness who qualifies as a handwriting expert, and who testifies that he has examined a sufficient number of specimens of defendant's handwriting to enable him to so testify, may properly be permitted to state his opinion that the signature alleged to have been forged was written by defendant.

## 6. SAME—QUALIFICATION OF WITNESS TO STATE OPINION.

A knowledge of the handwriting of a defendant charged with forgery, by a witness who is not an expert, does not qualify him to state his opinion whether or not the forged signature, made in imitation of the handwriting of another, was written by defendant.

In Error to the District Court of the United States for the Northern District of California.

The plaintiff in error was convicted of forgery upon an indictment under section 5414 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3662]. The indictment charged as follows:

"That J. M. Neall, late of the Northern district of California, heretofore,

to wit, on the 10th day of June, in the year of our Lord one thousand eight hundred and ninety-eight, at the city and county of San Francisco, in the state and Northern district of California, then and there being, then and there had in his possession a certain obligation of the United States, to wit, a certain certificate of deposit dated, Presidio of S. F., Cal., June 10th, 1898, for the sum of four hundred and sixty dollars, in favor of John Cranson, who was then and there a private in Company B, 4th regiment, United States Army, duly enlisted as such, the tenor of which said certificate of deposit is as follows, to wit:

"'Presidio S. F. Cal., June 10th, 1898.

"\$460.00/100. Received this day of Private John Cranson, Co. "B," 4 Reg't U. S. Army, for deposit under secs. 1305 and 1306, R. S., four hundred and sixty dollars.

"'Lt. Col. and Deputy Paymaster Genl. U. S. A.

"'Attest: J. M. Neall, 1st Lieut. 4 Cavy. Commanding Company.'

"And that the said J. M. Neall, so having the said obligation of the United States in his possession as aforesaid, on the said tenth day of June, in the year one thousand eight hundred and ninety-eight, at the city and county of San Francisco, and within the jurisdiction of this honorable court then and there being, with intent to defraud the United States and the said John Cranson in the said obligation mentioned, did then and there unlawfully, knowingly, and feloniously falsely forge upon the face of the said certificate of deposit and obligation of the United States, in the place indicated for the signature of the Lt. Col. and Deputy Paymaster Genl. U. S. A., a certain material indorsement and signature, of the tenor following, to wit, 'F. M. Coxe,' whereby the said J. M. Neall, in manner and form aforesaid, with intent to defraud, feloniously did falsely forge an obligation of the said United States, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided."

To this indictment the plaintiff in error demurred. The demurrer was overruled, and the plaintiff in error thereupon pleaded not guilty, upon which plea he was tried before a jury, and was convicted and sentenced to two years' imprisonment in the penitentiary.

Crittenden Thornton, for plaintiff in error.

Marshall B. Woodworth, U. S. Atty., and Edward J. Banning, Asst. U. S. Atty., for defendant in error.

E. H. Crowder, Judge Advocate U. S. Army, amicus curiæ.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff in error assigns as error the ruling of the district court upon the objections to the indictment which were the grounds of his demurrer, and earnestly contends that the court had no jurisdiction of the offense charged in the indictment, for the reason that it appears on the face thereof that the plaintiff in error was, at the time when he was alleged to have committed the offense, an officer of the United States army, at a military post of the United States, and is charged with having committed an offense against an enlisted soldier of the army, and that, therefore, he was amenable only to a court-martial under the provisions of the articles of war, section 1342 of the Revised Statutes [U. S. Comp. St. 1901, p. 944]. We have given this contention the careful consideration to which its importance entitles it. The section of the Revised Statutes, 5414 [U. S. Comp. St. 1901, p. 3662], under which the indictment is found, refers in terms to "every person

who with intent to defraud falsely makes, forges, counterfeits, or alters an obligation or security of the United States." The provision is comprehensive in its scope, and it includes as well an officer of the army of the United States as all other persons within the jurisdiction of the United States, unless he is exempted from its operation by some provision of the constitution or some other statute. It is not contended that any statute in express terms gives exclusive jurisdiction to a court-martial of the offense which is charged against the plaintiff in error, but it is urged that such is the meaning and purport of the constitution and the articles of war. Reference is made to the fifth amendment, which declares the general rule that no person shall be held to answer for a capital or otherwise infamous crime unless on the presentment of a grand jury shall not apply "in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger": and to article 1, § 8, of the constitution, which confers upon congress power to declare war, to raise and support armies, and to make rules for the government and regulation of the land and naval forces; and to the sixtieth article of war (section 1342, Rev. St. [U. S. Comp. St. 1901, p. 944]), which enacts that forgery committed by any person in the military service of the United States is an offense triable and punishable by court-martial with fine and imprisonment, and further provides that any one guilty of any of the offenses enumerated in the articles of war while in the military service of the United States, and subsequently dismissed, shall continue to be liable to be arrested and held for trial and sentence in the same manner and to the same extent as if he had not received such discharge. The plaintiff in error cites and relies upon, also, *U. S. v. Bevans*, 3 Wheat. 336, 4 L. Ed. 404, *U. S. v. Mackenzie*, 26 Fed. Cas. 1118 (No. 15,690), and *U. S. v. Mackenzie*, 30 Fed. Cas. 1160 (No. 18,313), as sustaining the view that it is the purpose of the constitution and the statutes to confer upon courts-martial the exclusive jurisdiction of such a case as this.

In the case first cited Marshall, chief justice, discussed the question whether a crime committed by a marine in the service of the United States on board a ship of war belonging to the United States lying at anchor in Boston Harbor could be tried for that offense in the circuit court of the United States for the district of Massachusetts. The conclusion which was reached was that under the eighth section of the act of April 30, 1790, providing for the punishment of certain crimes against the United States, no jurisdiction was given to the federal court of the offense charged, for the reason that the act gives such courts cognizance only of certain offenses on the high seas, or in any river, haven, basin, or bay "out of the jurisdiction of any particular state," and that the offense, having been committed in the Boston Harbor, was not out of the jurisdiction of Massachusetts, and therefore not within the jurisdiction of the federal court. It was held in that case, moreover, that the provision of the constitution extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" did not, of itself, confer jurisdiction of the offense, as it gave to congress only the power to legislate,—a power which had not been exercised. The learned chief justice then pro-



ceeded to inquire whether section 3 of the act of 1790, which enacts "that if any person or persons shall within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of murder," etc., brought the offense within the cognizance of the United States court, and concluded that the deck of a man-of-war is not a "place," within the purport of that section. He then proceeded to remark, in the language which is relied upon by the plaintiff in error:

"This construction is strengthened by the fact that at the time of passing this law the United States did not possess a single ship of war. It may therefore be reasonably supposed that a provision for the punishment of crimes in the navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark that afterwards, when a navy was created, and congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States of any crime committed on a ship of war, wherever it may be stationed."

We think this utterance of the court was intended only to direct attention to the fact that, when in the course of congressional legislation a navy was created, there was in the act creating it no express provision making crime committed on a ship of war, wherever it may be stationed, triable in the courts of the United States. The chief justice meant to say, in other words, that, when congress did create a navy, vessels of war were not by express legislation placed in the category of "forts," "arsenals," "dockyards," etc., as those terms are used in the crimes act of 1790, above referred to. The context of the opinion shows that the sentence so quoted was intended only to fortify the view of the court already expressed, that a ship of war was not a "place," within the purport of that act. We find in it nothing to sustain the contention of the plaintiff in error in the case at bar.

In the second case (*U. S. v. Mackenzie*) application was made to Betts, district judge, under the crimes act of 1790 (section 8), to issue a warrant for the arrest of Mackenzie and Gansevoort, officers of the United States navy, for murder committed on a naval vessel on the high seas. In dealing with the application the court referred to the fifth amendment, and to the jurisdiction given to courts-martial in such a case, and to the provision of the act of April 23, 1800, art. 21, which enacted "that the crime of murder committed by an officer belonging to any public vessel of the United States, without the territorial jurisdiction of the United States, may be punished with death by the sentence of a court-martial"; referred to the opinion of Atty. Gen. Pinckney, who had expressed the view that a naval court-martial ought not to try to punish a murder committed on board a United States ship, but that the jurisdiction belonged to the ordinary civil tribunals; and alluded to the decision of the supreme court in *U. S. v. Bevens* as intimating a strong opinion that the crimes act of 1790, § 8, did not embrace offenses committed on board ships of the United States. The court then directed attention to the crimes act of March 3, 1825, which contained the proviso that nothing therein contained "shall be construed to take away or impair the right of any court-martial to punish any offense which by the law of the United States

may be punishable by such court," and expressed the opinion that this proviso indicated the intention of congress that the concurrent jurisdiction of courts-martial with civil courts over offenses within the cognizance of both shall not be abrogated or suspended; but the court proceeded to remark that, even upon the theory that civil courts only had jurisdiction to take cognizance of the case, the district court would have declined to issue the warrant at that time, for the reason that a regularly organized court of inquiry instituted by the secretary of the navy was then investigating the case, and no step could be taken by civil authority without drawing away from the naval court the principal witnesses for the prosecution, and thereby causing a suspension of action by such court. It is to be observed that the naval court referred to was not a court-martial, but a court of inquiry, convened under the act of congress of April 23, 1800, art. 1. All that was actually decided by Judge Betts in that case was that the district court of the United States would not issue a warrant to arrest parties charged with having committed the crime of murder on the high seas, pending an investigation of that crime by a court of inquiry instituted by the secretary of the navy. It was not decided that the district court had no jurisdiction of the offense, or that exclusive jurisdiction thereof was given by law to a court-martial.

The third case (*U. S. v. Mackenzie*, 30 Fed. Cas. 1160 [No. 18,313] ) is not an adjudicated case, but the report of the charge of Judge Betts to a grand jury concerning their power to inquire into the charge of murder, above referred to. The court reasoned that there was no doubt of the power of congress to govern the army and navy by bringing offenses committed in either under the cognizance of law courts, and that "this power is fully executed in respect to the army in the rules and articles of war adopted April 10, 1806" (2 Stat. 364); that in proceeding to institute and establish a system of criminal jurisprudence it was competent for congress to legislate over all subjects in a single statute or section; and that the language of the crimes act of 1790 is plainly extensive enough to include the commission of those crimes by the land forces of the United States in ports or places under the sole and exclusive jurisdiction of the United States. But the court inquired whether it was the intention of congress to apply this general legislation over crimes on land to like offenses committed in the army, and in answer to that inquiry directed attention to the fact that by the fiftieth article of the rules and articles of war all crimes not capital, though not mentioned in the articles of war, are to be taken cognizance of by courts-martial, and to be punished at their discretion; and that those rules and articles of war, although first adopted by the resolution of 1787, were re-enacted by a general adopting clause September 29, 1799, and were in force, therefore, as an act of congress, at the time when the crimes act was passed; and that on the date when the latter act was passed congress passed another act, regulating the military establishment, by the thirteenth section of which it was declared that the commissioned officers, noncommissioned officers, privates, etc., of the army, "shall be governed by the rules and articles of war which have been established by the United States in congress assembled, as far as the same

may be applicable to the constitution of the United States." The court then observed:

"Here, then, is a most positive and authoritative exposition of the crimes act, showing that it had no paramount operation over the land forces, but must be construed in subordination to the rules and articles of war applicable to the case. The thirty-second article of the existing rules of war is pertinent to show the understanding of congress that express legislation was necessary in order to bring officers and privates of the army to trial before the civil courts for capital crimes or acts of violence to the persons or property of citizens, and affords additional evidence that the crimes act of 1790 was not intended to apply to the land forces."

These views so expressed by Judge Betts were approved by Chancellor Kent in an edition of his Commentaries issued shortly thereafter, but they seem to have received no subsequent approval by any text-writer or by any court. On the other hand, the jurisdiction of the civil courts over offenses committed in the land forces of the United States has been sustained in several reported cases. In some, it is true, jurisdiction was assumed without discussion, but in others upon a full consideration of the grounds thereof. In *U. S. v. Cornell*, Fed. Cas. No. 14,867, 2 Mason, 61, decided in 1819, Mr. Justice Story took cognizance of a murder committed by one soldier upon another in Ft. Adams, and in support of his jurisdiction cited the provisions of the judiciary act of 1789. In *U. S. v. Carr*, Fed. Cas. No. 14,732, 1 Woods, 480, Mr. Justice Woods, sitting with Judge Erskine, entertained jurisdiction of a similar offense. In *U. S. v. Cashiell*, Fed. Cas. No. 14,744, 1 Hughes, 552, it was held that an acquittal before a court-martial cannot be pleaded in defense of an indictment in a court of law. The court remarked that "the military law as it exists in the United States is an exceptional code, applicable to a class of persons in given relations, and not abrogating or derogating from the general law of the land, but that the latter is left in full force and virtue." But we need not enter into a discussion of the question whether there is a double liability or liability both to the civil and military court. The question presented to us for decision, is whether a civil court has jurisdiction of the offense which is charged, there having been no assertion of jurisdiction by a court-martial, and there being no question of conflicting jurisdiction.

A case directly in point on the question of jurisdiction here involved is *U. S. v. Clark* (C. C.) 31 Fed. 710, a case in which Mr. Justice Brown, then the district judge for the Eastern district of Michigan, took cognizance of a homicide committed by a soldier in the performance of his alleged duty upon another soldier within a military reservation of the United States. The court, not without some hesitation at first as to whether a civil court could take cognizance of the case, came to the conclusion that the martial or military law does not supersede or interfere with the civil laws of the realm, and that there is a concurrent jurisdiction in the civil court; citing *U. S. v. Cornell*, *U. S. v. Carr*, and the opinion of Atty. Gen. Cushing in *Steiner's Case*, 6 Op. Atty. Gen. U. S. 413. We accept the rule stated in that decision, which is also in accord with the consensus of opinion of all the text-writers on military law, as embodying the law upon the question here under discussion. Forcible reasons may be suggested why

courts-martial should be given exclusive jurisdiction of all offenses which are punishable under the articles of war, but we are not convinced that either in the constitution or in the acts of congress the intention has been expressed to except from the jurisdiction of the civil courts offenses committed by any persons or class of persons, or, as was said by Mr. Justice Brown, to abdicate "that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity."

The judiciary act of September 24, 1789, gives to the circuit courts "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct." This enactment contemplates that the jurisdiction so exclusively conferred on the circuit courts may be made a concurrent jurisdiction with other tribunals whenever the laws of the United States shall so direct. It was so directed by the act of April 30, 1790, which provided that commissioned officers and others in the land forces "shall be governed by the rules and articles of war." The rules and articles of war consisted of a large number of regulations applicable to the government and discipline of the army, one of which provided for the punishment by courts-martial of certain designated offenses. There has been, and is no express enactment that the jurisdiction of the military courts shall be exclusive, or that the general grant of jurisdiction to the circuit court shall in such cases be superseded. The intention to divest the civil courts of their regular jurisdiction will not be ascribed to congress in the absence of clear and direct language to that effect, in view of the "known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts." *Coleman v. Tennessee*, 97 U. S. 514, 24 L. Ed. 1118. The articles of war in terms recognize the civil jurisdiction over offenses of the nature of that with which the plaintiff in error is charged, by providing in article 59 for delivering to the civil magistrates, except in time of war, "upon application duly made by or in behalf of the party injured," any officer or soldier "accused of a capital crime or of any offense against the person or property of any citizen of any of the United States which is punishable by the laws of the land." The case of the plaintiff in error would have come within this provision had he not been discharged from the army before proceedings were instituted against him. It was then a time of peace. The offense was charged to have been committed against the property of a citizen, and the place of the "party injured" was represented by "the law of the land, through the public prosecutor or the grand jury." *Steiner's Case*, 6 Op. Atty. Gen. U. S. 422.

It is contended that the indictment charges two offenses in one count, and that it is bad for duplicity, for the reason that it alleges that the forgery was committed with intent to defraud both the United States and John Cranson. It may be conceded that it is better pleading to make two counts in such an indictment, and to charge a separate intent in each; but we do not think that the defect referred to is a material one, or that it affects any substantial right of the ac-

cused. We do not agree with counsel for the plaintiff in error that the indictment charges two offenses, one under section 5414 [U. S. Comp. St. 1901, p. 3662], and the other under section 5421 [U. S. Comp. St. 1901, p. 3667]. The indictment lacks the proper averments to constitute an offense under section 5421 [U. S. Comp. St. 1901, p. 3667]. It is brought solely for the forgery of an obligation of the United States under section 5414 [U. S. Comp. St. 1901, p. 3662]. The offense charged may properly be said to have been committed with an intent to defraud the United States, and an intent to defraud John Cranson. The United States would have been defrauded if the forgery had been undetected before the final discharge of Cranson as a soldier in the army of the United States. Cranson would have been defrauded if the forgery had been discovered before his discharge. It was impossible for the pleader to allege, or for the jury to find, which particular intent actuated the accused. From the nature of the act charged, the law will impute the intention to defraud all who might have been defrauded thereby.

The point is made that the indictment is defective for the reason that it fails to allege that F. M. Coxé was at the time of the commission of the offense a lieutenant colonel and deputy paymaster general of the army of the United States. If the indictment had charged only the commission of an offense with intent to defraud the United States, it might have been essential to allege therein that F. M. Coxé was in fact the officer who he was in the instrument represented to be; but, so far as it concerns the intent to defraud Cranson, it was not material whether F. M. Coxé was or was not the officer described in the instrument. Cranson might or might not have known whether F. M. Coxé was a paymaster general in the army. He might have been defrauded even if a fictitious name had been signed to the certificate.

It is contended, further, that the instrument described in the indictment is not an "obligation or other security of the United States," such as is referred to in section 5414 [U. S. Comp. St. 1901, p. 3662]. Section 5413 defines the words "obligation or other security," and declares that they shall mean, among other things, "certificates of indebtedness and certificates of deposit." But it is said that the paper which was signed by the plaintiff in error and delivered to Cranson was not a "certificate of deposit," as the term is understood both in common usage and in the statutes of the United States. It is true it does not contain all the incidents which belong to a "certificate of deposit," as that term is understood in banking. It acknowledges the receipt of money from the depositor for deposit with the United States, and the date, place, and amount thereof, but it does not state the time when the deposit is repayable. Notwithstanding this omission, we think that the paper is substantially a certificate of deposit. The law imports into its terms the time and conditions of repayment. It was a certificate issued for the deposit of money under section 1305 of the Revised Statutes [U. S. Comp. St. 1901, p. 925], which provides that any enlisted man of the army may deposit his savings with any army paymaster, who shall furnish him a deposit book in which shall be en-

tered the name of the paymaster and of the soldier, and the amount, date, and place of such deposit. Section 1306 [U. S. Comp. St. 1901, p. 925] provides for repayment of the money, with interest, to the soldier at the time of his final discharge. The paper charged upon in the indictment contains all the requirements of section 1305. In fact, it is a page from the book of deposit slips used by the paymaster under the provisions of that section.

It is contended that the court erred in admitting certain testimony offered by the defendant in error concerning the handwriting of the signature F. M. Coxé. The prosecution called an expert witness on handwriting, who testified that he had seen 419 signatures of the plaintiff in error, two lines of his writing on a photograph which was introduced in evidence, three lines of his handwriting on another paper, and the names Charles H. A. Brooke, Allen G. W. Coan, and John W. Woodrum, which he had written. He testified that after careful examination it was his opinion that the plaintiff in error wrote the name of F. M. Coxé upon the certificate. This testimony was received under the objection that the witness was not shown to be qualified or sufficiently acquainted with the handwriting of the plaintiff in error to testify as an expert. We cannot say that the court erred in admitting the testimony. It was shown that the witness was a qualified expert, and he testified that the examination which he had made was sufficient to qualify him to testify as he did, and that the reason why he asked for no more specimens of handwriting was that he did not consider it necessary. It is now objected that the writings which the witness resorted to to acquire a knowledge of the handwriting of the plaintiff in error were not in evidence or proved to be his writing. That, however, was not the ground of the objection. The objection was that no sufficient knowledge of handwriting could be acquired from the limited investigation which the witness made.

It is contended that the court erred in excluding testimony offered by the plaintiff in error to show that the signature of F. M. Coxé was not the handwriting of the plaintiff in error. Charles H. A. Brooke, a soldier, was called for the United States, who testified that he knew the handwriting of the plaintiff in error. On his cross-examination he was asked if from his knowledge of the handwriting of the plaintiff in error he believed that he signed the signature "F. M. Coxé." To this question an objection was made and sustained. We find no error in that ruling. The witness did not claim to be an expert on handwriting. All that he had testified was that he knew the handwriting of the plaintiff in error, had seen him write in the company records, and had seen a large number of official documents written and signed by him, and had seen many of his signatures on checks and deposit receipts. A knowledge of the handwriting of the plaintiff in error possessed by a witness who was not an expert in handwriting would not, of itself, qualify him to testify whether a forged signature made in imitation of the handwriting of another was or was not written by the plaintiff in error.

Error is assigned to the refusal of the court to give a certain requested instruction to the jury on the subject of reasonable doubt. The instruction so requested did not differ in material substance from

the instruction which the court gave upon that subject. There was no error, therefore, in refusing it.

We find in the record no error for which the judgment should be reversed. It is accordingly affirmed.

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MUTUAL LIFE INS. CO. OF NEW YORK v. HILL et al.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 813.

1. SECOND APPEAL—LAW OF CASE.

On the second appeal of a case to the circuit court of appeals, after a reversal of its former decision by the supreme court, the former decision constitutes the law of the case on all points which have not been criticised or reversed by the supreme court.

2. LIFE INSURANCE—PLACE OF CONTRACT—FORFEITURE—WHAT LAW GOVERNS.

Laws N. Y. 1877, c. 321, § 1, provides that no insurance company shall declare a policy forfeited for nonpayment of premiums without having first given assured 30 days' notice that the premiums were due, and that the policy would be forfeited if they were not paid. An application for life insurance in a New York company, made in the state of Washington, contained a provision that "the contract of insurance, when made, shall be held and construed \* \* \* to have been made in the city of New York"; and the policy recited, "In consideration of the application for this policy, which is hereby made a part of this contract." The contract was delivered and the first premium paid in Washington. *Held*, that the policy was a New York contract, and governed by the statute.

3. SAME—WAIVER BY ASSURED—EFFECT.

The rights of the beneficiaries of a policy governed by Laws N. Y. 1877, c. 321, § 1, providing against forfeiture for nonpayment of premiums, without due notice to the assured, cannot be affected by an attempted waiver of the statute by the assured, or by other than their own act or agreement.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

This is an action to recover the amount of a life insurance policy, brought by the defendants in error, as beneficiaries under said policy, against the plaintiff in error, the company issuing the policy. The case is before this court for the second time; having been removed to the supreme court of the United States (20 Sup. Ct. 914, 44 L. Ed. 1097) after the first hearing (38 C. C. A. 159, 97 Fed. 263-270, 49 L. R. A. 127) upon certiorari, and by that court certified back to the circuit court of the United States for the district of Washington, with a mandate for further proceedings. Upon such proceedings being had (113 Fed. 44), an appeal was again taken to this court.

On April 29, 1886, the plaintiff in error issued its policy of insurance upon the life of George Dana Hill, in the sum of \$20,000, in favor of his wife, Ellen Kellogg Hill, if she were living at the time of his death, or, in case of her death, to the children of their bodies who should be living at the time of the death of the insured. The first annual premium, amounting to \$814, was paid by the insured, upon delivery of the policy to him at Seattle, Wash., to the agent of the insurance company at that place. The wife died in February, 1887, and the insured died on December 4, 1890. No further premiums were paid upon the policy after the first annual premium. It appears from the evidence that when the next annual premium became due

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¶ 2. See Insurance, vol. 28, Cent. Dig. §§ 293, 894.

the Seattle agent of the insurance company called upon Hill for payment of the same, presenting a renewal receipt duly executed by the head officials of the company; that Hill did not pay the premium, and after repeated opportunities for payment having been given, and not availed of, the agent at Seattle returned the renewal receipt to the general office of the company at San Francisco; that the head of the latter office, out of special interest in the case, returned the renewal receipt to the agent at Seattle, and it was again presented to Hill, and payment requested; that Hill failed and declined to make payment, and the renewal receipt was returned to San Francisco, and thence to the home office, in New York, where the policy was noted as lapsed and terminated. No offer or tender of payment of premium was later made by any one upon the policy. Upon the death of Hill the defendants in error, children of the said Hill and his wife, and named as beneficiaries in the policy, furnished proper proof of the death of the said Hill, and demanded of the plaintiff in error the payment of the amount of the policy. In support of their claim the defendants in error contended that the insured was not in default in the payment of premiums on said policy until a notice had been mailed to him pursuant to the statute of New York requiring notices to be given by insurance companies transacting business in that state; that according to the agreement contained in the application for insurance, and contract of insurance, the terms of said contract were to be performed in New York, and all questions as to the validity of the provisions of said contract, and as to the rights and liabilities of the parties thereto, must be determined in accordance with the laws of New York; that under such laws the plaintiff in error had no power to cancel the policy or claim a forfeiture without giving the statutory notice; that by reason of the failure to give such notice the premiums did not become due, and there was no default. The plaintiff in error (defendant below) denied that the conditions of the contract of insurance had ever been performed by the insured, and contested the claim that the contract of insurance was to be performed in New York, or was subject to the laws of New York. It contended that it was transacting its business in the state of Washington at the time of the issuance of the policy, having its principal office in Seattle, in said state; that the insured was at that time a citizen of Washington, residing therein; that he made application for insurance of the Seattle agent; that this application was transmitted to the agent of the company at San Francisco, and by him forwarded to the home office, at New York; that pursuant to the application the company issued the policy; sent it to the agent in San Francisco, who afterwards transmitted it to the agent in Seattle; that the insured there paid the first premium, and received the policy. And in response to the contention that there was no default on the part of the insured, it was alleged that at a time more than one year from the time of the issuance of the policy it was mutually agreed between the insured and the insurance company that the said contract of insurance should be waived, abandoned, and rescinded. It was contended that this agreement was made up of the acts of the agent of the insurance company at Seattle in notifying the insured that the premium of \$814 necessary to be paid upon said policy for its continuance was due and payable, and of the acts of the insured in informing said agent that he was unable to pay such premium, and intended to allow the policy to lapse and become forfeited for want of payment of said premium, or any future premium accruing on said policy; and it was alleged that the insurance company, in good faith relying upon said conduct and representations of the insured, was induced to, and did, fail and abstain from giving or mailing any notice to the insured, or to any person interested in said policy, concerning the payment of any premium thereon. Demurrers to the answer were sustained, and, upon the election of the plaintiff in error to stand upon its pleadings, a judgment was given upon the pleadings in favor of the beneficiaries for \$24,086.61, with interest and costs. The circuit court of appeals affirmed this judgment; holding that the contract of insurance must be considered as made in the state of New York, and subject to the laws of that state. 38 C. C. A. 159, 97 Fed. 263, 267. Upon appeal to the supreme court of the United States, that court held that the answer of the defendant disclosed a distinct agree-



ment on the part of the insured and the company to waive and abandon the policy, and all rights and obligations on the part of the parties thereto, and that upon the allegation of the insurance company that "each and all the plaintiffs, including the beneficiaries, neglected and refused to pay" the premium due on said policy, the beneficiaries were also parties to the abandonment of the policy, and had no rights remaining thereunder. The judgments of the circuit court of appeals and of the circuit court were reversed, and the case remanded to the circuit court with instructions to overrule the demurrers to the answer of the insurance company. *Insurance Co. v. Hill*, 178 U. S. 347, 20 Sup. Ct. 914, 44 L. Ed. 1097. In accordance with this mandate, the case was reinstated in the circuit court for the district of Washington, brought to trial, and submitted to a jury for decision upon the question whether the insured himself abrogated the contract by any agreement on his part to surrender or avoid it, and, if so, whether there was knowledge of such agreement by the beneficiaries, or whether there was any act on the part of the beneficiaries amounting to a refusal to pay the premiums, or to surrender the policy or abrogate the contract. The jury found a verdict in favor of the beneficiaries in the sum of \$29,020, and from that verdict the insurance company again brings the case to this court upon writ of error.

Julien T. Davies, E. S. Pillsbury, Edward Lyman Short, John B. Allen, and Wm. H. Chickering, for plaintiff in error.

S. Warburton, Harold Preston, and Eben Smith, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The assignments of error relate to the refusal of the court to give certain instructions requested by the plaintiff in error, to the giving of other instructions by the court, and to the refusal of the court to grant a motion by the plaintiff in error for a judgment in its favor notwithstanding the verdict.

Upon the former hearing it was held by this court that the policy of insurance in controversy was a New York contract, according to its terms, and that the Laws of New York of 1877 (chapter 321, § 1), providing that no insurance company shall declare a policy forfeited for nonpayment of premiums without having first given the assured 30 days' notice that the premiums were due, and that the policy would be forfeited if they were not paid, were mandatory; also that under such a policy the rights of the beneficiaries could not be affected by an attempted waiver of the statute by the assured, or by other than their own act and agreement. The judgment of this court was reversed upon the ground that the answer of the defendant (plaintiff in error) alleged that the insured and the company had agreed to abandon and terminate the contract of insurance, and that the beneficiaries (plaintiffs below) "had failed, neglected, and refused to pay the second premium," thus refusing to continue the policy. This allegation of the answer, it was said, "disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy, and all rights and obligations on the part of the parties thereto." *Insurance Co. v. Hill*, 178 U. S. 347, 350, 20 Sup. Ct. 914, 44 L. Ed. 1097. The case was sent back to the circuit court for trial on this question alone; the supreme court saying in its opinion that

it was an interesting question how far the action of the insured could affect or bind the beneficiaries in a life insurance policy, but that, under the allegations of the answer above stated, it was unnecessary to examine that question. The plaintiffs (defendants in error), by their replication, denied these allegations of the answer, and the case was brought to trial on the issues thus made. Upon the second trial it appeared by the testimony of each of the defendants in error, including the guardian, that not one of them had knowledge of the nonpayment of the premium, and that they had never refused to pay the same. The jury found a verdict for the plaintiffs (defendants in error), upon which judgment was entered. This question of fact relating to the alleged abandonment of the contract on the part of the beneficiaries was thus disposed of in their favor.

The decision of this court upon all other points, not having been criticised or reversed by the supreme court, is now the law of the case for this court. *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 38 Ill. App. 555; *Matthews v. Bank*, 40 C. C. A. 444, 100 Fed. 397; *Railway Co. v. Wilder*, 41 C. C. A. 305, 101 Fed. 198.

It is contended, however, that with respect to the opinion of this court that the contract of insurance must be considered as having been made in the state of New York, and subject to the laws of that state, this court has, in effect, been reversed by the supreme court of the United States in the case of *Insurance Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181. Let us see if that is so. The contract in the present case was made up of the application on the part of the insured, and the policy issued by the company pursuant to the application, and the obligations of the respective parties are defined therein. The application contains the following clause:

"It is agreed that \* \* \* the contract of insurance, when made, shall be held and construed at all times and places to have been made in the city of New York."

In the policy issued in compliance with this application appears the following statement:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office, in the city of New York, unto Ellen Kellogg Hill," etc.

The contract was thus, by the express agreement of the parties, made subject to the laws of New York, and governable by them. In the *Cohen Case* the supreme court gave particular attention to the question of what law should control a contract of insurance made by the insurance company in New York with an individual in the state of Washington. The application in that case contained a stipulation that it (the application) was made subject to the charter of the company and the laws of the state of New York. It was held that, while such a stipulation in the application is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled, a provision that the contract issued upon such application should, when made, be in all respects controlled by the laws of New York, incorporates those laws into the terms of the contract, and the contract is then controlled by such laws. Reference was made

to the case of *Baxter v. Insurance Co.*, 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293, as an example, where a stipulation appeared in the application for the policy that it was "a contract made and to be executed in the state of New York, and construed only according to the laws of that state." The case was distinguished from the *Cohen Case* because of the fact that the application in the *Cohen Case* recited merely that the application was "subject to the charter of the company and the laws of the state of New York." This application was held to be but a preliminary instrument, containing such a stipulation in order to prevent a local suit as to the effect of statements or representations or any other matter in the application from overriding the provisions of the charter and the laws of the state. No reference to the contract, when completed, was made in the application, and it was held that under those conditions the laws of New York did not apply to the question of forfeiture. In the present case, however, the stipulation in the application is identical in substance with that appearing in the *Baxter Case*, 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293, containing the agreement that the contract, when made, should be held and construed at all times and places to have been made in the city of New York. The policy issued was pursuant to that application, and the agreements contained in the application became a part of the completed contract. The decision of the supreme court in the *Cohen Case* is not, therefore, a reversal of the decision of this court in the present case, but, on the contrary, it is clearly to be construed as in accord with our decision; and, so construed, we must hold that the contract in the present case is controlled by the laws of the state of New York. By those laws, no forfeiture could occur until the statutory notice had been given to the insured. This notice was not given either to the insured or to the beneficiaries. Hence the policy was still in force at the time of the death of the insured, and the beneficiaries entitled to recover thereon.

Attention has been called to the decision of this court in the case of *Insurance Co. v. Hathway*, 45 C. C. A. 655, 106 Fed. 815. It is only necessary to say that in that case the facts presented were identical with those in the *Cohen Case*, the application containing the same stipulation. The case was therefore governed by the decision of the supreme court in the *Cohen Case*, and is clearly distinguished from the one now under consideration. Here the completed contract was made subject to the laws of New York. There the application merely was subject to the charter of the company and the laws of New York.

The action of the court below appears to have been in accord with the law herein stated, and the judgment is therefore affirmed.

**TEXAS STATE FAIR v. BRITTAIN.**

(Circuit Court of Appeals, Fifth Circuit. December 2, 1902.)

No. 1,176.

**1. NEGLIGENCE—CONCLUSION OF WITNESS—HARMLESS ERROR.**

Where, in an action for injuries sustained by the falling of seats in a show on a state fair ground, a witness who had erected the seats testified that he had used first-class material in their construction, and that after he had erected them they were in first-class condition, defendant was not harmed by the rejection of a question asking the witness to state whether or not the seats were properly and carefully erected.

**2. STATE FAIR ASSOCIATION—NEGLIGENCE OF LESSEE—PRIVILEGES.**

Where a state fair association, under a contract giving the exclusive use of a portion of its ground to an exhibitor, advertised such exhibit as one of the attractions of the fair, it was liable for injuries to a spectator caused by the falling of seats negligently constructed by the exhibitor.

In Error to the Circuit Court of the United States for the Northern District of Texas.

D. E. Greer and Geo. H. Plowman, for plaintiff in error.

Wm. J. Moroney, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

BOARMAN, District Judge. This action was instituted on behalf of plaintiff, Edward H. Brittain, in the circuit court for the Northern district of Texas, against the Texas State Fair, to recover damages for injuries to himself. His allegations show substantially that the Texas State Fair is a corporation organized under the laws of Texas, with its principal place of business in Dallas; that said fair is the owner of 100 acres or more of land, which, being inclosed within a high board fence, is, together with the buildings and structures thereon, used by said corporation for carrying on the business of an annual fair or exposition, to which the public are, by advertisements in newspapers and otherwise, invited; that said Texas State Fair carried on and controlled separately, as a part of its business enterprise, a number of side-show attractions, all of which were within the said fence inclosure; that an admission fee was charged at the entrance of each of the several side shows; that, in accordance with such said newspaper and other advertisements, said fair was on October 3, 1900, carrying on at nighttime a side show called the "Burning of Chicago"; that said side show, though ostensibly under the direction of a firm known as Smith & Lucas, was in fact under the management and control of the Texas State Fair, the said side show being advertised as one of its attractions; that said Texas State Fair was largely interested in the expense and profits of said side show, and, if said Smith & Lucas had any connection or interest therein, such interest was not known to plaintiff or to the public; that plaintiff was led to believe and understand from said advertisements that said side show was a part of the attractions managed by the Texas State Fair, and to which it invited the public; that on October 3, 1900, plaintiff, having paid admission fee, entered said side show, and took a seat on the seats furnished by Texas State

Fair for its patrons; that said seats were very frail, and so weak and dangerously constructed that they were a menace to human life and limb, all of which was known to the Texas State Fair, or by the use of reasonable diligence would have been known by it, but which was not known to plaintiff, and could not have been known by the use of reasonable diligence; that while plaintiff was on said seats they fell to the ground, and he was thrown to the ground, thereby receiving bruises and injuries which have caused him, and will continue to cause him, great pain, suffering, and damage, great loss of time, and expense, said injuries being permanent in their nature; that such said injuries resulted in partial paralysis of his leg, and have greatly diminished his capacity to labor and attend to his business. He further alleged that the proximate cause of said damage to him was the gross negligence of the Texas State Fair, in not properly and safely constructing said seats, and by not exercising proper care and caution to erect and maintain a safe place for the public who were invited to witness said exhibition; that plaintiff is not guilty of any contributory negligence. Defendant, resisting this action, presented 17 exceptions or demurrers to plaintiff's petition, all of which the circuit court, as we think, properly overruled. In answering, the defendant corporation denied all the allegations, and, for special defense, alleged that it was not in any manner liable for the alleged injuries to plaintiff, because the Texas State Fair was not at the time mentioned in the possession of or control, or had any supervision or management of, the inclosure or premises in which was given the side show called the "Burning of Chicago"; that it was not in any manner responsible for the condition of said grounds, or the seats which were alleged to have fallen; that prior to the injuries of which plaintiff complains the defendant corporation had leased the same to Smith & Lucas, and they, then being in exclusive possession, direction, and control of said premises, were solely responsible for any person injured thereon. Defendant corporation further alleged that, at the time Smith & Lucas entered upon the premises leased to them, the same were in safe condition, free from defects of every character, and, if the premises became dangerous thereafter, the same was due exclusively to the acts of some person or persons other than defendant. The corporation contends further that, if plaintiff was injured as he claims, the seats, if they were faulty, were constructed by a person or persons other than the defendant, without its knowledge or consent; that defendant corporation, never having had knowledge of the condition complained of, is not responsible for plaintiff's injuries. On the issues stated substantially above, the trial resulted in a judgment for defendant in error.

The record shows that counsel for plaintiff in error sought a new trial, charging the trial court, in his motion therefor, with 24 separate erroneous rulings, besides the 17 errors made in overruling the same number of demurrers or exceptions to the petition of defendant in error. Those several assignments charging the trial court with erroneous rulings on the pleadings and during the trial proceedings are more or less emphasized again in the 25 assignments of error disclosed in the briefs of plaintiff in error. The formidable array of assignments of error found in the record has not forbidden a careful consideration

of them, together with the argument of the learned counsel in their behalf. It does not appear to us that reversible error is disclosed in any of the assignments. It may be that error urged in assignment No. 19 deserves special consideration. It is contended in that assignment that plaintiff in error should have had the benefit of Sessums' answer to the question, "State whether or not these seats were properly and carefully erected." The trial court forbade an answer to that question on objection of defendant in error, substantially on the ground that it was incompetent and irrelevant, and called for an opinion of the witness, who was not an expert. We think the objection, if it was limited to the grounds stated, was not well taken, and that there would be reversible error in its exclusion from the jury, but for the fact that the same witness had, before this question was asked him, answered other questions which brought out substantially the same facts which plaintiff in error was then endeavoring to have him state to the jury. Sessums, before this question was asked, had said, in response to questions presumably similar to the excluded question, that he erected the seats, and told of the sort of material that he, as the builder of the seats, had used in their construction. Then, answering further, he said "that after I erected the seats their condition was first-class," and were made of first-class material. The witness, as any other carpenter who worked on the construction of the seats, though he might not, under the court's test of his qualification as an expert, have been permitted to testify in such capacity, was competent to answer said question, and the question was not irrelevant. It appears that his answer to the objectionable question would have added to the force of his previous testimony as to the matter of the construction of the seats only in a cumulative way. The jury had already heard substantially the same testimony which Sessums was expected to give if he had been allowed to answer that question. His answer, at best, would have added emphasis to his testimony on substantially the same issues. Conceding that the objection, if limited to the grounds which met the approval of the trial court, should have been overruled, we think Sessums' answers to other questions substantially aided the purpose of the counsel for plaintiff in error as much as if Sessums had been permitted to answer most favorably to the excluded question. On this view, it follows that the error assigned does not, under the circumstances, have the effect of a reversible error.

It may be, as between the Texas State Fair and Smith & Lucas, the latter were authorized, on such terms as to them were satisfactory, to carry on and supervise the side show; but it seems clear that no contractual relations between such parties can be invoked to release the state fair, under the state of case shown in the record, from the duty of exercising reasonable care in the interests of the people who were attending that fair, or were witnessing such attractions in side shows as it offered to the public. When Britain paid his admission fee and entered upon the seats in question, it was a matter of no importance to him who had erected the seats. Whether the representatives or managers of the fair, or Smith & Lucas, furnished the seats; he had a right to expect that he would be provided with reasonably safe seats. The case of *Texas State Fair v. Marti* was founded on the

same cause of action shown by the pleadings in this case. Marti's wife received personal injuries while attending a fireworks exhibition given ostensibly by the same Smith & Lucas on the grounds and in the place now in question here. The injuries therein complained of seem to have been inflicted at the same time and in the same way (by falling of the seats) as shown in the Brittain case. Substantially the same defenses as were set up in the trial of this case were discussed in the opinion of the court of civil appeals in Texas. The case is reported in volume 69 of the Southwestern Reporter, at page 432. The court, having in that case cited a rule stated in Cooley, Torts (2d Ed.) p. 718, says:

"No matter by whom the seats were erected, it was the duty of the plaintiff in error, Texas State Fair, to see that the same were in reasonably safe condition before inviting the public to occupy them."

We think the rule cited from Cooley fully vindicates what we quote above from the Texas court's opinion. This view of the Texas court is supported by a number of cases cited by the court. Among them are *Railway Co. v. Moore's Adm'r* (Va.) 27 S. E. 70, 37 L. R. A. 258; *Conradt v. Clauve*, 93 Ind. 478, 47 Am. Rep. 388; *Sebeck v. Platt-deutsche Volkfest Verein* (N. J. Err. & App.) 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512, and others. In the New Jersey case cited it was held that:

"Whether invited upon the premises by contract of service, or by the calls of business, or by direct request, is immaterial. The party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence are exercised to protect him against dangers not within his knowledge, and not open to observation."

Conceding that the jury found correctly on the issuable material facts which show the legal relations of Smith & Lucas to the Texas State Fair, we think it follows, under the rule of law which we cite from the Louisiana and Texas cases, that the negligence which was the proximate cause of Brittain's injury is chargeable to the Texas State Fair, and that the judgment of the circuit court rightfully held the said corporation liable in damages.

The judgment of the circuit court is affirmed.

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#### EDWARD HINES LUMBER CO. v. CHAMBERLAIN.

(Circuit Court of Appeals, Seventh Circuit. March 1, 1902.)

No. 784.

1. ADMIRALTY—FREIGHT—BREACH OF CONTRACT—DEFENSES.

Where libellant contracted to transport a pile of lumber, which his agent had inspected, from Cheboygan to Chicago, by a steamer and certain barges, under an entire contract, and carried only a proportion of the amount, and the amount carried was less than the carrying capacity of the steamer and any one of the barges owned by libellant, it was no defense to libellant's breach of contract that one of the barges was disabled by the loss of a mast, and that the lumber consisted partly of strips and partly of boards, instead of being all boards.

2. SAME—DAMAGES.

Where libellant broke an entire contract of affreightment by refusing to transport all of a pile of lumber contracted to be carried, he was never-

theless entitled to recover for the lumber carried, less the damages sustained by the owner of the lumber by reason of the breach of contract.

8. SAME—TENDER—COSTS.

Where libellant failed to perform a contract for the carriage of lumber, and the owner tendered into court the amount which libellant was entitled to for carrying the part carried, less the amount of cash advanced for fuel and damages for increased freight it was compelled to pay for transporting the balance of the lumber, libellant was not entitled to costs, but a judgment should have been rendered in favor of the shipper, with costs from the time of the tender.

Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois.

Robert Rae, for appellant.

Chas. E. Kremer, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is a suit in admiralty brought by the appellee, who was engaged in the carrying business upon the lakes, to recover the sum of \$537, as freight for carrying a cargo of lumber upon his steamer, the H. L. Worthington, from Cheboygan, Mich., to Chicago, Ill. The respondent admitted the carrying of 358,000 feet of lumber at the price agreed upon of \$1.50 per M., but denied its liability because the appellee had agreed to carry for appellant a certain pile of lumber containing about 1,000,000 feet, and had neglected and refused to carry more than the 358,000, and that, therefore, no freight was due for what was admitted to be carried. There is no dispute about the facts. Edward Hines, of the lumber company, gives this account of the transaction in his testimony:

"Mr. Blair, of the Chamberlain Company, came to our office soliciting freight. Asked us what freight we had and where it was located. I told him among other lots of lumber we had at Cheboygan, Michigan, on Swift & Clark's dock, a quantity of hemlock approximately from 900,000 to 1,000,000 feet. He stated he would telegraph Mr. Chamberlain, or the captain of one of his boats, to go and examine the lumber as regards length, dryness, and quantity, and as soon as he received the reply he would see me concerning the carrying of it. Either the next day, or the second day following—I wouldn't be positive about that, but it was very soon after—he called again with a telegram, and stated he had heard from Cheboygan from his representative, and that the lumber was all right and he would like to carry it. We had some talk about freight, finally settling on the rate of freight at \$1.50 per thousand to carry the lot of lumber from Swift & Clark's dock. He read me the telegram. I asked him to confirm in writing the contract, and he did so."

On November 4, 1900, Buchanan and Chamberlain, agents of appellee, residing at Cheboygan, reported to appellee by wire as follows:

"Have seen lumber marked 'Hines.' If they give that lot it is as good as inch cull hemlock could be, from eighty to one hundred thousand four-inch strips, balance wide, all lumber from seven to sixteen feet, take it if freights suit."

On November 5, 1900, Chamberlain at Chicago writes to Hines, president of the Hines Lumber Company of the same place, as follows:

"As per conversation between you and our Mr. Blair this day by 'phone this confirms charter of steamer 'H. L. Worthington' and consort 'D. R. Martin,'



J. B. Wilbur,' 'boards' from Swift & Clark's Mill, Cheboygan, to Chicago, \$1.50 per M., prompt despatch. These loads in accordance with enclosed telegram, which kindly return and oblige.

"Yours, respectfully,  
"Correct: S. R. Chamberlain."

[Signed] S. R. Chamberlain & Co.

On the 7th of November the appellant wrote to Chamberlain the following letter of acceptance:

"Referring to your favor of the 5th inst., we accept of the charter. The lumber is all on Messrs. Swift & Clark's dock, as we understand it, and there is approximately about 1,100,000 feet of it. We have to-day written Messrs. Martin & Silliman to give your boats prompt dispatch. Kindly advise us definitely which of the consorts we will get with the Worthington and about when they will be there, so we will be able to give them immediate dispatch.

"Respectfully yours,

Edward Hines Lumber Company."

The appellee was the owner of the steamer H. L. Worthington and the barges D. R. Martin, J. B. Wilbur, and A. T. Bliss. The Worthington towed as her consorts the three barges and their cargoes, constituting an entire affreightment. The appellee carried on the steamer 358,000 feet, which was less than her carrying capacity, and either one of the barges had a capacity to carry the entire cargo contracted for, except the Martin. Before any attempt was made to carry the lumber the price of freights, as is perhaps usually the case at that time of the year, had considerably advanced, and the lumber company, upon refusal to carry the balance of the lumber, was compelled to pay an advance of 50 cents per thousand, which amounted to the sum of \$279.57; that is to say, the respondent had to pay \$2 per thousand to another steamer, the Marshall, to get the lumber brought to Chicago. Several excuses were made by the libelant's agent for not furnishing vessels. One was that the Martin was not unloaded in time to go back with the Worthington, saying, at the same time, he would see about it, and finally saying that he could not send the Martin on account of a mishap to the vessel, which had lost her mast. Respondent asked him to get a vessel and take the lumber, if his own vessels could not. The libelant not doing anything about it, the respondent served him with notice that he would go out and charter a vessel, at the lowest rate possible, to carry the lumber, as it was obliged under contract to have it that fall.

These, it seems to the court, were lame and impotent excuses for not fulfilling the contract. The appellee had agreed to carry the lumber. He had the means for doing it. If one barge was disabled he had more; or, if he had not, he should have furnished them. It was not the respondent's fault that the Martin was disabled, if the breaking of a mast was sufficient for that purpose. In putting in the libelant's case, no excuse whatever was offered for not carrying the balance of the lumber, but on cross-examination of the respondent's witnesses the appellee first made the above excuse of disablement of the Martin; also the excuse that the lumber consisted partly of strips and partly of boards, instead of being all boards. This last excuse is as weak as the other. The appellee had an opportunity to inspect the pile of lumber and did inspect it by his agent, and, presumably with full knowledge of its character, entered into the contract. It is too late now to say that some of the boards were less than eight inches in width,

which it seems is the dividing line between boards and strips. It is quite apparent that the real reason for not carrying out the contract was that it was getting late in the navigation season, and the freights had advanced. The appellee comes into court, then, with not any too clean hands, admitting, as he does, that he agreed to carry the entire pile of lumber and carried only a moiety. He asks to be paid for what he did carry without offering to allow any damages for not fulfilling the contract by carrying the balance of the cargo. On the other hand, the appellant insists that no recovery can be had, because the contract was not completely carried out by appellee. No doubt this would be the rule at common law, except in states where the more equitable rule has prevailed, as in New Hampshire. In the admiralty courts in a case like this, where the party may be compensated in damages, the rule has prevailed to allow the freighter to recover for the freight carried, deducting the damages sustained by the other party on account of the breach. This seems more equitable than the common-law rule that, in order to recover, the plaintiff must show as a condition precedent a substantial compliance with the contract. The *Salem's Cargo*, 1 Spr. 389, Fed. Cas. No. 12,248; *The Marcella*, 1 Woods, 302, Fed. Cas. No. 13,797. Upon the acknowledged law of this case we think the decree must be reversed. The court below decided the case upon right principles, with a single exception. Instead of allowing the appellant his entire damages of 50 cents per thousand, it allowed him one-half of the damages, or 25 cents per thousand. The court states in its opinion that it is satisfied that the libelant should bear a part of the damages occasioned by the failure to fulfill the contract. But why not the full damages, so long as the entire damage was caused by the failure of the libelant to perform? It is evident that this is not a case where the court should apportion the damages as in case of collision, where both parties are at fault.

It is in evidence that the lumber company had furnished on the trip \$203 to buy fuel, which belonged to the libelant to furnish. About this item there is no dispute. The respondent on the hearing paid into court as a tender to the libelant \$55. This, with the fuel bill, \$203, and \$279.87 damages for failure to carry the entire cargo, amount to \$537.87, while the freight amounts to but \$537, leaving a balance in appellant's favor of \$87.

The account would stand thus:

Charge appellant with freight bill.....	\$537 00	
Cr. by cash for fuel.....	\$203 00	
Money paid into court.....	55 00	
Damages .....	279 87	
To balance .....		87
	<hr/>	<hr/>
	\$537 87	\$537 87

Balance in favor of appellant, 87 cents.

This is not a case where libelant could have recovered costs, coming into court appealing to the conscience of the court to allow him what he had actually earned, while admitting that he had not fulfilled his contract. We think the libelant should have accepted the tender made on the hearing as a settlement of the case, and made no further costs. Having refused to do so, and the damages, with fuel bill and costs,

paid into court, amounting to the full sum of the libellant's freight bill, the decree of the court below should be reversed, with directions to enter a decree in favor of the appellant, dismissing the libel, with costs, from the time of the tender in open court. It is so ordered.

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**SANDERS v. VILLAGE OF RIVERSIDE.\***

**VILLAGE OF RIVERSIDE v. SANDERS.**

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

Nos. 856, 857.

**1. QUIETING TITLE—JURISDICTION—EFFECT OF CROSS-BILL.**

The filing of a cross-bill in a suit to quiet title, alleging possession in defendant, and praying that its own title be established and quieted, confers jurisdiction on a court of equity to determine the question of title, as between the parties, and grant relief to the one entitled to the same, although the fact that plaintiff was not in possession would have defeated the jurisdiction upon the original bill.

**2. SAME—WAIVER OF OBJECTION TO JURISDICTION.**

A defendant in a suit to quiet title, who stipulates for the trial of the cause before a master, thereby waives the right to insist that a court of equity is without jurisdiction, and that plaintiff's only remedy was at law.

**3. EQUITY PRACTICE—CONCLUSIVENESS OF MASTER'S FINDINGS.**

Where, in accordance with a written stipulation of the parties, the whole case is submitted to a master, to find both the law and facts, his findings are conclusive on both parties, except so far as they are excepted to.

**4. DEDICATION BY PLAT—CERTAINTY OF DESCRIPTION.**

To constitute a common-law dedication of land to public purposes by means of a plat, the same certainty of description is required as in other forms of conveyance, and the mere coloring, on a plat drawn to a scale of 400 feet to the inch, of a portion along one side of a strip marked as being 30 feet in width, to indicate that the colored portion was to be devoted to park purposes, is not sufficient to constitute a dedication which will defeat a subsequent conveyance of the entire strip, where the coloring was not of uniform width, and there was nothing marked either upon the plat or on the ground by which the width of the intended park portion could be determined with certainty.

Appeal and Cross-Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This suit grew out of the disputed ownership of two strips of land, each 30 feet wide and 4,700 feet long, in Riverside, a suburb of Chicago. They are adjacent to, parallel with, and separated by, the right of way of a railroad. Mr. Sanders, a citizen of New York, claims title through mesne conveyances from the Riverside Improvement Company, a corporation that founded Riverside. The village claims the land as part of its public parks, through an alleged common-law dedication by the improvement company. Private rights of abutting lot owners are not involved, as none of them is a party to this litigation.

In March, 1891, Mr. Sanders filed his bill against the village, alleging that he was the owner and in possession of the land; that the village was asserting an unfounded claim of ownership, and had committed and was threatening to continue acts of trespass and waste, and praying that his title be quieted and the village enjoined, etc. In April, 1891, the village

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\* Rehearing denied November 15, 1902.

answered, denying complainant's title and possession, asserting title and possession in itself, and averring that complainant had no right to maintain his bill, because when he filed it he was out of possession, and the land was not vacant and unoccupied. Complainant immediately replied. In December, 1891, by leave of court, the village filed a cross-bill setting up its title and possession, the adverse and unfounded claims of Mr. Sanders, and praying that its title be quieted. Mr. Sanders answered the cross-bill in February, 1892, denying the village's title, but admitting that he was not in possession when he commenced his suit. In March, 1892, the village filed its reply. Between May, 1892, and May, 1894, a large amount of evidence was taken before a notary by agreement of the parties. This evidence was printed and filed on December 12, 1894, and the cause and cross-cause were set for final hearing on the pleadings and proofs on the 17th, but were not heard at that time. In January, 1896, a motion by the village for the dismissal of complainant's bill on the ground that he was not in possession, as shown by his own pleadings, was overruled. February 11, 1896, by agreement, an order was entered that "said cause and cross-cause are by agreement of counsel hereby referred to E. B. Sherman, one of the masters in chancery of this court, to consider the evidence taken herein, and to report to this court his conclusions of fact and of law." The master's report was filed in October, 1900.

In substance, the master found that the improvement company had offered to dedicate the strips in question,—the inner part, adjoining the railroad, as a portion of a park system, and the outer portion as alleys; that the alleys were abandoned, and that Mr. Sanders, under his deed of the entire strips, executed in 1874, was entitled to a decree quieting his title to the alley portions only; "that the improvement company failed to indicate by its acts, or the statements of its officers and agents, the precise and definite location and boundaries of the strips on either side of the right of way of the railroad which it intended to dedicate to public use as a part of the public parks and grounds, except as such locations and boundaries were shown upon its maps (made in 1869 and 1870),—on one map by a part of said strips being colored in green, and on another map by the said part being dotted with dark spots"; "that the master is of the opinion that, although tested by accurate mathematical measurement, the colored part of said strips, as shown upon the maps (drawn on a scale of 400 feet to the inch), is not in all places exactly one-half of the entire strips, and, although said colored part is not exactly of uniform width throughout their entire length, yet an ordinary observer, examining the map to ascertain what part of said strips was colored and what part uncolored, would receive the impression that practically the inner one-half of said strips, lying next to and on both sides of the railroad right of way, was colored, and the outer half thereof uncolored, and that it is made sufficiently certain by said maps that the improvement company intended to dedicate the one-half of said strips lying adjacent to said railroad right of way as a part of the public parks and grounds, and the outer half thereof as public alleys"; that the public and the village accepted the offer of dedication; that from 1885 to 1890 the village cut the grass and weeds on the 30-foot strips; that in 1890 the village planted a row of trees along the center of each strip, and made ditches to mark the boundaries; that the maps fail to state, in words or figures, the respective widths of the park and alley portions of the strips; that no marks have ever been made upon the ground, nor separate possession taken, to indicate what was park and what was alley; that the village was entitled to a decree quieting its title to the inner half of the strips.

With his report the master returned the objections Mr. Sanders had made before him; and by order of court, entered by agreement, these objections were to stand and be treated as exceptions filed before the court. The village filed no objections before the master, nor exceptions before the court. On the hearing of the exceptions the court dismissed both the cause and the cross-cause for want of jurisdiction of the subject-matter.

Mr. Sanders, among other assignments, has presented these: "(1) The court erred in dismissing the said bill for want of jurisdiction. (2) The court erred in refusing to enter a decree in said cause and cross-cause quiet-

ing the title of the complainant as against the village of Riverside to the whole of the two strips of land claimed by complainant in his bill." The village insists that the action of the court below was right; but that, if the dismissal be found erroneous, its title be quieted to the park portions of the strips, and also to the alley portions.

Samuel W. Packard, for Joshua C. Sanders.

Amos C. Miller, for village of Riverside.

Before JENKINS and BAKER, Circuit Judges.

BAKER, Circuit Judge, having made this statement, delivered the opinion of the court.

There can be no question but that the village could have driven Mr. Sanders to an action of ejectment if it had stood upon the proposition that one out of possession cannot maintain an equity suit to quiet title against one in possession. *Jackson v. Simmons*, 39 C. C. A. 514, 98 Fed. 768. And the objections now urged, that Mr. Sanders came into court with unclean hands, and that a municipality cannot be held as defendant in a suit to quiet title, would have to be considered, if they had been made in time, and had not subsequently been waived. The village, however, filed a cross-bill, in which it set up its own title and possession, and the adverse claims of Mr. Sanders, and asked affirmative relief. "The jurisdiction to relieve the holders of real property from vexatious claims to it, casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity." *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52. The cross-bill presented a cause that was purely of equitable cognizance. The effect of this was stated accurately, we think, in *Cockrell v. Warner*, 14 Ark. 346:

"The cross-bill, founded on matters clearly cognizable in equity, supplied any defect in jurisdiction, if any existed, and placed the court in possession of the whole cause, and imposed the duty of granting relief to the party entitled to it. The original bill and cross-bill are but one cause (3 Daniell, Ch. Pl. 1943; *Kemp v. Mackrell*, 3 Ark. 812; *Field v. Schleffelin*, 7 Johns. Ch. 252); and it certainly cannot be at all material from what particular source jurisdiction arose, provided it existed in the case."

It is true that the village, about four years after Mr. Sanders admitted in his answer to the cross-bill that he was not in possession when he filed the original bill, and after the evidence had been taken by agreement, printed and filed, and the case set for final hearing, moved that the original bill be dismissed. But the village did not offer to dismiss its cross-bill. In *Jackson v. Simmons*, supra, this court said:

"A cross-bill which seeks affirmative relief is in the nature of an original bill wherein the cross-complainant is the actor. Such a cross-bill is not dependent upon the original bill, is not subject to the control of the complainant in the original bill, and does not fall with the dismissal of the original bill, whether that dismissal be the act of the complainant or the act of the court."

The circuit court might well have refused to entertain the motion while the village was proposing to hold Mr. Sanders on the cross-bill. But conceding, arguendo, that the motion should have been sustained, the village, after the overruling thereof, made a deliberate

stipulation with Mr. Sanders, entered as a rule of court, that the cause and the cross-cause should be referred to a master to consider the evidence taken, and to report his conclusions of fact and law. The village thus selected its own tribunal,—one competent to pass upon the conflicting claims of title,—and thereafter could not be permitted to assert that its adversary should have resorted to a court of law. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *American Bell Tel. Co. v. Western Union Tel. Co.*, 16 C. C. A. 367, 69 Fed. 666; *Farrar v. Bernheim*, 21 C. C. A. 264, 75 Fed. 136; *Bosworth v. Hook*, 23 C. C. A. 404, 77 Fed. 686. And for the village it may be said that, on the coming in of the master's report, it did not challenge the jurisdiction of the court to decide the merits of the exceptions presented by Mr. Sanders. The court, so far as the record discloses, of its motion dismissed the case, the cause and the cross-cause, at this stage of the proceedings. But the present contention of the village in support of the court's action apparently comes to this: If the tribunal of its own selection found that the village had title to the whole, the case would be a suit in equity; but, if Mr. Sanders were found to have title to any part, the case would be an action at law. This sounds very like the urchin's proposition to match coppers on the basis of, "Heads, I win; tails, you lose."

The village insists that the propriety of the court's action cannot be inquired into because no assignment directly avers "that the court erred in dismissing the cross-bill." We think the assignments quoted in the statement are sufficient. On this record, it was error to dismiss the original bill, and it was error to refuse to rule on the merits of the exceptions.

The parties agreed to a submission of the whole case to a master to find the facts and the law. The finding came into court, conclusive upon both parties, except in so far as they should file exceptions. The village filed no exceptions to the finding that Mr. Sanders was the owner of, and entitled to a decree quieting his title to, the alley parts. The correctness of that conclusion, therefore, is not now in controversy. *Farrar v. Bernheim*, *supra*. Under the exceptions of Mr. Sanders, the point, among others, is made that the alleged dedication of the park portions is void for uncertainty. The report and the evidence show that Mr. Sanders has good record title to the whole of the land. The report finds that his record title is cut down by a common-law dedication of one-half of the land for park purposes. His actual title is therefore as broad as his record title, if the purported dedication is void. The maps are on the scale of 400 feet to the inch. The width of the strips is definitely given at 30 feet. The improvement company intended to devote part of the 30 feet to alleys and part to park purposes,—particularly for planting a row of trees to cut off the view of passing trains. The width of neither part was stated on the maps or elsewhere. Nothing was done upon the ground itself to mark the dividing line. On the maps no dividing line, as such, was drawn. On one map the park portion is shown by a green stripe, of varying width, overlying in

part the definite boundary of the 30-foot parcels. On the other map the park portion is indicated "by being dotted with dark spots," supposed to represent the intended row of trees. If the improvement company had gone ahead with its original plans, and had paved 25 feet for alleys, and on the remaining 5 feet had set out a row of trees, it would have established by its acts a definite dividing line, and there is nothing in this record by which its partition of the 30 feet originally intended for devotion to public uses could be impeached. In the absence of a line fixed by the parties, the master established one from his belief that an ordinary observer, looking at the maps, would receive the impression that about one-half was meant to be given for each purpose. A dedication is a mode of conveyance. If the grantor has failed to describe the land, the court cannot do it for him, where reformation is not asked. The rule in Illinois with respect to certainty of description in statutory or in common-law dedication, to be followed by federal courts where Illinois titles are involved (*Jackson v. Chew*, 12 Wheat. 153, 6 L. Ed. 583), is thus given in *Village of Winnetka v. Prouty*, 107 Ill. 218:

"To make a good dedication, either under the statute or at the common law, requires a definite and certain description of that which is proposed to be dedicated. \* \* \* An instrument of conveyance ought, upon its face, to show at least enough to enable a competent surveyor to find with absolute certainty that which is assumed to be conveyed."

Also, *City of Carlinville v. Castle*, 177 Ill. 105, 52 N. E. 283, 69 Am. St. Rep. 212, and *City of Edwardsville v. Barnsback*, 66 Ill. App. 381. The testimony of the surveyor in this case is not needed to show that it is impossible from the maps "to find with absolute certainty that which is assumed to be conveyed." The variation of a hundredth of an inch, the breadth of a most delicate line, would make a difference of four feet,—nearly a seventh of the whole land, and more than a quarter of what is now in controversy. In *Minneapolis & St. L. Ry. Co. v. Incorporated Town of Britt*, 105 Iowa, 202, 74 N. W. 934, in holding an alleged dedication void for uncertainty, the court said:

"The only means of knowing the breadth of most of the streets in controversy, and, indeed, the only way in which to determine the exact location or size of any lot or block or alley, is by reference to the scale, which says that the plat is drawn on the basis of one inch to one hundred and twenty feet. Such a reference is too indefinite to constitute the basis for a conveyance of land. The variation of one-twelfth of an inch means a difference of ten feet in the dimensions of a lot or the breadth of a street."

To quote from *Attorney General v. Whitney*, 137 Mass. 450:

"We are not disposed to abandon the use of language, or to aid in introducing a new method of conveying by colors or pictorial representation independently of it, under a system of legislation which requires all estates or interests in lands, more important than those which are to have the force and effect of those at will only, to be conveyed by instruments in writing."

The decree is reversed, and the cause remanded, with directions to enter a decree quieting title in Mr. Sanders to the land in controversy.

## BROOKS v. PRATT.

## SAME v. GRAY et al.

(Circuit Court of Appeals, First Circuit. June 18, 1902.)

Nos. 399, 400.

## 1. INSANE PERSONS—EVIDENCE.

Two brothers, who were dependent on their uncles, were sent to an insane asylum during their young manhood, where their uncles supported them. They had remained there for nearly 50 years without objection at the time they executed certain assignments, and the superintendent of the asylum and two of his assistants testified that they were insane. They were permitted by the asylum authorities to have their freedom, and they were given an allowance with which to buy articles they required, part of which they deposited in a savings bank account. A diary kept by one of them, when taken as a whole, also indicated insanity; but a reputable physician, who was an expert on insanity, testified that, after a conversation with one of them, lasting 45 minutes, he did not discover insanity. *Held*, that a finding that the brothers were insane at the time they executed the assignments was justified.

## 2. SAME—ASSIGNMENT TO ATTORNEY—VALIDITY.

Where an attorney at law, who was a relative of two incompetents, obtained from them assignments of certain spoliation claims against the United States government, which he was prosecuting, and which he succeeded in collecting, without requiring the incompetents to act under independent advice, and in an action to set aside the assignment it appeared that one of the incompetents did not understand the meaning of the assignment, and defendant on several occasions had advised them not to mention it to their relatives, and in several of his letters to them had made incorrect statements, and did not testify frankly as to what had become of a prior assignment, a judgment vacating the assignment was proper.

Appeals from the Circuit Court of the United States for the District of Massachusetts.

The following is the opinion of the court below (LOWELL, District Judge):

These are two bills in equity, brought respectively by Charles R. Gray and Frederick W. Gray, to set aside two assignments made severally by them to the defendant William Gray Brooks. Charles has died since the filing of the original bill, and his administrator has filed a bill of revivor. The guardians duly appointed of the complainants above mentioned have joined in the bills. The assignment by Charles R. Gray was as follows:

"Know all men by these presents, that I, Charles Russell Gray, of Brattleboro, in the state of Vermont, do hereby assign, release, and relinquish unto my nephew, William Gray Brooks, counselor at law, of Boston, in the county of Suffolk, in the commonwealth of Massachusetts, all my right, title, and interest which at the date of these presents, or at any future time, I may have in and to any portion of any award now made, or at any future time to be made, by the government of the United States of America, under the acts of the congress of the same, to the 'next of kin' of William Gray, the elder of that name, by reason of indemnity for losses, depredations, seizures, captures, detentions, and spoliations suffered by William Gray, the elder, aforesaid, subject, nevertheless, to the conditions following:

"First. To have and to hold the property aforesaid in trust for my use and benefit during the continuance of my natural life, yielding and paying unto me the interest and income arising therefrom, and so much of the principal sum thereof as to make the payment to me equal to four and one-half per centum on the principal sum by these presents conveyed in each and every year during the continuance of my natural life, and such sums as



I may desire to withdraw from the principal sum aforesaid during my natural life.

"Second. Upon my decease the property aforesaid is to become the absolute property of William Gray Brooks aforesaid, free and discharged from any trust or condition whatsoever.

"In testimony whereof I, Charles Russell Gray, aforesaid, have hereunto set my hand and seal this seventh day of July, in the year of our Lord one thousand eight hundred and ninety-six.

"Charles Russell Gray. [Seal.]"

The assignment by Frederick W. Gray was identical with the above.

The complainants seek to set aside the assignments because Charles and Frederick Gray were of unsound mind at the time of execution, and because they were induced to execute the assignments by the fraud of the defendant.

Charles and Frederick Gray were brothers. Charles was born in 1819, Frederick in 1823. In 1847, Frederick was admitted to the Vermont Asylum for the Insane, now called the "Brattleboro Retreat," where he has since resided. Charles was admitted to the same institution in January, 1848, and resided there until the time of his death, February 1, 1898.

The court has first to consider if these two persons, either or both, were of unsound mind July 7, 1896. In my opinion, they both were. Each of them had at that time been an inmate of an insane asylum for nearly fifty years. To that institution they had not then been committed by any form of law, perhaps because these forms were less scrupulously observed fifty years ago than at the present time, and the administration of insane asylums was then less carefully regulated by statute. It should be added that the brothers probably went to the asylum and remained in it without opposition on their part. William H. Brooks, father of the defendant, who married their sister, testified that they were sent to the insane asylum for two reasons: First, because the cost of board there was very small, and their father had lost all his property, so that the uncles had the care of the children; and, second, in order that they might have a place where they could permanently remain, instead of changing from place to place, as they might prefer. That these reasons were real, I see no reason to doubt, but that the primary and controlling reason was a mental weakness on the part of both Charles and Frederick there can be no doubt whatsoever. Uncles do not send penniless nephews of average mental capacity, and in the prime of young manhood, to insane asylums, in order to save something in the price of board; and, if this be true of uncles in general, there is no reason to suppose that the most respectable uncles in this particular case acted in the very unusual manner suggested by Mr. W. H. Brooks. Moreover, ordinary young men, a little more than twenty years of age, do not passively retire to insane asylums for the rest of their natural lives, even if their uncles request them to go there.

In 1847 and 1848 Charles and Frederick Gray were doubtless deemed to be mentally weak, and proper inmates for an insane asylum. In the Vermont insane asylum or retreat they were permitted, as is the case with not a few insane patients in other asylums, a comparatively great degree of liberty. They had a key, by which they could let themselves in and out of the building. They went about the streets of Brattleboro freely. Each of them had an allowance of about fifteen dollars a month, with which they bought clothing and other articles as they pleased. They opened an account in the savings bank with their surplus allowance, and they made visits to their friends in Boston and elsewhere. They were allowed to correspond freely, and in ordinary conversation they doubtless passed for ordinary members of the community,—a condition which can always be predicated of a few inmates of an average insane asylum. That they were mentally unsound, however, is shown by conclusive evidence. In the first place, we have the records of the asylum, which I conceive to be admissible in evidence by virtue of the decision in *Inhabitants of Townsend v. Inhabitants of Pepperell*, 99 Mass. 40. See *Donovan v. Railroad*, 158 Mass. 450, 455, 33 N. E. 583. There is testimony to the same effect from the superintendent, from a present and from a former assistant. In the case of Frederick, there was introduced in evidence his diary for the years 1873, 1883, and 1892. In these

diaries there may be no entry, which, standing by itself, proclaims its writer insane, but it is probably true that almost any single written or spoken expression of a raving lunatic can be paralleled in some utterance of some man undoubtedly sane. It is not by a single expression that insanity is ordinarily to be detected. These diaries, both in respect of the language, the peculiar and unintelligible signs largely employed, and their general physical appearance, impress me with the strong belief that the writer was of unsound mind. To specify instances is unprofitable. The impression is derived from a general inspection of the whole of each diary.

The defendant has introduced in evidence the testimony of Dr. Hazelton, who, on one occasion since the execution of the instrument in question, spent forty-two minutes with Frederick Gray in the retreat, and during that time had with him considerable conversation. That conversation appeared rational to Dr. Hazelton, and to indicate that Frederick's mind was a little above the class of minds who have the same early education and the same slight contact with the world. In the conversation Dr. Hazelton discovered no evidence of mental incapacity. From his examination of the record of Charles R. Gray he reached substantially the same conclusion concerning him. Dr. Hazelton is an established physician of good standing, who was at the McLean Asylum from 1865 to 1867; had a license to maintain a private asylum in 1868, which he kept for a year and a half; went into general practice in 1869, and has since continued therein. For about seventeen years he has "been medical examiner for prisons; that is, I examine people who are suspected of mental trouble in all prisons or reformatories of this state." Whether Dr. Hazelton is the sole officer employed for this purpose does not appear, nor does the extent of his service. He is the family physician of the father and mother of the defendant. I cannot regard Dr. Hazelton's testimony as of great weight when compared with the records of the asylum, the opinion of its physicians, the diaries of Frederick Gray, and the fact that the brothers, at the time of executing the documents in question, had been patients in an insane hospital for nearly half a century. Frederick Gray testified himself at considerable length in this case. I have examined his testimony with care, and find in it no indication opposed to the conclusion just stated. That he was capable of carrying on ordinary conversation in an ordinary manner is quite clear, and is abundantly shown by all the testimony in the case. Some persons at Brattleboro testified that the brothers appeared upon the streets of that town and in its shops like other men, and seemed competent to make little purchases and make deposits in the savings bank like other people. Upon all this testimony I have reached the conclusion that the brothers Gray were of weak mind, that they were insane, and were proper inmates of an insane asylum, but that they were capable of understanding much that went on about them.

Although they were of unsound mind in some respects, it does not follow that every instrument executed by them can be avoided. A man may be unquestionably insane, and may have resided in an insane asylum as long as had Charles and Frederick Gray, and yet may be able to understand and validly to execute an important document. I am not prepared to say that, if the assignments here in question had been made under some circumstances, they might not be held valid in a proceeding like this.

The complainant has charged that they were obtained by the fraud and undue influence of the defendant William G. Brooks. Mr. Brooks, as has been said, was a nephew of the brothers. In 1891 he became counsel for some members of his family, including Charles and Frederick, in collecting money voted by congress to the heirs of his great-grandfather, William Gray, the well-known merchant. Partly, at least, in consequence of his efforts as counsel, a decision of the supreme court of Massachusetts adverse to his clients was reversed by the supreme court of the United States, and thereafter the decision of a single justice of the supreme court of Massachusetts was reversed by the full bench; thus increasing the amount which his clients obtained. However much I may think that the defendant has exaggerated the pecuniary value of his services, it seems plain that that value is considerable.

The defendant now contends that these assignments were made in payment of his services as counsel. There is nothing of this expressed in the assignments, which do not in terms prevent the defendant from taking his proper counsel fees from the fund, and holding the balance only in trust under the assignments; but perhaps the arrangement now suggested by him may fairly be implied from the whole series of transactions. Had this been the intention of Charles and Frederick, deliberately expressed after independent advice fully given, and after the meaning of the assignments had been fully explained to them by independent counsel altogether disinterested, I am not sure that they might not have made assignments like those in question. But, as was said in *Jackson v. King*, 4 Cow. 207, 219, 15 Am. Dec. 354: "In discussing this point, it is conceded that, although mere weakness of understanding is insufficient, it furnishes strong ground of suspicion that when persons in such a state execute conveyances, they are acted upon by improper influence." When the near relative and legal adviser of two weak-minded old men, residing in an insane asylum for nearly half a century, is to be benefited by their deed, the utmost openness, impartiality, and self-restraint is required from him; and when such a man seeks by his testimony, almost unsupported, concerning the explanations given to the assignors, to support the assignments, he should tell his story frankly, and without reserve.

On direct examination the defendant testified to some general conversation with Charles in 1892, and then passed at once to the summer of 1896, and the assignments here in question. On cross-examination it appeared that in 1893 the brothers executed to the defendant an assignment of these French claims. Precisely what was the form of this assignment no one but the defendant knows. Frederick was not asked about it. Indeed, his examination strongly suggests that the defendant's counsel was then ignorant of it. The defendant's testimony regarding it is not frank, or free from evasion; the paper was probably destroyed when the second assignment was executed. Not only was this first assignment made in 1893, but in January, 1896, it was sent by the defendant to the brothers, and was by them acknowledged. That it conveyed to the defendant the brothers' interest in the claims was not understood by them, as is shown by their letters of May 24, 1896. That Frederick did not understand the meaning of the assignment here in question is evident from his testimony, unless he has lost his memory,—a supposition which would make strongly against the defendant's case.

Instead of procuring for the brothers independent advice regarding the execution of these papers, the defendant, in his dealings with them, frequently urged that they should not mention these dealings to other members of the family; and his letters contain more than one erroneous statement which might well influence the brothers' minds.

It is not thus that a counselor at law can be allowed to profit by a deed made in his favor by his client. The defendant's intentions may have been good. He may have honestly believed that he had a right to act as he did; but his moral honesty will not, in a court of equity, justify his professional conduct. It is not necessary to cite cases, but these may be referred to, in all of which the solicitor's conduct was more defensible than here: *Broun v. Kennedy*, 4 De Gex, J. & S. 217; *Rhodes v. Bate*, L. R. 1 Ch. 252; *Barron v. Willis*, *London Times*, May 10, 1900, p. 16. In both these cases there must be a decree for the complainants.

Henry V. Cunningham (William G. Brooks, pro se, on the brief), for appellant.

John L. Thorndike, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

COLT, Circuit Judge. Upon full consideration of the evidence, we have no doubt that Charles R. Gray and Frederick W. Gray, at the time they severally made the assignments to the defendant below, and

for many years previous thereto, were of weak mind, and, in consequence, the easy subjects of undue influence. Further, in conformity with the principles and decisions of courts of equity both in this country and in England, we have no question that the relation of attorney and client, under the circumstances disclosed in these cases, renders the assignments invalid. To reverse the decree in these cases, as was said in *Broun v. Kennedy*, "would be to unsettle the law upon a point on which the best interests of society require that it should be absolutely adhered to." 4 De Gex, J. & S. 217, 222. In our judgment, these cases are free from doubt, and we need add nothing to the clear and comprehensive opinion of the circuit court.

Decrees affirmed, and the costs of appeal are awarded in each case to the appellees.

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UNITED STATES v. WILLCOX.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 787.

1. ARMY—CLAIMS OF OFFICER FOR PRIVATE PROPERTY LOST—RECOVERY OF PAYMENT MADE—PLEADING.

Under Act Cong. March 3, 1885, 23 Stat. 350 [U. S. Comp. St. 1901, p. 172], authorizing the treasury department to investigate the claim of officers and men for private property lost in the service, and, where it appears the property was lost under certain circumstances without fault of claimant, to pay him therefor, "provided, that any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered," a payment made pursuant thereto cannot be recovered back, in the absence of mistake or fraud, which is not shown by a complaint stating that, after payment of the claim, the department disallowed the claim for the reason that the loss was not without fault of the claimant; this being but an allegation of the reason assigned by the department for its action, and not an allegation of the fact that the loss was not without his fault.

In Error to the Circuit Court of the United States for the Southern District of California.

L. H. Valentine, U. S. Atty.

Oliver P. Evans, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The court below sustained a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and that ruling is the basis of the single assignment of error found in the record. The complaint alleges that the defendant thereto was a first lieutenant in the 6th regiment of cavalry of the United States, and as such officer "did render his account to the United States in the sum of two hundred dollars (\$200.00) as and for the value of a certain horse then and there claimed by said defendant to have been lost in the military service of the United States at Ft. Lewis, in the state of Colorado, on or about the 6th day of April, 1889, which said account was duly presented to the war de-

partment, and claim numbered 108,188; that afterwards, to wit, on the 7th day of December, 1896, said account was duly settled by the auditor of the war department, and a certificate of settlement, numbered 1,737, duly issued by the said auditor of the war department for the said sum of two hundred dollars, which sum of two hundred dollars was paid to said defendant on or about the 14th day of December, 1896." It is then alleged that on the 28th day of May, 1897, the comptroller of the treasury directed a revision of the claim so presented, settled, and paid, "and disallowed said claim of defendant, for the reason that the loss of the said horse on which the said claim of defendant was based was not without fault on the part of said defendant, and the said defendant by his negligence contributed to the loss of said horse, and thereby was not entitled to recover for said loss under the act of March 3, 1885, 23 Stat. 350 [U. S. Comp. St. 1901, p. 172]," and that subsequently, to wit, on the 24th day of May, 1898, acting under the direction of the comptroller of the treasury, the auditor of the war department "restated said claim of defendant, and issued a new certificate, numbered 4,867, raising a charge of two hundred (\$200.00) dollars against said defendant, by reason of which said defendant became then and there indebted to the plaintiff in the sum of two hundred dollars." The complaint alleges the refusal of the defendant to pay the said sum after demand made and asks for judgment against him therefor, with interest and costs.

There is in the complaint no allegation tending to show that in the allowance or payment of the claim presented by the defendant there was any mistake of law or fact, nor is any fraud alleged to have been practiced on the government by the defendant in any stage of the proceedings. It is true that it is alleged that the subsequent disallowance of the claim by the comptroller of the treasury, upon which the subsequent action of the auditor of the war department is alleged to have been based, was "for the reason that the loss of the said horse on which the said claim of defendant was based was not without fault on the part of said defendant, and the said defendant by his negligence contributed to the loss of said horse, and thereby was not entitled to recover for said loss under the act of March 3, 1885, 23 Stat. 350 [U. S. Comp. St. 1901, p. 172]." But, manifestly, that is but an allegation of the reason for the action of the comptroller of the treasury, which may or may not have been well founded, and is certainly not an allegation of any fact. Whether a mistake of fact or of law, or the subsequent discovery of fraud in the presentation, allowance, or payment of the claim in question would, in view of the act of congress of March 3, 1885, 23 Stat. 350 [U. S. Comp. St. 1901, p. 172], entitled "An act to provide for the settlement of the claims of officers and enlisted men of the army for loss of private property destroyed in the military service of the United States," sustain an action like the present, need not be determined or considered, for the reason, already suggested, that the complaint here contains no allegation of any such mistake or fraud. By the act referred to congress authorized and directed the proper officers of the treasury to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the mil-

itary service of the United States, which has been or may hereafter be lost or destroyed in the military service, when such loss or destruction was without fault or negligence on the part of the claimant, where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment, and where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances, and further provided that "the amount of such loss so ascertained and determined shall be paid out of any money in the treasury not otherwise appropriated, and shall be in full for all of such loss or damage: provided, that any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered," with other provisions not pertinent to the present case. Whatever might be held if it was made to appear that the claim in question had been presented, or acted on, or paid under a mistake of fact or law, or by reason of any fraud practiced against the government, certainly, in the absence of any such showing, the express declaration of congress that any claim which shall be presented and acted on under authority of the act shall be held as finally determined, and shall never thereafter be reopened or considered, is conclusive against any further action on the part of the government. Similar views were expressed by the circuit court for the Southern district of Iowa in the case of *U. S. v. Olmsted*, 106 Fed. 286.

The judgment is affirmed.

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#### HAGAN v. TUCKER.

(Circuit Court of Appeals, Third Circuit. November 14, 1902.)

**1. SHIPPING—RIGHT TO DEMURRAGE—EVIDENCE CONSIDERED.**

Libelant furnished a number of barges for use as lighters by respondent's testator in his coal business in New York City and harbor. Such use necessarily involved more or less delay of the barges while waiting for the sale or the transfer of their cargoes to steamships, which was a part of defendant's business. A suggestion by libelant that he should expect demurrage for such delays was met by a prompt denial of liability, and notice by decedent that he would not keep the vessels on such terms. Thereafter the business continued as before, monthly bills being presented and paid for the hire of the barges, which contained no charges for demurrage, nor were any such charges made on libelant's books until after decedent's death, when a large sum was charged against him on that account. *Held*, that on such evidence, and in the absence of clear evidence to the contrary, libelant must be presumed to have accepted the risk of such delays as an incident of the business, and that he was not entitled to recover demurrage therefor.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 112 Fed. 546.

¶ 1. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

Henry R. Edmunds, for appellant.

M. Hampton Todd, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. Upon an attentive examination of the proofs we discover no good ground for rejecting or modifying the findings of the district judge. We think that he rightly apprehended and has correctly stated the nature and terms of the business arrangement which was entered into between the libelant and the respondent's testator, under which the libelant furnished his barges. We agree with the conclusion that the libelant's claim for demurrage or damages for the detention of his barges is not satisfactorily established. The clear weight of evidence, we think, is with the respondent.

The intimation contained in the libelant's letter of February 16, 1898, written soon after the beginning of the enterprise, that he (Hagan) would expect to be paid for time "they [the barges] lay with coal" was met with a prompt denial of his right to any such compensation, and a notification that, "if he was not satisfied, he could take his boats away." The libelant acquiesced. He made no further claim for demurrage or damages for detention of his barges during the currency of the business. The libelant's letters of July 12, 1898, December 3, 1898, January 13, 1899, and January 23, 1899, plainly indicate that he well understood he was not to be paid for lost time. The present claim was set up after Mr. Tucker had died. The libelant's books contain no charges for demurrage or damages for detention entered in Mr. Tucker's lifetime. The entire items of the claim were entered on the libelant's books after Mr. Tucker's death, and all of them at one time. Moreover, the libelant rendered to Mr. Tucker monthly accounts for the use of the barges, which were regularly paid. No claim for demurrage or detention was made in any of those accounts. Those monthly statements and settlements may not absolutely conclude the libelant, but they are strong evidence against this belated claim. We do not find in this record evidence to counteract the probative force of the monthly settlements.

Upon the whole case we are entirely satisfied that the court rightly dismissed the libel, and, accordingly, the decree of the district court is affirmed.

PETTIBONE, MULLIKEN & CO. v. AJAX FORGE CO.\*

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 870.

1. PATENTS—INFRINGEMENT—RAILROAD SWITCHES.

The Strom patent, No. 457,905, for a railroad switch, construed, and held not infringed, as to either form of tie-bar therein shown, by the device of the Bradley patent, No. 649,267.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

In Equity. Suit for infringement of letters patent No. 457,905, for a railway switch, granted to Axel A. Strom August 18, 1891. From a decree dismissing the bill, complainant appeals.

On the ground of noninfringement, the court below dismissed appellant's bill, which was based on letters patent No. 457,905, August 18, 1891, to Strom, assignor. In a split-switch the movable rails are planed to a point, respecting their width. The point-rails are coupled by a tie-bar, which, by means of its connections with the lever of a switch-stand, throws the switch. As the switch is set for the main or the side track, the appropriate point-rail should be brought into close contact with its adjacent stationary rail, while the other should stand several inches away from its fixed neighbor. If the contact is not close, the flanges on the wheels of engines and cars are likely to cause disaster. By the wearing of the rails, and of the bolts and nuts used in connecting them to the tie-bar, as well as by the accidental bending of the tie-bar, or other disarrangement of parts, the original fixity of relation between the point-rails becomes impaired, and the switch is made dangerous. At least 12 years before the Strom patent was granted, means were employed for spreading the point-rails to take up lost motion. The claims of the patent are these: "(1) In combination, a split-switch and a connecting medium for the switch-rails, adjustable lengthwise thereof, to set the gage, substantially as described. (2) In combination, a split-switch and a tie-bar, C, connecting the switch-rails, and adjustable lengthwise thereof, to set the gage, substantially as described. (3) In combination, a split-switch and a tie-bar, C, extending obliquely between and connecting the switch-rails, and adjustable at one end lengthwise of the adjacent rail, to set the gage, substantially as described." In the construction of a split-switch there is a natural convergence of the switch-rails toward their points. To effect the required spreading of the switch-rails, the tie-bar, C, of the second claim, is moved along toward their points and fastened at the proper place by means of clips and a series of bolt-holes in the web of each switch-rail. The tie-bar, C, of the third claim, is longer than the distance between the switch-rails, where one end of the bar is permanently pivoted, and does the spreading by being brought nearer to right angles and fastened to the web of the rail. Neither of these specific devices was ever made and used. Appellant marketed split-switches made under the Strom patents, No. 457,904, August 18, 1891 (same date as patent in suit, though applied for 11 days earlier), and No. 543,605, July 30, 1895. The former is spoken of in the record as the "Channel," and the latter as the "Transit" device. In the "Channel" patent, guard-rails are rigidly attached to the switch-rails, and extend some little distance beyond the points. The extensions are bent inwardly toward each other in the plane of the rail-flanges. The spreading of the switch-rails is accomplished by moving a bar forward into the throat of the convergence, and fastening it by means of plates that slide along the web of each rail, and are attached thereto at the proper point in a series of bolt-holes. In the "Transit" construction, to each switch-rail is rigidly fixed a plate that extends inwardly in the plane of the rail-flanges. In each

\* Rehearing denied November 15, 1902.



plate is a series of holes in a right line that runs obliquely to the line of the rail, toward either the point or the heel of the rail. The switch-rails are spread by moving a bar forward, and bolting it at the proper points in the plates. Appellee is manufacturing split-switches under the Bradley patent, No. 649,267, May 8, 1900. To each switch-rail is rigidly fixed a plate that extends inwardly in the plane of the rail-flanges. In each plate is a circular opening with notched circumference. In the opening fits a toothed disk that has an eccentric bolt-hole. A bar, having jaws at each end, is securely bolted, through the eccentric holes, to the disks and plates. The separation of the switch-rails to compensate lost motion is effected by changing one or both eccentric bolt-holes to a point further removed from the rail.

W. H. Dyrenforth, for appellant.

James H. Raymond, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after making this statement, delivered the opinion of the court.

At the bottom of appellant's argument lies the contention that each of the claims sued on is generic, and covers every construction in which the connecting medium between the switch-rails is used to separate them by being moved lengthwise of the rails. Before Strom's time it was old to join the switch-rails by a bar that had its ends pivotally connected with clips fastened to the rails. Brahn, No. 248,990, November 1, 1881; Parsons, No. 308,373, November 25, 1884. It was also old to counteract lost motion by spreading the rails through the agency of turn-buckle and screw-threaded devices. Dunwoody, No. 218,720, August 19, 1879; Stone, No. 292,144, January 15, 1884. In 1891 Strom showed how the tie-bar, C, of his second claim (the old Brahn or Parsons tie-bar), could be operated as a wedge to separate the switch-rails, by reason of their natural (old) convergence. As he said in his specification, "This means of adjustment depends for efficacy upon the normal convergence of the switch-rails toward their points." The second claim is a specific embodiment of this concept, which Strom stated broadly in his first claim. If there was invention in using the known bar to separate—which is the wedge's function—the existing convergence, in relation to which the bar was already placed (a question we do not consider), the new art, if any, consisted in moving the bar as a wedge lengthwise of the switch-rails towards their points,—an operation in which the entire movement is dependent wholly upon the normal convergence of the rails. The general art of separating switch-rails to take up lost motion was old. In that art a variety of means, of one general class, were employed, by which the required movement was obtained through increasing the effective length of the tie-bar,—an operation completely independent of the rails' convergence.

The old nonextensible bars of Brahn and Parsons were set at right angles to the switch-rails. In his third claim, Strom took the old tie-bar, increased its length beyond the shortest distance between the switch-rails, set it obliquely, and provided a series of holes in the web of one rail by which the tie-bar could be brought nearer to right angles. If there was invention in using the known bar as a brace between rails, in relation to which it was already found (a point we do

not decide), we are of opinion that the device in the third claim was, at most, an independent improvement in the known art. For the brace is adapted to separate parallel surfaces; its efficacy is wholly independent of convergence; if convergence is present, it is as an accidental state of the objects to be moved, and not as an essential condition to the brace's operation; the brace would work in a plane vertical and at right angles to the switch-rails as well as in the plane of their flanges; and the tie-bar, C, of the third claim, is within the principle of spreading the switch-rails by increasing the operative length of the connecting medium, as much as if at each movement a tie-bar of greater length were set at right angles to the rails.

In appellee's mechanism the range of increasing the distance between the eccentric bolt-hole and the rail is about three-quarters of an inch. This space is divided into many small portions. The separation of the switch-rails is accomplished by means of the eccentric. It is adapted to separate parallel surfaces. Its efficacy is wholly independent of convergence. It would operate as well in a plane vertical and at right angles to the rails. In a movement of the eccentric in the plane of the rail-flanges, which movement separates the rails, say, a sixteenth of an inch, the amount that may be attributed to the normal convergence of the rails is accidental, not of the essence, and wholly insignificant.

The first and second claims are not infringed, because appellee's device is not within the alleged new way that depends for its efficiency solely upon the normal convergence of the switch-rails. The third claim is not infringed, because that is in the old field, and must be limited to the means stated. Appellee's instrumentality and its operation are different. The brace, as it departs from a right angle, draws the switch-rails nearer each other, while they are spread by the movement of the eccentric bolt-hole away from the disk's diameter, drawn at right angles to the rail. The Bradley device we deem an independent and meritorious improvement in the old art of effecting the desired movement, regardless of convergence, by increasing the operative length of the medium that extends from rail to rail.

A considerable part of appellant's brief is devoted to a contention, in effect, that appellee infringes the "Channel" and "Transit" patents. As they are not sued on, this is not the occasion to test their validity and scope. For present purposes, it is enough to say that, if they are in the new field, the Bradley device is not; and, if in the old, that was open for independent improvements.

The decree is affirmed.

**RIVERSIDE & A. RY. CO. v. CITY OF RIVERSIDE et al.**

(Circuit Court, S. D. California, S. D. November 1, 1902.)

No. 1,000.

**1. JURISDICTION OF FEDERAL COURT—FEDERAL QUESTION—IMPAIRMENT OF CONTRACT.**

It is not essential to the jurisdiction of a federal court of a suit based on an alleged impairment of the obligation of a contract by a state in violation of article 1 of section 10 of the constitution that there should be a valid contract, or that the impairment complained of should in fact be effected, but it is sufficient for jurisdictional purposes if plaintiff claims the existence of such contract, and its impairment, in good faith.

**2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ACTION OF CITY.**

The action of a city in repudiating and refusing to perform a contract by the exercise of powers conferred upon it by the state constitutes a depriving of the other party of his property by the state without due process of law within the constitutional inhibition, notwithstanding the fact that the contract was made by the city in a quasi private or business capacity rather than a governmental capacity.

**3. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.**

A suit to enjoin a city from carrying into effect a resolution of its council by which it declared its purpose to discontinue the furnishing of electric power to complainant under a contract, on the ground that such action was an impairment of the obligation of the contract and deprived complainant of its property without due process of law, is not one for the specific performance of the contract, but one for the protection of complainant's constitutional rights, of which a federal court has jurisdiction.

**4. SAME—AMOUNT IN CONTROVERSY.**

In a suit to enjoin a city on constitutional grounds from shutting off a supply of electric power furnished under a contract, the amount or value in dispute for jurisdictional purposes is the value of complainant's rights under the contract, and not the amount of the payments to be made thereunder.

**5. CITIES—VALIDITY OF CONTRACT—SUPPLYING ELECTRIC POWER TO STREET RAILROAD.**

A city having authority under section 862 of the California municipal corporation act of 1883, as amended in 1891 and 1897, to acquire, own, and operate street railways, telephone and telegraph lines, gas, and other works for light and heat, and to permit the laying of tracks for street railways in the public streets, has power to contract for a supply of electricity to be used for any of such purposes; and, where it has so contracted for a supply to be used by the terms of the contract in any way it should see fit, or disposed of to private citizens to use for any purpose whatever within the limits of the city, a subcontract to furnish a portion of such supply to a company for the operation of a street railroad to be constructed by the company is not on its face ultra vires.

**In Equity.** On motion for preliminary injunction and demurrer to bill.

¶ 3. Jurisdiction of federal courts in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

¶ 4. Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

John G. North, for complainant.  
W. A. Purington, for defendants.

WELLBORN, District Judge. Complainant and the city of Riverside are corporations organized and existing under the laws of California, the latter being a municipal corporation of the sixth class. The other defendants are also citizens of said state.

On December 6, 1895, said city, as party of the first part, and the Redlands Electric Light & Power Company, as party of the second part, entered into a contract, whereby they agreed, among other things, quoting from the contract:

"That the said party of the second part will furnish and deliver to said party of the first part, at the shafts of one or more generators set up in the power house of said party of the second part, near Redlands, county of San Bernardino, state of California, \* \* \* sufficient developed water power to operate and transmit to the substation of the said party of the first part, to be located at any point within the corporate limits of the city of Riverside, \* \* \* electricity to the extent of two hundred (200) horse power measured at said substation, for a period of twelve (12) years from and after the date hereof, at the rate of thirty-six dollars (\$36) per year for so much developed water power delivered as aforesaid as shall be sufficient to generate and transmit electricity to the extent of one (1) horse power measured at the said substation of said party of the first part, payable in equal monthly installments, at the end of each and every month during said term, the said water power so furnished to be a twenty-four (24) hours' continuous service. \* \* \* The said party of the first part also agrees, for the same consideration, to erect, construct, and acquire the necessary generators, line, and substation for the transmission and reception of the electricity from the power house of the said party of the second part, near Redlands, to such substation within the corporate limits of the city of Riverside, consisting of the necessary poles, wires, transformers, generators, and other apparatus, and within such time as it will be possible so to do, having regard to all necessary legal steps to be taken; provided the said party of the first part shall not be held to pay any sum whatever under this agreement for the time necessarily occupied in the construction, erection, and acquisition of the poles, wires, transformers, and other apparatus above mentioned."

Said city had the right, at the end of 12 years, to renew the agreement for a period of 10 years longer, at the highest rate of payment named for the original term, and upon the expiration of 22 years to again renew it for a further period of 10 years at the rate of payment fixed for the second period.

About the month of October, 1896, the transmission line named in said contract was completed, and the Redlands Electric Light & Power Company began to supply said city with power under said contract, and ever since the last-named date has continued, and still continues, to furnish the same, and said contract at all times since has been, and still is, in full force and effect.

On September 14, 1897, said city entered into a contract with the complainant to furnish it a maximum of 80 horse power between 6 a. m. and 5 p. m., and 40 horse power between 5 p. m. and midnight, of each day during the months of October, November, December, January, February, and March, and 80 horse power between the hours of 6 a. m. and 6 p. m., and 40 horse power between 6 p. m.

and midnight, of each day during the remaining months of the year; and complainant was to pay for the power so furnished \$500 per year for the first three years, \$1,500 per year for the next two years, \$2,400 per year for the following three years, and thereafter \$2,700 per year until the termination of the Redlands contract, including its two extensions of 10 years each. The life of said contract is made dependent upon the continued receipt of power by the city of Riverside under the Redlands contract, which latter contract is referred to in the former and made a part thereof.

The power contracted to be furnished to complainant by said city was, at the date of the contract, surplus power, that is to say, power received by said city under its contract with the Redlands Electric Light & Power Company, and not required by users of light or power other than complainant. Complainant was induced by its contract with said city to construct nine miles of street railway in said city, at a cost of more than \$100,000, and in April, 1898, began to use, and ever since has used, and is now using, the power obtained under said contract with said city in the operation of said railway, and its right to said use will continue until the termination of the city's contract with the Redlands Company, and complainant has no other source of power than that obtained through its contract with said city, and there is no other electrical machinery, generator, or plant in said city, or within any reasonable distance thereof, from which complainant can obtain electric power to operate said railway. The power furnished to said city under its contract above-mentioned with the Redlands Electric Light & Power Company is used to generate electricity by means of a generator in the power house of said Redlands Company, the said electricity so generated and furnished to said city being conveyed to it over the transmission line above mentioned, constructed by said city, and extending from the power house of the Redlands Company to, and entering the power house and substation of said city within, the corporate limits thereof. A part of said electricity and electrical power so generated and conveyed to the said power house and substation is directed and conducted by said defendants into and through the machinery and over the conductors and feeder wires of complainant to its said street railway and the trolley wires and cars operated thereupon. The Redlands contract, dated December 6, 1895, with its original term of 12 years, and its two extensions of 10 years each, will expire December 6, 1927, and the aggregate of the payments to be made by complainant under its contract with the city of Riverside, counting from April, 1898, when complainant began to use the power, to December 6, 1927, the end of the Redlands contract, a period of 29 years and 8 months, will be \$70,000.

Complainant is not in default upon its contract, but defendants have threatened to, and, unless restrained by this court, will sever the connection between its wires and the Redlands wires, and cut off the Redlands electricity from complainant, and by so doing prevent the running of complainant's cars and the operation of its street railway. Said city, by its board of trustees, on October 22, 1901, passed the following resolutions:

"Whereas, the city of Riverside, on the 14th day of September, 1897, entered into a contract with the Riverside and Arlington Railroad Company, agreeing to furnish said railway with electric power at a stipulated price and

"Whereas, according to a report of the superintendent of the city electric light plant, made to this board on September 18, 1901, and a second report dated October 5, 1901, it appears that the said price is considerably below the actual cost to the city of the said power, resulting in great loss to this city, which loss continues throughout the entire term of said contract; and

"Whereas, the city attorney has advised this board, in a written opinion filed recently, that the said contract is illegal and void, and in conflict with the constitution of the state of California, if said power is furnished at less than the cost of production, unless the city is to supply said power out of surplus power otherwise unused; and

"Whereas, it appears that the said power now sold to said railway company is not surplus power, but is the regular current for which this city has a good market at a price affording a profit over and above the cost of production, to supply which, delivered, the city is compelled to generate a large portion of its power by steam at an increased cost; therefore be it

"Resolved, that the Riverside and Arlington Railway Company is hereby notified that the price charged them since January 1, 1901, and to be hereafter charged, shall be the actual cost of production of said current, and that if said company shall not notify this board on or before November 5, 1901, that they will accept and pay for said power at said rate, dating from January 1, 1901, that the board will shut off said company from receiving electric current after said date, November 5, 1901. And further

"Resolved, that if it is the wish of said company to have the court's opinion on the validity of said contract, that the board is willing to continue furnishing said power during the pendency of any action brought to test said contract, provided that said action is prosecuted with reasonable diligence, and provided that the power so furnished is paid for at the price herein established, and that if said contract is held binding on the city that the city will refund to said company the excess of money so paid over and above the amount due under the said contract."

The foregoing are the material facts as they appear, either expressly or by necessary implication, upon the face of the bill.

The defendants have interposed a demurrer, assigning therein, for causes, that the court has no jurisdiction, and that the bill is without equity, and, in their briefs, urge, under the former cause, that the bill neither shows a federal question nor a matter of adequate value in dispute, and, under the latter, that the contract between complainant and the city of Riverside is ultra vires and void. These grounds of demurrer will be noticed in the order of their statement.

I. The allegations of the bill, on which complainant relies for a federal question, are, in brief, that complainant has a contract with the city of Riverside, by and under which the latter agreed to furnish, and since April, 1898, has furnished, and is now furnishing, the former with electrical power to operate its street railroad within the limits of said city, and that said city, by the resolutions aforesaid, has repudiated said contract, and by said resolutions and otherwise threatens to, and will, unless judicially restrained, shut off from complainant the electrical power to which complainant, under said contract, is entitled, which resolutions and threatened action, the bill alleges, will, if consummated, impair the obligation of said contract, and deprive complainant of its property without due process of law, and, therefore, contravenes section 10 of article 1 of the constitution of the United States, and section 1 of the 14th amendment to said

constitution. It is not essential to federal jurisdiction, under said constitutional provisions, that there should really be a valid contract, or that the impairment or deprivation complained of should really be effected through legislation or other action of the state, but it is sufficient if these grounds of suit are claimed in good faith and not frivolously. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 558, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Illinois Cent. R. Co. v. City of Chicago*, 176 U. S. 646, 20 Sup. Ct. 509, 44 L. Ed. 622; *Yazoo & M. V. R. Co. v. Adams*, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; *Hamilton Gaslight & Coke Co. v. City of Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; *Michigan Tel. Co. v. City of Charlotte (C. C.)* 93 Fed. 13; *Vicksburg Waterworks Co. v. City of Vicksburg* (decided April 7, 1902) 22 Sup. Ct. 585, 46 L. Ed. 808. It is true an earlier decision of the supreme court, cited in defendants' brief (*City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943), while recognizing the sufficiency of a bona fide claim of impairment or deprivation through legislation or other action of the state, seems to require (Justice Harlan dissenting) a valid contract for jurisdictional purposes. The last requirement, however, is not found in subsequent cases, while, as shown below, two of them expressly, and others in effect, hold that a bona fide claim of contract is sufficient. In *City R. Co. v. Citizens' St. R. Co.*, supra, the court, through Justice Brown, who also wrote the opinion in *City of New Orleans v. New Orleans Waterworks Co.*, supra, says:

"All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

In *Illinois Cent. R. Co. v. City of Chicago*, supra, federal jurisdiction was sustained, and yet the court held, upon the merits, that the contractual obligation which it was claimed had been impaired did not exist. This last case, therefore, necessarily determines that the rule concerning the sufficiency for jurisdictional purposes of a bona fide claim of a federal question includes the validity of the contract as well as its impairment,—in other words, that the contract need not really be valid nor impaired, provided its validity and impairment are claimed in good faith, and the claims are not frivolous. In *Yazoo & M. V. R. Co. v. Adams*, supra, the supreme court entertained jurisdiction of the case, yet held, solely upon a construction of state laws, that there was no such contract as the one which it was claimed had been impaired, saying at page 15, 180 U. S., and page 245, 21 Sup. Ct., 45 L. Ed. 395,—the opinion again being by Justice Brown:

"As we have often held that, where an impairment of a contract by state legislation is charged, the existence or nonexistence of the contract is a federal question, it is impossible to escape the conclusion that the foundation of the whole case was whether there was really a contract which had been impaired, and that this was necessary to the determination of the case. As already stated this was a federal question, and the fact that the supreme court did not in terms discuss the contract clause of the constitution does not oust our jurisdiction."

In the yet later case of *Illinois Cent. R. Co. v. Adams*, supra, the supreme court upheld the jurisdiction of the circuit court, without passing upon the existence or validity of the contract which it was alleged had been impaired by state legislation. In *Vicksburg Waterworks Co. v. City of Vicksburg*, supra, which is the latest case on the subject, the court held that there was a federal question, and said:

"The objection urged in the brief of the appellee to the validity of the contract, because it undertakes to bind the city for a period of thirty years, because an attempt to barter away the legislative power of the city authorities, and because creating an indebtedness in excess of the charter limits, are those that were considered at length in the similar cases of *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, and *City of Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886, and were in those cases held to be untenable. However, we do not wish to be understood as now determining such questions in the present case, for we are only considering whether or not the circuit court had jurisdiction to consider them."

The circumstance upon which both parties, as well as the authorities they cite (*Illinois Trust & Savings Bank v. Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518; *Pikes Peak Power Co. v. City of Colorado Springs*, 44 C. C. A. 333, 105 Fed. 11; *City of Walla Walla v. Walla Walla Water Co.*, supra; *Little Falls Electric & Water Co. v. City of Little Falls* (C. C.) 102 Fed. 663; and *Iron Mountain R. Co. of Memphis v. City of Memphis*, 37 C. C. A. 410, 96 Fed. 113), are agreed, that the city of Riverside, in entering into its contract with complainant, acted in a quasi private capacity, is unimportant in determining the question whether or not the threatened impairment and deprivation, which complainant seeks to enjoin, are imputable to the state. The making of a contract by a municipality for or concerning a public utility may be the exercise of a proprietary function, but, when the contract has been made, its repudiation by the legislative body of the municipality, and forcible divestiture of the contractual rights, by direction of said body and through the superior physical power which the municipality wields, are surely something more than the mere acts of a private person. The declaration of the resolutions, already quoted, that, unless complainant accepted the interpretation placed upon said contract by the city of Riverside, the latter would shut off from the former the electric current it was then receiving, obviously implied that the executive authorities and agencies of the city, which unquestionably are governmental, would, so far as necessary, be employed to carry out said purpose, and therefore said resolutions and the illegal action they threaten, even if they fall short, which, however, I do not decide, of legislation, within the meaning of article 1 of section 10 of the constitution of the United States, are yet imputable to the state under section 1 of the 14th amendment to said constitution. In *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 978, Mr. Justice Harlan, speaking for the court, said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities,—and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and,



as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state."

In *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676, the court says:

"We have said the prohibitions of the 14th amendment are addressed to the states. \* \* \* They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning."

Defendants' contention that the bill here is for a specific performance, and, therefore, *City of Fergus Falls v. Fergus Falls Water Co.*, 19 C. C. A. 212, 72 Fed. 873, and *St. Paul Gaslight Co. v. City of St. Paul*, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788, are controlling authorities, is based upon a false premise. Said bill is not for a specific performance of the contract therein set out, although, if effectual, it may ultimately contribute to that object, but, as in *Vicksburg Waterworks Co. v. City of Vicksburg*, supra, is for an injunction against apprehended impairment of contract and deprivation of property through legislation and other action of the state, within the meaning of the constitutional provisions above mentioned, and, therefore, the resolutions aforesaid, or allegations of their contents and passage, are material as showing complainant's right to be protected by said constitutional provisions. These features of the case distinguish it, not only from the two last named and others of like character, but also from *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, and the subsequent cases in line therewith, among them *Gas Co. v. Miller* (C. C.) 96 Fed. 12.

The argument, earnestly made by defendants, that said resolutions and threats, for various reasons assigned in their brief, do not constitute legislation or any sort of state action, within the meaning of said constitutional provisions, itself admits a federal question in the case, for it is, in substance, a construction of said provisions in opposition to the claims insisted upon by complainant, and, no matter which way these claims may be decided on the merits, there is no reason to question complainant's good faith in urging them. It is unnecessary, however, to discuss or review in detail the numerous other authorities cited in the briefs of the respective parties on this branch of the case, since the supreme court of the United States, in one of the cases already partially examined, has expressly adjudged, after full consideration, upon allegations substantially similar to those made by the bill herein, the existence of a federal question. *Vicksburg Waterworks Co. v. City of Vicksburg*, supra. The syllabus of said case is as follows:

"1. A case presented by a bill in equity which alleges that a contract right of a waterworks company with whose predecessors a municipality,

with legislative sanction, contracted for a municipal water supply, is impaired by an ordinance directing that the waterworks company be notified that the city denies any liability on any contract for the use of hydrants, and by the subsequent action of the city in holding an election to authorize an issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the contract,—is one so arising under the laws and constitution of the United States as to give a circuit court of the United States jurisdiction.

"2. Apprehension that such illegal action may be taken by a municipality as will impair the franchise and contract rights of a waterworks company, with whose predecessor the city has contracted for a municipal water supply, entitles the company to maintain a suit for equitable relief in advance of any actual proceedings on the part of the city to impair the company's rights under the contract."

See, also, *City of Walla Walla v. Walla Walla Water Co.*, supra; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; *Hamilton Gaslight & Coke Co. v. City of Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; *Scott v. McNeal*, 154 U. S. 45, 14 Sup. Ct. 1108, 38 L. Ed. 896; *Indianapolis Gas Co. v. City of Indianapolis* (C. C.) 82 Fed. 245; *Railroad Co. v. Taylor* (C. C.) 86 Fed. 168; *San Joaquin & K. R. Canal & Irrigation Co. v. Stanislaus Co.* (C. C.) 90 Fed. 516; *Michigan Tel. Co. v. City of Charlotte* (C. C.) 93 Fed. 13; *Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co.* (C. C.) 99 Fed. 812; *Iron Mountain R. Co. of Memphis v. City of Memphis*, 37 C. C. A. 410, 96 Fed. 113; *Los Angeles City Water Co. v. City of Los Angeles* (C. C.) 88 Fed. 720; *Id.*, 103 Fed. 711; and *Pikes Peak Power Co. v. City of Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1.

II. The matter here in dispute, I think, is the right which complainant has, under its contract with said city, to the electrical power therein agreed to be furnished. *Railroad Co. v. McConnell* (C. C.) 82 Fed. 73; *Humes v. City of Ft. Smith* (C. C.) 93 Fed. 862; *Railroad Co. v. Frank* (C. C.) 110 Fed. 689; *El Paso Water Co. v. City of El Paso*, 152 U. S. 157, 14 Sup. Ct. 494, 38 L. Ed. 396; *Colvin v. City of Jacksonville*, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053. In *Railroad Co. v. Frank*, supra, the court quotes approvingly from *Humes v. City of Ft. Smith*, supra, as follows: "Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction." The bill does not expressly allege, nor otherwise show with requisite certainty, that the matter in dispute, the contractual right above mentioned, exceeds the value of \$2,000. The cost of said power is alleged, but that is a different thing from complainant's right thereto, and, besides, while cost may be a criterion, it can hardly be considered an equivalent of value.

III. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved

by the courts against the corporation, and the power is denied. \* \* \* 1 Dill. Mun. Corp. p. 115, § 89. This text is cited with approval by defendants in their brief, and, without referring to the numerous cases also cited in the same connection, may be accepted as a clear summary of the law on the subject to which it relates." *Los Angeles City Water Co. v. City of Los Angeles* (C. C.) 88 Fed. 729. The powers of the city of Riverside, as they existed at the dates of its contracts with the Redlands Electric Light & Power Company and with complainant, and as they exist now, are, in part, declared in subdivision 13 of section 862 of the municipal corporation act of 1883, as amended in the years below named, as follows:

"To acquire, own, construct, maintain and operate street railways, telephone and telegraph lines, gas and other works for light and heat, public libraries, museums, gymnasiums, parks and baths; and to permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon, and the laying of gas and water pipes in the public streets, and to permit the construction and maintenance of telephone and telegraph lines therein." St. Cal. 1891, pp. 233, 234, and St. Cal. 1897, pp. 175, 176.

From this express legislative grant of power, defendants deduce, and rightfully, implied authority for the contract between the city of Riverside and the Redlands Electric Light & Power Company, but deny that there was any such authority for the contract between said city and complainant. The contention of defendants as to the latter contract is stated at pages 3 and 4 of their brief, filed March 27, 1902, as follows:

"The validity of the contract is attacked mainly on the ground that such contract is ultra vires in that electric power acquired for lighting purposes is being diverted to a foreign purpose. The city would not have the power to divert the electric current to purposes other than for lighting, because the city might receive more for it than for lighting purposes; it has no right to divorce the electric power from the purpose for which it was acquired, or from the only purpose for which the city had power to acquire electric power."

This contention, it seems to me, is vulnerable in assuming that the city of Riverside has no authority to acquire electric power except for lighting, and that the electric power acquired under the Redlands contract was solely for that purpose. The supreme court of the state of California has held, quoting the second and third paragraphs of syllabus, that:

"When a corporation seeks to avoid its contract on the ground of its want of power to contract, where the contract is not upon its face necessarily beyond the scope of its authority, it will, in the absence of proof, be presumed to be valid, and the corporation must make good its defense of ultra vires by plea and proof.

"With respect to mere ordinary business contracts, a municipal or quasi municipal corporation stands on the same footing with other corporations; and it is only where the contract could not legally be made by it under any conceivable circumstances that its inability to contract can be raised upon demurrer." *Brown v. Board*, 103 Cal. 531, 37 Pac. 503.

Defendants' counsel, in the brief above mentioned, filed March 27, 1902, at page 7, refers to the case last cited approvingly, as follows:

"I admit the contract must be presumed to be valid unless it appears upon its face that it is beyond the power of the city to enter into this contract.

The rule stated in *Brown v. Board*, 103 Cal. 534, 37 Pac. 503, is undoubtedly correct, viz: 'A contract by a corporation, which is not upon its face necessarily beyond the scope of its authority, will, in the absence of proof, be presumed to be valid.'

The grant of power to construct and operate "street railways" implies authority to acquire electricity therefor as fully as authority to acquire electricity for lighting is implied in the grant to construct and operate "gas and other works for lighting." Nor is ownership of a roadbed, cars, and other appliances of a street railway any more a condition precedent to the exercise of the implied authority in the former case than ownership of a complete plant for furnishing power, as well as generating and transmitting the electric current, is to the exercise of similar authority in the latter, and a contract, engaging electricity for either purpose, is good upon its face. Now, recurring to the contract between the city of Riverside and the Redlands Electric Light & Power Company, we find therein a clause which unmistakably includes street railways among the uses to which the electric power contracted for is to be applied, and which is as follows:

"Said party of the first part shall have the right, in any way it sees fit, to use or dispose of such power to private citizens to use for any purposes whatever, within the corporate limits of the city of Riverside; provided, however, that such electric power may be used to propel electric cars upon any line running out from the said city of Riverside to any point in the county of Riverside."

I am of opinion that the city of Riverside, by virtue of the legislative grant of power above quoted, and under its contract with the Redlands Company, respectively, had authority to, and did, acquire electric power for each of the purposes above indicated. The transmission of the electricity thus acquired began in October, 1896, and nearly a year thereafter, on September 14, 1897, the city of Riverside found itself entitled to a large or considerable quantity of electric power for which it had no present need, and which would have gone to waste unless it had been sold to private individuals for such use as they desired to make of it. It is true that the city, looking to its possible or probable future growth and a resulting increased demand for electrical lighting, might, if it had thought best to do so, have allowed its surplus electricity to be temporarily wasted, and ultimately have realized a larger direct revenue from its application to lighting purposes than will be realized on account of the street railway uses for which it was contracted to complainant. But, had such a course been pursued, it probably would have defeated, or postponed indefinitely, the development of the nine miles of street railway service, whose conveniences and benefits the inhabitants of said city, as one of the results of the city's contract with complainant, have enjoyed since 1896. These speculations, however, in no way affect the power of the city in the premises, but only the question, which is immaterial here, whether or not the power, in view of subsequent events, was wisely exercised. It was under the conditions above named that the city entered into its contract with the complainant, and, bearing in mind that the acquisition, construction, maintenance, and operation of street railways are among the declared purposes of the city's organization, the conclusion seems to be unavoidable that said contract was within the scope of the city's

powers, and that its obligations cannot be terminated or changed by any subsequent increase in the demand for electrical lighting. *Pikes Peak Power Co. v. City of Colorado Springs*, 44 C. C. 333, 105 Fed. 1. Whether or not the bill shows such an increased demand as indicated, I am in doubt, but, assuming that said fact does appear, I hold that said contract is unaffected thereby.

Complainant contends that ample authority for the contract between it and the city of Riverside is found in subdivision 2 of the hereinbefore mentioned section 862 (St. Cal. 1897, p. 175), which is as follows:

"The board of trustees of said city shall have power: \* \* \* To purchase, lease, or receive such real estate and personal property as may be necessary or proper for municipal purposes, and to control, dispose of, and convey the same for the benefit of the city or town; provided, they shall not have power to sell or convey any portion of any water front."

Complainant also contends that defendants are estopped from denying the validity of said contract. The conclusions already announced render it unnecessary for me to pass upon the last two contentions.

For the reason that the bill fails to show with sufficient certainty that the matter in dispute exceeds, exclusive of interest and costs, the value of \$2,000, the demurrer must be sustained. Complainant, however, asks, in its brief, that, in view of the substantial nature of the controversy, as it appears from the bill, the court permit complainant to amend in the respect just indicated, rather than dismiss the bill, and thus oblige complainant to file a new one. This permission, under the circumstances, I think, should be granted, but upon condition that the amendment be made without delay.

The motion for injunction will be continued until the filing of the amendment, and the restraining order remain in force until otherwise directed by the court.

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## PACIFIC ELECTRIC CO. v. CITY OF LOS ANGELES et al.

(Circuit Court, S. D. California, S. D. November 1, 1902.)

No. 1,018.

### 1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—IMPAIRMENT OF CONTRACT.

It is not essential to the jurisdiction of a federal court of a suit based on an alleged impairment of a contract by a state in violation of section 10 of article 1 of the constitution that there should be a valid contract, or that the impairment complained of should in fact be effected, but it is sufficient, for jurisdictional purposes, if the plaintiff claims the existence of such contract, and its impairment, in good faith.

### 2. MUNICIPAL CORPORATIONS—GRANTING OF FRANCHISES—STATUTORY POWER.

A provision of a statute authorizing and regulating the granting of franchises by municipalities, that "every franchise \* \* \* shall be granted upon the conditions in this act provided, and not otherwise," is imperative, and requires the act to be strictly followed both as to the terms on which a franchise is granted and the time and manner of procedure.

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¶ 1. Jurisdiction of federal courts in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

### 3. SAME—SALE OF FRANCHISE—CALIFORNIA STATUTE.

Act Cal. March 11, 1901, requires all franchises granted by municipal corporations to be sold to the highest bidder, and prescribes the procedure for granting the same, providing that every franchise "shall be granted upon the conditions in this act provided and not otherwise." It provides that notice shall be published and sealed bids received, to be opened at an hour fixed in the notice; that "at the time of the opening of said bids any responsible firm or corporation present or represented may bid for said franchise or privilege a sum not less than 10 per cent. above the highest sealed bid therefor, and said bid so made may be raised 10 per cent. by any other responsible bidder present and said franchise or privilege shall finally be struck off, sold and granted \* \* \* to the highest bidder therefor." It further provides that the successful bidder shall pay the amount of his bid within 24 hours, and that, in case he or it shall fail so to do, then the said franchise or privilege "shall be granted to the next highest bidder therefor." *Held*, that such statute contemplated that the competition in bidding should take place at the time the sealed bids were opened, and before the franchise was "struck off, and sold"; that the authority of a city council, on the failure of the accepted bidder to deposit the amount of his bid as required, was limited to the granting or refusing of the franchise to the next highest bidder, and its acceptance of an oral bid thereafter made was *ultra vires* and created no valid contract.

In Equity. On motion for preliminary injunction and demurrer to bill.

J. S. Chapman, Bicknell, Gibson & Trask, Hunsaker & Britt, Works & Lee, Dunn & Crutcher, and W. F. Fitzgerald, for complainant.

W. B. Mathews, Camp & Lissner, Gibbon, Thomas & Halstead, P. R. Wilson, Garret W. McEnerney, and E. E. Millikin, for defendants.

WELLBORN, District Judge. Complainant brings this suit against the city of Los Angeles and other defendants to obtain a decree establishing complainant's ownership of the street railway franchise described in the bill, to vacate and set aside certain orders or resolutions of the city council of Los Angeles purporting to divest complainant of said franchise, and to enjoin any interference by defendants with the construction and operation of the railway authorized by said franchise. The matters alleged in the bill are these:

Complainant and the city of Los Angeles, one of the defendants, are California corporations, the latter being a municipal corporation, under a freeholders' charter. St. Cal. 1889, p. 456. The other defendants are also citizens of said state, except the Los Angeles Traction Company, which is a corporation organized under the laws of the state of Illinois. The legislature of the state of California, at its session held in the year 1901, passed an act entitled "An act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," which act became a law of said state on the 11th day of March, 1901, and is in the words and figures following:

"Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege

whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any city and county, city or town within this state, except steam railroads and, except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

"Sec. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the municipality an application, and thereupon said governing body shall, in its discretion, and, when the application is accompanied with a petition praying that the same be granted, signed by the owners of three-fourths of the frontage of the real property fronting along and upon the route of the franchise applied for, must advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the city and county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a day for ten successive days, if it be a daily newspaper, and if there be no daily paper published in such city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty (20) nor more than thirty (30) days before any further action can be taken thereon.

"Sec. 3. The publication must state the character of the franchise or privilege to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the municipality two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; provided further, that if the franchise be a renewal of a right already in existence, the payment of said percentage of gross receipts shall begin at once.

"Sec. 4. In case the franchise granted shall be an extension of an existing system of street railroad then the gross receipts shall be estimated to be one half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be conclusive as to the amount of the gross receipts of said extension.

"Sec. 5. Said advertisement shall also contain a statement that the said franchise will be granted to the person, firm or corporation who shall make the highest cash bid therefor; provided only, that at the time of the opening of said bids any responsible firm or corporation present, or represented, may bid for said franchise or privilege a sum not less than ten per cent above the highest sealed bid therefor, and said bid, so made, may be raised ten per cent by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor.

"Sec. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat or power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not so

commenced within said time said franchise so granted shall be declared forfeited, and shall be completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; provided, that for good cause shown the governing or legislative body may by resolution extend the time for completion thereof, not exceeding three months.

"Sec. 7. The grantee of every franchise or privilege granted under this act shall file a bond running to said city and county, city or town, with at least two good and sufficient sureties to be approved by such governing body, in a penal sum by it to be prescribed and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfill, and perform each and every term and condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties upon said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and in case said bond shall not be so filed, the award of such franchise shall be set aside, and the same may be granted to the next lowest bidder, or again offered for sale, in the discretion of said governing body.

"Sec. 8. It shall be the duty of the attorney-general, upon the complaint of any municipality, or, in his discretion, upon the complaint of any taxpayer, to sue for the forfeiture of any franchise granted under the terms of this act, for the non-compliance with any condition thereof.

"Sec. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in anywise favor one person, firm or corporation, as against another, in bidding for the purchase thereof.

"Sec. 10. Any member of any common council or other governing or legislative body of any city and county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction.

"Sec. 11. All acts or parts of acts in conflict herewith are hereby repealed; provided, however, that nothing herein contained shall be construed as repealing or amending the following acts, to-wit: 'An act relating to the granting by the counties and municipalities of franchises for the construction of paths and roads for the use of bicycles and other horseless vehicles,' approved March twenty-seventh, eighteen hundred and ninety-seven; 'An act to authorize cities and towns to grant franchises for the construction and maintenance of railroads beyond the limits of such cities or towns leading to public parks owned thereby,' being chapter forty of the laws of eighteen hundred and ninety-seven of the state of California.

"This act shall take effect immediately." St. Cal. (Extra Sess. Thirty-third Legislature, 1900) p. 265.

Complainant, under and pursuant to said act, on the 25th day of November, 1901, presented to the governing body, to wit, the council of the city of Los Angeles, its application for an electric street railway franchise upon certain streets of said city. Said council, on January 6, 1902, adopted and caused to be published, as provided in said act, a "notice of sale of a street railroad franchise," which notice defines the route of said proposed road, the terms and conditions upon which the franchise will be offered for sale and granted, and concludes as follows:

"Notice is also hereby given that sealed bids in writing will be received for the said franchise up to 11 o'clock in the forenoon of the 10th day of February, 1902; that the bids received will be opened at that time; that



all bids must be for the payment of a stated sum in gold coin of the United States; and that said franchise will be granted to the person, firm, or corporation who shall make the highest cash bid therefor; provided, only, that at the time of opening said bids any responsible firm or corporation, present or represented, may bid for said franchise a sum not less than 10 per cent. above the highest sealed bid therefor, and said bid so made may be raised 10 per cent. by any responsible bidder present, and said franchise will finally be struck off, sold, and granted by said city council to the highest bidder therefor in gold coin of the United States, and said successful bidder will be required to deposit with said city council, or such person as it may direct, the full amount of his or its said bid within 24 hours thereafter, and, in case he or it shall fail to do so, then the said franchise shall be granted to the next highest bidder therefor, and that the city council reserves the right to reject any or all bids; provided, that no bid, whether sealed or otherwise, shall be received or considered unless the same be in writing and subscribed by a responsible bidder, or by his or its duly authorized agent."

On the day named in the notice, at 11 o'clock a. m., the sealed bids were opened and found to be as follows: One by complainant of \$25,000, one by the defendant William S. Hook of \$37,500, one by the defendant E. A. Davis of \$139,000, and one by E. Murray of \$415,000. There being no bid of 10 per cent. upon the amount bid by said Murray, said council on the same day accepted the bid of said Murray, and ordered that the said franchise be struck off, sold, and granted to him, and that the city treasurer be authorized and directed to receive the money to be paid for such franchise by said Murray, and ordered and declared that the period of 24 hours within which the said Murray is allowed to pay for the said franchise should expire at 3:15 o'clock p. m. of February 11, 1902. The three bids other than complainant's were made in the interest of the defendant corporation the Los Angeles Traction Company, and with the fraudulent intent to prevent competition in the bidding before the council; and the bid of \$415,000 was made at the suggestion and for the benefit of said Los Angeles Traction Company, and with the fraudulent intent to prevent any further bidding when the sealed bids were opened. The said Murray is not a person of any financial standing, and was not, at the time said bid was made, nor has he been at any time since, worth \$1,000, and could not, either from funds or credit of his own, have paid, nor did he ever intend to pay, the said sum of \$415,000, or any part thereof, and all of these matters were known by the said Los Angeles Traction Company, said E. A. Davis, and said William S. Hook. Said Murray did not pay the \$415,000 within 24 hours, and never offered to pay said, or any, sum at any time, and never appeared before said council on the 11th day of February, 1902, or at any other time. The said Davis and the said Hook, agents of said Traction Company, appeared before said council on said 11th day of February, 1902, and when said 24 hours expired, and, in pursuance of the fraudulent scheme to prevent competition in bidding, claimed that said council had no power, under said act, to do anything or take any proceedings looking to the sale of said franchise, other than to accept the bid next highest to that of said Murray, namely, the bid of said Davis for the sum of \$139,000, and to sell and grant to said Davis said franchise, and demanded that said franchise be awarded to said Davis, under said bid, and for the benefit of said Los Angeles Traction Company, and tendered to said council the amount of the bid of said Davis, to wit, \$139,000, gold coin,

but which tender was refused by said council. Said Davis throughout said proceedings was acting for and on behalf of and in the interest of said Los Angeles Traction Company, and sought to obtain the grant of said franchise to himself, but for the benefit of said company. Said Davis and Hook and said Traction Company did then, and do now, claim an interest in said franchise, and claim that said Davis is the owner thereof, and make said claim adversely to complainant, which claim is without any foundation whatever, and said parties, nor either of them, has any right, title, or interest in said franchise. On the 11th day of February, 1902, and prior to the expiration of said 24 hours, complainant, being previously apprised of the fact that the bid of said Murray was a fraudulent contrivance of said Traction Company, William S. Hook, and E. A. Davis to prevent further bidding, and knowing that said Murray would not appear within the 24 hours and pay said bid, or any part thereof, presented in writing a bid of \$152,900 for said franchise, being 10 per cent. over and above the bid of said Davis, and, when said 24 hours had expired, offered said sum to said council. Upon the presentation by complainant of said bid of \$152,900, said council called before them the city treasurer, who informed said council that there had been no payment on Murray's bid, and thereupon said council, by a vote of seven of its members for and two against, passed a motion declaring said Murray a fraudulent and irresponsible bidder. After said motion was passed, complainant bid for said franchise, the same described in said notice of sale, the sum of \$152,900, and at the time presented to said council a certificate of deposit, drawn on the Farmers' & Merchants' Bank of Los Angeles, payable to said city, for said sum of \$152,900. Thereupon, and at the same meeting, the president of the council called for bids to purchase said franchise, over the one so made by complainant, but no other bid was received or offered, and thereupon said council ordered that said street-railway franchise be struck off, sold, and granted to complainant for said sum of \$152,900, and that said treasurer be authorized and directed to receive said purchase money. Pursuant to said order, said sum of \$152,900 was paid by complainant to the treasurer of said city in gold coin of the United States for said franchise, and was accepted by said treasurer and said council, and immediately thereupon complainant delivered its bond, with two sureties, for \$25,000, conditioned for the faithful performance of the terms of said street-railway franchise, and otherwise in conformity with the act of the legislature of said state, to said council, and thereupon said council approved said bond, and caused the same to be filed in the office of the city clerk of said city. After complainant paid said sum of \$152,900 to said city treasurer, and executed and delivered its said bond to said city council, and after said council had struck off, sold, and granted to complainant said franchise, and the same had vested and accrued, said council passed an ordinance granting said rights, privileges, and franchise to complainant, and presented the ordinance to M. P. Snyder, as mayor of said city, and said Snyder afterwards, and about the 21st day of February, 1902, returned said ordinance without having affixed his signature thereto or approved the same, and with his objections to said ordinance, and thereafter, to wit, on the 21st day of February, 1902,

said council, by reason of said mayor's disapproval of said ordinance, adopted a motion that said ordinance be reconsidered, and upon the vote being again taken upon the passage of said ordinance, notwithstanding the mayor's veto, said council voted against the passage of said ordinance. Thereupon, and on the same day, said council passed a resolution pretending and purporting to order any and all bids for said electric street railway franchise, including the bid made by complainant, to be rejected, and directing and authorizing said treasurer of said city to refund to complainant said sum of \$152,900, and ordering said city clerk to return said bond, executed as hereinbefore stated. The said clerk acting under said instructions, offered to return said sum of money and said bond to complainant, but complainant refused to accept either said money or bond, denying the right of said council to annul or in any manner affect the franchise it claimed to have acquired under and by virtue of the proceedings already set forth. At the same session of said council a motion was carried that the applications of complainant for franchises over certain streets in said city be referred to the board of public works, and that said board redraft notice of sale of the same, and that among said applications referred to in said motion was included the said application upon which the above alleged sale was made to complainant.

Said council threatens to, and will, unless restrained by this court, offer said franchise, rights, and privileges for sale, and will, if any bids are made therefor, sell or attempt to sell the same, and grant or attempt to grant the same rights, privileges, and franchise to any person making the highest bid therefor at said sale. Said council and other public authorities threaten and intend to prevent complainant from constructing said street railway on any street in said city, and will, unless restrained by this court, forcibly prevent complainant from so doing; and on the 26th day of February, 1902, said council passed an order instructing the mayor, street superintendent, or the chief of police to stop and prevent any attempt complainant might make to construct any street railway on any of said streets, with all the force at their command.

The matter in dispute exceeds, exclusive of interest and costs, the value of \$2,000, and is of a value not less than \$152,900. Several affidavits have been filed by the parties, respectively, but they do not set up any additional facts which materially affect the legal aspects of the case. Two demurrers have been interposed, one jointly by all the defendants, except the Los Angeles Traction Company, William S. Hook, and E. A. Davis, and the other by the last three defendants. For causes, both demurrers allege want of jurisdiction and equity, and one of them also alleges uncertainty in the bill.

On the question of jurisdiction, complainant contends that the proceedings set forth touching the street-railway franchise in question, up to and including the acceptance, approval, and filing of the bond required by the statute, constituted a complete and valid contract between said city and complainant, and vested in the latter said franchise, and that the resolutions or orders of said council, and the other proceedings taken and threatened for the purpose of vacating and setting aside said contract, are within the prohibitions of section 10 of article

1 of the constitution of the United States, and section 1 of the fourteenth amendment to said constitution. The writer of this opinion has recently (November 1, 1902) decided a case in this court (*Riverside & A. Ry. Co. v. City of Riverside*, 118 Fed. 736) whose jurisdictional features bear such close resemblance to those here presented that the opinion in that case may be fittingly adopted in this, and, for the reasons and upon the authorities there given and cited, complainant's contention here as to a federal question is sustained.

Coming now to the other cause of demurrer, want of equity in the bill, the next question to be considered is whether or not there was a valid grant to complainant of the street-railway franchise in question. On this branch of the case, complainant, at pages 156 and 183 of its brief, filed June 10, 1902, states its contention thus:

"The power to grant this franchise comes from the act of 1901. \* \* \* We next contend that the question whether the plaintiff has the rights which it here claims is dependent upon the statute of 1901, and not any other authority whatever, and that, under that act, there was a complete grant."

Defendants' objections to the validity of said alleged grant may be generalized under two heads: First, that in the proceedings had by the city council of Los Angeles for the sale of said franchise certain requirements of said act of 1901 were not complied with, and, therefore, there was no valid grant; second, that said act of 1901 is void, because it undertakes to delegate municipal functions to a special commission, in violation of article 11 of section 13 of the constitution of California, and, furthermore, said act, if constitutional, does not apply to the city of Los Angeles, because it concerns only municipal affairs, and, as to such affairs, said city, by article 11 of section 6 of the constitution of California, as amended in 1896, is exempt from the operation of general laws, and subject only to its charter, whose provisions require, for granting a franchise, the conjoint action, by an ordinance, of council and mayor. Either of these objections, if good, is fatal to the alleged grant, and I proceed at once to the consideration of the first.

In determining whether or not the council, in its proceedings for the disposition of said franchise, lawfully complied with the requirements of said act of 1901, the rule that mode is the measure of power, and aside from the designated mode there is no power, should be carefully observed. *City of Ft. Scott v. W. G. Eads Brokerage Co.* (C. C. A.) 117 Fed. 51; *Board v. Templeton*, 51 Ind. 266; *Woodruff v. Berry*, 40 Ark. 253; *Sadler v. Board*, 15 Nev. 39; *State v. Cornell*, 52 Neb. 25, 71 N. W. 961; *Webster v. French*, 12 Ill. 302; *Zottman v. City and County of San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *McCracken v. City of San Francisco*, 16 Cal. 620; *Heidelberg v. St. Francois Co.*, 100 Mo. 69, 12 S. W. 914. It should also be borne in mind that negative words in a statute show an intent to make its provisions imperative, and require strict performance, both as to time and manner; since section 1 of said act provides that "Every franchise \* \* \* to construct or operate street railroads \* \* \* shall be granted upon the conditions in this act provided, and not otherwise." 23 Am. & Eng. Enc. Law (1st Ed.) 455; *Koch v. Bridges*, 45 Miss. 247; *Hurford v. City of Omaha*, 4 Neb. 336; *Cooley, Const. Lim.*

(6th Ed.) 89. In the present case, additional energy is imparted to the rules of construction above stated by section 10 of said act of 1901, which is as follows:

"Any member of any common council or other governing or legislative body of any city and county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction."

I come now directly to the inquiry whether or not the proceedings of the council conformed, in all essentials, to the requirements of said act of 1901. Defendants, among other alleged illegalities, contend that the award of the franchise to complainant, on its bid of \$152,900, after Murray's default, was a fatal departure from that part of section 5 of said act of 1901, which provides—

"That at the time of the opening of said bids any responsible firm or corporation present or represented may bid for said franchise or privilege a sum not less than ten per cent above the highest sealed bid therefor, and said bid so made may be raised ten per cent by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor."

The precise question here presented is this: When must the competition subsequent to sealed bids, for which said section provides, take place? To this question, the first clause of the foregoing extract from the section makes answer as follows:

"At the time of the opening of said bids any responsible firm or corporation present, or represented, may bid for said franchise or privilege a sum not less than ten per cent above the highest sealed bid therefor, and said bid, so made, may be raised ten per cent by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States."

This clause does not confine the subsequent competition to the precise moment of opening the sealed bids, but it does make it the next step in the series of steps prescribed by said section, and thus requires it to take place before the franchise has been struck off to the highest bidder. Said clause certainly does not contemplate that bidding shall continue after the franchise has been struck off. With that construction the clause would be meaningless. Again, the last clause of said section, which, referring to default of the successful bidder the matter of the deposit required of him, is as follows: "And in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor,"—forbids, by unavoidable implication, the idea that there can be any competition after such default. It will be observed that the words "struck off, sold and," used in a previous clause of the section, are omitted from the last clause. These words, "struck off" and "sold," which are ordinarily employed, and particularly appropriate, to designate the closing of a public sale to the

highest bidder, such as that provided for by the clause where these words appear, would have been out of place in, and hence were designedly omitted from, said last clause, for the reason that it provides for a contingency, namely, the failure of the successful bidder to deposit the amount of his bid, which can only arise after the bidding has been closed. When the bidding has been closed and the successful bidder declared, or, in other words, when the property has been "struck off" and "sold," the next and last thing to be done is a formal transfer of ownership by such means as are suited to the particular case, and this final act is fully and accurately prescribed in said last clause by the use of the word "granted." Under said clause there is to be no striking off, no selling; those stages of competition have been passed; the only act to be performed is that of granting. Complainant's construction of said clause, namely: "The meaning fairly is nothing more nor less than this, that it should be struck off to him who next bids the highest therefor,"—is, to my mind, wholly inadmissible, and must be rejected. It is inconsistent, as I have just shown, with the peculiar phraseology of the clause, and, as appears below, does violence to the general plan of the section. If the legislature had intended that there should be further competition after default of the successful bidder, it would have chosen apt words to express the intention, rather than language which implies the contrary, and, besides, would have prescribed fully the nature and duration of the subsequent competition, that is, whether it was to be by sealed or open bids, and when it was to close. The various steps for which the section provides, consecutively arranged, are these: First, opening of the sealed bids; second, opportunity for further competition, in the manner and upon the terms prescribed in the section; third, striking off of the franchise to the highest bidder; fourth, allowance of 24 hours to the successful bidder to deposit the amount of his bid; and, fifth, in case said bidder fails to make the deposit, grant of the franchise to the next highest bidder therefor. I do not mean that each step after the first must follow immediately, in point of time, its nearest antecedent, but that nothing affecting the result of the competition can intervene between any two of said steps. Exigencies may arise at any stage of the proceedings to justify a postponement or adjournment of the whole matter, but, whenever its consideration is resumed, the order of progression I have indicated must be adhered to.

In the case at bar, therefore, when the sealed bids were opened, and no bid of 10 per cent. above the amount bid by Murray was then made, the action of the council in striking the franchise off to him, and fixing the time at which the 24 hours allowed by law for depositing the amount of his bid would expire, namely, 3:15 o'clock p. m. of February 11, 1902, was regular. When the time thus fixed had expired, and Murray had failed to make the required deposit, the action that should have been next taken is prescribed in the last clause of said section already partially considered, which provides that, if the successful bidder fails to make the deposit required of him, "the franchise shall be granted to the next highest bidder therefor." When, speaking concretely, the contingency referred to in said clause, namely, Murray's failure to deposit the amount of his bid, occurred, in the afternoon of

February 11, 1902, it was then the duty of the council to grant the franchise to the next highest bidder, unless there was some sufficient reason for a refusal. This qualification of the council's duty I make because of the charge in the bill, that the next highest bid was fraudulent. Assuming the truth of this charge, which must be done on demurrer, the council ought not to have granted the franchise to said bidder. When it refused to do so, however, its power in the premises was exhausted, because said act of 1901 makes no provision for any subsequent proceeding, and the alleged grant of the franchise thereafter to complainant was without authority and void. The only way said franchise could have been lawfully granted, after its refusal to the next highest bidder, was under and pursuant to a new advertisement.

Complainant's argument that this construction of said act impairs its efficiency by enabling designing and unscrupulous persons to defeat the disposition of any franchise offered for sale under said act, if not without force, can but be deemed inconclusive, for the rule is well settled that the language of a statute, when plain and unequivocal, determines its meaning, regardless of consequences. *Bartlett v. Morris*, 9 Port. 268; 4 Bac. Abr. 652; *Coffin v. Rich*, 71 Am. Dec. 563. The truth is, said act of 1901 never contemplated the scandalous frauds here charged, without denial, against some of the defendants, and hence, it may be, no adequate safeguards against them were erected. This defect in the law, however, if it exists, is an omission to be supplied by the legislature, not by the courts.

The declaration of the council, made after Murray's default, that he was a fraudulent and irresponsible bidder, and that his bid was null and void, is an immaterial circumstance. If such an inquiry was authorized, it must have preceded the order striking off the franchise to Murray, since said order necessarily determined the lawfulness of his bid, and there was no power in the council to review said order. *Belser v. Hoffschneider*, 104 Cal. 455, 38 Pac. 312. After the franchise had been struck off, all the council could lawfully do, under the pending advertisement, was to allow Murray 24 hours to make the deposit, and, if he failed to do so, grant, or, on sufficient grounds, refuse to grant, the franchise to the next highest bidder.

For the reasons above given, I am of opinion that the complainant has not acquired the franchise it here claims, nor has it any valid contract with the city in relation thereto. This conclusion renders it unnecessary for me to pass upon the other questions which have been argued by counsel, and are outlined in an earlier part of this opinion.

The motion for injunction will be denied.

## UNITED STATES v. BALLARD.

(District Court, W. D. Missouri, W. D. November 17, 1902.)

No. 2,354.

## 1. CRIMINAL LAW—INDICTMENT—STATUTORY OFFENSE—DESCRIPTION.

Where an offense is statutory, and is described in the statute, an indictment sufficiently describes the offense which follows the language of the statute, and describes in addition what was the act done constituting the offense.

## 2. SAME—IMPERSONATING UNITED STATES OFFICER—OBTAINING FRAUDULENT CREDIT.

1 Supp. Rev. St. p. 425 [U. S. Comp. St. 1901, p. 3679], provides that "every person who with intent to defraud \* \* \* falsely assumes \* \* \* to be an officer or employé acting under the authority of the United States," and in such pretended character demands or obtains "any money \* \* \* or other valuable thing, shall be deemed guilty," etc. *Held*, that the statute covers the obtaining some valuable thing by means of the fraudulent standing or credit secured by holding one's self out as such officer.

## 3. SAME—DISJUNCTIVE PHRASES—INDICTMENT—EVIDENCE.

1 Supp. Rev. St. p. 425 [U. S. Comp. St. 1901, p. 3679], provides that any person who shall "demand or obtain" any valuable thing under certain false pretenses shall be guilty, etc. An indictment in following the words of the statute alleged that the defendant "did demand and obtain" a certain thing of value. *Held*, that it was not necessary in order to sustain the indictment to prove that he both demanded "and" obtained.

## 4. SAME—VALUABLE THING.

A month's lodging is a valuable thing, within the meaning of 1 Supp. Rev. St. p. 425 [U. S. Comp. St. 1901, p. 3679], providing against the obtaining of any "valuable thing by impersonating" a United States officer.

Wm. Warner, U. S. Atty., and A. S. Van Valkenburgh, Asst. U. S. Atty.

W. F. Riggs, for defendant.

PHILIPS, District Judge. The defendant was indicted for a violation of the act of April 18, 1884 (1 Supp. Rev. St. U. S. p. 425 [U. S. Comp. St. 1901, p. 3679]), which reads as follows:

"That every person who with intent to defraud either the United States, or any person, falsely assumes or pretends to be an officer or employé acting under the authority of the United States, or any department or any officer of the government thereof, and who shall take upon himself to act as such, or who shall in such pretended character, demand or obtain from any person, or from the United States, or any department or any officer of the government thereof, any money, paper document, or other valuable thing, shall be deemed guilty," etc.

The indictment contains two counts. The first count, omitting the introductory statement, charges that the defendant "unlawfully and feloniously, and with intent to defraud one Julia Eggeling, and divers and sundry other persons to the grand jurors unknown, did falsely assume and pretend to be an officer and employé acting under authority of the United States, and the department of justice thereof, to wit, as a deputy United States marshal, and in such pretended character did demand and obtain from said Julia Eggeling a thing of value,

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. §§ 292, 293.



to wit, lodging at the house of the said Julia Eggeling, in apartments therein, to the amount and of the value of twenty dollars, contrary to the form of the statute," etc. The second count charges that the defendant, "with intent to defraud divers and sundry persons to the grand jurors unknown, unlawfully and feloniously did falsely assume and pretend to be an officer and employé, acting under the authority of the United States, and the department of justice thereof, to wit, as deputy United States marshal, and did take upon himself to act as such, contrary," etc. As the defendant was tried and convicted on the first count of the indictment, it is not necessary to consider the second count. Motions for new trial and in arrest of judgment have been filed by the defendant.

It is objected to the indictment, *inter alia*, that it does not sufficiently describe the offense. It is sufficient to say in respect of this objection that the offense is statutory, and where the statute itself describes the offense an indictment is good which follows the language of the statute, and, as in this case, describes what was the act done constitutive of the offense.

It is next objected that obtaining the use and rent of a lodging room is not a valuable thing, within the meaning of the statute; the contention being that the offense is in the nature of the common-law offense of "extorting" money or property, something tangible, from another person, under claim of authority to demand the same,—citing in support thereof the opinion of Judge Adams in *U. S. v. Taylor* (D. C.), 108 Fed. 621. This is an entire misconception of the opinion. What the learned judge ruled was that said section of the statute constitutes two substantive distinct offenses, the first offense denounced by the statute consisting in the use of the assumed position "for the purpose of extorting money or property from another." The court said: "The distinguishing feature of this first offense, in my opinion, is the making use of the assumed or pretended position for the purpose of falsely and wrongfully asserting a pretended claim of the United States, and thereby to defraud the person with whom he is dealing out of money or property." It was in respect of this offense that the term "extorting" was employed.

In respect of the second subdivision of the section, the court said it consists of "falsely impersonating an officer or employé of the United States, and in the pretended or assumed character demanding or obtaining either from the United States, or from some person, any money or valuable thing, with the intent to defraud. The elements of this offense, in my opinion, are more comprehensive, and do not limit the wrongful act to such as extorting money or property from another under the guise of asserting a claim due to the United States, which it is the duty of the offender in his pretended official character to assert, but includes the holding of one's self out as such officer or employé for the purpose, among other things, of giving him such credit or standing as will enable him to successfully demand or otherwise obtain money from another for his own private use and benefit, and with the intent to defraud."

Of course, the closing language of the court, to wit, "enable him to successfully demand or otherwise obtain money," was not intended

to limit the offense to the obtaining of money alone. The language must be restrained to the fitness of the subject-matter under discussion, which in that case was the obtaining of money. It was the joining in one count of the indictment the two separate offenses which the court held to be bad for duplicity.

It is to be observed that the language of the latter clause of the section is "demand or obtain" from any person. But the indictment in this case uses the terms "demand and obtain" conjunctively, for the obvious reason that an indictment which would charge the acts disjunctively would have been bad pleading. The rule requires the disjunctive expressions to be charged conjunctively, but it does not require, in order to sustain the indictment, that both things, to wit, demanding and obtaining, should be proven. It is sufficient if the evidence shows, as in this case, that the party, by reason of his false personation of a deputy United States marshal, obtained a thing of value.

The next contention in the motion in arrest is that the obtaining of the lodging room for a month is not a valuable thing, within the meaning of the statute. To this contention I cannot consent. It is true that criminal statutes are to be strictly construed in favor of personal liberty. But there is another rule equally as well established, and quite as wholesome, that, in construing remedial and protective statutes of this character, such construction should be given to them by the courts as is reasonably necessary to carry out and effectuate the legislative intent. It was doubtless well known to congress, as it is especially well known to the judges administering the criminal statutes of the United States, that the personating of United States officers, or the representing by irresponsible parties that they are in the employ of certain departments of the government, going through the country practicing the grossest frauds and impositions upon unsuspecting and unwary people, and under color of such false representations and pretensions obtaining money, credit, personal benefits, and assistance, had become so frequent as to constitute an intolerable abuse. It was to correct this abuse and to protect the community from these peripatetic and prowling imposters that this statute was enacted.

The term "or other valuable thing" is a comprehensive one. By common consent, it means and implies a thing of value or worth to the party who obtains it. It was not possible for congress in enacting the statute to anticipate all the devices and schemes which human knavery might conceive in securing benefits under the guise of an officer in the employ of the government, or under some authorized officer thereof, such as a United States marshal, whose very office, to the common people, carries with it sometimes great respect, and sometimes dread and apprehension. So that after specifying certain things, like money, paper, and documents, in order to cover the whole category of benefits which he might receive under such representations, the statute employed the comprehensive term, "or other valuable thing." The ordinary definition of the term "valuable" is "having value or worth; a thing of value." If this defendant had gone to this woman, and represented himself to be a deputy

United States marshal, and, as the evidence in this case shows he did, take along with him a woman claimed to be his wife, and apply for a night's or a week's lodging, with bed and board, stating that he would pay her therefor as soon as he received his expected pay as a deputy marshal, and in reliance upon the truth of his statement she had given him bed and lodging, and he had at her expense fed himself and his wife, slept in her beds, and enjoyed the protection and hospitality of her home, could it be said that he had not obtained something of value,—a thing of value? And if he had applied to her for the hire of a horse for a day, representing himself to be a deputy United States marshal, going to the country to execute the process of the United States, and that he would pay her therefor when he received his pay as a deputy marshal, and in reliance thereon she had let him have her horse, which he used, and it should turn out that he was not in fact such deputy marshal, and had not paid her, could it be said that he had not obtained something of value? What difference, in point of law and common sense, can it make that this woman, in reliance upon the truth of his false statements to her, let him have the use of a lodging room for himself and wife for a month, when such representation turned out to be false? Was not the lodging, the cover and protection of this woman's house, the use of her beds and furniture, a thing of value? As the evidence in this case shows, it was an income upon which Mrs. Eggeling depended for her livelihood, and as the means of paying her rent to her landlord for this house. And it certainly was of benefit and value to this defendant and his wife that he should find shelter while waiting, as he represented, for his pay from the marshal.

The contention of defendant's counsel that this was merely obtaining credit is simply sticking in the bark. He received, by his falsehood to Mrs. Eggeling, a present benefit—a thing of value to him—which he would not otherwise have obtained.

The discussion by the learned judge in *State v. Thatcher*, 35 N. J. Law, 453, is quite pertinent and satisfactory. The defendant was indicted under a statute which made it a crime to obtain by false pretenses "money, wares, merchandise, or other valuable thing." The defendant was indicted for inducing another to affix his signature as surety to a note upon the representation that other notes upon which he was surety had been paid. The court, *inter alia*, said:

"The prosecutor was moved to part with a thing of value. \* \* \* The rule of strict interpretation for criminal statutes does not hinder the courts from searching for the legislative will; nor is the rule violated by giving words, in some cases, their full or the more extended of two meanings, as the wider popular, instead of the narrower technical, one. Cases are not wanting where some elasticity has been given to criminal statutes, in order to extend them to the mischief obviously aimed at. Thus a jail has been held to be an inhabited dwelling house within the statute respecting arson. \* \* \* In this country the course of legislation on this subject shows an intention to bring within the reach of the statute every kind of property. \* \* \* 'Valuable thing' is more comprehensive than 'valuable security.' Every valuable security is a valuable thing, but many valuable things are not valuable securities. Mere tangible things are not alone meant (by the statute), for the words prior to 'valuable thing' describe them. The legislature intended to denounce as a crime the obtaining by deceit of every valuable thing of a personal nature. 'Other valuable thing' includes every-

thing of value. \* \* \* Under our humane system of criminal law, judicial ingenuity should not exhaust its resources to reach an interpretation in favor of wrong."

The evidence in this case quite clearly shows, and so the jury found under the charge of the court, that this defendant applied to Mrs. Eggeling for a room in her house for himself and his wife, in which they would do light housekeeping. He represented that he was a deputy United States marshal, engaged in active service in this locality. On the faith of that representation she let him have a room at \$10 a month, to be paid for in advance. After having paid, perhaps, for two months or more of use, he defaulted. Thereupon Mrs. Eggeling demanded payment of the amount then due. He represented to her that he had not received his pay from the marshal, but was expecting it, and as soon as he got it he would pay her. Another month came round, no payment had been made, he defaulted again, and she let him remain longer on the faith of his representation that he would soon have his pay as a deputy marshal; and she distinctly testified that she would have ousted him upon his first default, but for the fact that she relied upon his representation, and supposed that he could not afford to falsely personate such an officer. It does not lie in his mouth, after thus lying to this woman, and enjoying the use of her lodging room and home, to now say that he did not receive a thing of value under color of his false assumption of the character of a deputy United States marshal.

There was other evidence in establishment of the *quo animo*, showing that at the same time and in the same locality he represented himself to others as a deputy United States marshal, and obtained credit thereby, even to the washing of his "dirty linen." While the result demonstrated that the transaction was not a thing of value to the washerwoman, it was a valuable service to him. I think the statute is broad enough to cover the case of such an imposter.

The motions for a new trial and in arrest are overruled.

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### THE GEORGE W. WELLS.

(District Court, D. Massachusetts. November 14, 1902.)

No. 1,349

#### 1. SEAMEN—ASSIGNMENT OF WAGES.

A paper signed by a seaman at the time he was hired, reciting that the captain and owners of the vessel "will please pay to M." a certain sum, "to be paid when due for services as sailor on board the" vessel, "and to be charged to my account at the end of the voyage or when duly discharged from said vessel," said paper being signed in the presence of the captain, who told M. the money would be paid him after it was earned, is an assignment of wages prior to the accruing thereof, within Rev. St. § 4536 [U. S. Comp. St. 1901, p. 3082], prohibiting the same.

#### 2. SAME—WAGES DELAYED WITHOUT REASONABLE CAUSE.

Payment of wages of a seaman is not delayed "without sufficient cause" within Rev. St. § 4529 as amended by Acts 1898, c. 28, § 4 (30 Stat. 756 [U. S. Comp. St. 1901, p. 3077]), in such case providing for additional pay, though the cause of the delay, a contention that an order

of the seaman which had been paid was valid, was insufficient in law; "without sufficient cause" meaning "without reasonable cause."

John J. O'Connor and F. F. Sullivan, for libelants.  
Carver & Blodgett, for claimant.

LOWELL, District Judge. This was a libel for wages. The libelants were hired at Newport News March 7, 1902, and served on a voyage from Newport News to Boston. The amount of wages earned by each libelant was \$8.16. Before leaving Newport News each libelant signed a paper as follows:

"\$6.00. Newport News, Va., March 7th, 1902.  
"Captain and owners schr. George W. Wells will please pay to John Mitchell the sum of \$6.00 for board and supplies, to be paid when due for services as sailor on board the schr. George W. Wells and to be charged to my account at the end of the voyage or when duly discharged from said vessel.

"[Signed]  
"Witness to signature:  
"Ch. Browne."

Andrew Berntsen.

These papers were signed in the presence of the master of the vessel, who told Mitchell that the money would be paid him after it was earned, either on the arrival of the vessel in Boston, or, if she was delayed on her voyage, then seven days after she had sailed, inasmuch as more than \$6 would have been earned in that time. Before the crew was paid off in Boston on March 13th, the vessel's agent in Newport News had paid the money to Mitchell, taken up the orders, and forwarded them to the master of the vessel in Boston, where they were received by him before the vessel was docked. At the proper time he called the libelants to him, showed them the papers, and offered to each \$2.16, being the balance due. This they refused to take, alleging that the orders were of no effect. The captain thereupon paid the balance to the shipping commissioner. Until the conversation last mentioned, the seamen made no attempt to revoke the order or assignment.

The question to be decided concerns the interpretation of Rev. St. § 4536 [U. S. Comp. St. 1901, p. 3082]. Was the paper signed at Newport News an assignment of wages made prior to the accruing thereof? Counsel for the claimant has argued that this was no assignment, but a mere order, in its nature revocable even after it had been verbally accepted by the master. It appears to me, however, that the whole transaction amounted to an assignment of wages within the fair intent of the statute, and that to recognize it as valid would be to do that which the statute was passed to forbid. See Tripp v. Brownell, 12 Cush. 376.

It remains next to consider if the libelants are entitled to the additional payment provided for in Rev. St. § 4529, as amended by section 4, c. 28, Acts 1898; 30 Stat. 756 [U. S. Comp. St. 1901, p. 3077]. Was the payment of the wages delayed "without sufficient cause"? That the cause of delay was insufficient in law has just been determined, but to construe the language thus narrowly is contrary to its reasonable intent. Congress can hardly have intended that in every controversy, however doubtful, which finally results in

the seaman's favor, he shall be entitled to additional compensation so large. Let us suppose, for example, a disputed question of fact concerning wages, where the conduct of the sailor has been such that the court refuses him costs, though he finally prevails so far as to collect a small part of his original claim. Payment is delayed until the decree of the court, made a year or more after the claim accrued. Can it be that the court is absolutely compelled, either in the original suit or in one subsequent, to award the libelant a bonus of four or five hundred dollars in addition to the four or five dollars of his wages actually detained? I think not. See *The Alice B. Phillips* (D. C.) 106 Fed. 956; *The Topsy* (D. C.) 44 Fed. 631, construing Statutes 17 & 18 Vict. c. 104, § 187. It is easy to perceive that the construction of the statute urged by the libelant would encourage seamen to speculate upon controversies between themselves and the ship. The phrase "without sufficient cause" should rather be construed as equivalent to "without reasonable cause." In this sense there was reasonable cause in the case at bar for the delay in the payment.

Decree for the libelants for the amount of wages due and costs.

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In re GOLDSMITH.

(District Court, N. D. Texas. October 29, 1902.)

No. 11.

**1. BANKRUPTCY—SECURED CREDITORS—PROOF OF CLAIMS.**

Where property of a bankrupt, on which is a mortgage given by him, is sold in the bankruptcy proceedings, free of the incumbrance, the mortgagee, who intervenes merely to subject the proceeds to part payment of his debt, is not bound to prove his claim, as required by Bankr. Act 1898, § 57 [U. S. Comp. St. 1901, p. 3443], but has only to plead and prove his debt and security as in an ordinary suit; such a payment to a secured creditor not being a dividend, within section 65a [U. S. Comp. St. 1901, p. 3448], providing that dividends of an equal per cent. shall be declared on all allowed claims, except such as have priority or are secured.

In Bankruptcy. On certificate from referee.

I. Goldsmith was adjudged a bankrupt on his voluntary petition on the 26th day of September, 1898. Among his assets, the bankrupt scheduled two certain lots in the city of Dallas. It is stated in the schedules that these lots are subject to a lien created by a deed of trust in favor of I. Hirsch & Son, executed on the 3d day of January, 1897, to secure the payment of certain notes dated February 5, 1897. The bankrupt received his discharge on the 13th day of June, 1899. On the 8th day of August, 1900, the trustee made application to the referee for an order to sell these lots free from incumbrance. Notice of the application was given by the referee to all creditors, including I. Hirsch & Son. He fixed a day for the creditors to show cause, if any they had, why the application of the trustee should not be granted. No creditor appeared, nor was any opposition filed; and the referee directed the trustee to sell the property either at public or private sale, which was done. The sum of \$475 was realized, and the sale was approved by the referee. On the 24th day of July, 1901, I. Hirsch & Son filed their application with the referee for the proceeds of the sale, alleging that they have a lien by virtue of the deed of trust mentioned

above; the same being executed by the bankrupt to Victor H. Hexter, trustee, to secure the payment of a note for \$4,000, dated January 27, 1897, and payable six months thereafter to the order of I. Hirsch & Son. Nothing is stated in the deed of trust, nor in the application of the creditors, I. Hirsch & Son, as to the consideration of the indebtedness, and no proof of claim was filed by them. Certain creditors filed opposition to the application of I. Hirsch & Son, and the issue thus made was heard before the referee. After hearing, he held that the application of I. Hirsch & Son could not be entertained, because they did not prove up their claim in accordance with the provisions of the bankruptcy law, and the rules and forms adopted by the supreme court of the United States. He therefore, by order, overruled the application; and to this order I. Hirsch & Son filed exceptions, and secured a certificate to have same reviewed by the judge. After hearing, the court held that the referee erred in refusing the application of I. Hirsch & Son for payment of the proceeds of the property on which they claimed to hold a mortgage, because of their failure to have their claim allowed by the referee within one year from the adjudication of the bankrupt, and decreed that the order entered by the referee be set aside, and directed the referee to hear and determine the application upon proof as to the existence of the indebtedness and mortgage claimed by I. Hirsch & Son. In pursuance of this direction, the referee heard their claim, and proof offered in support thereof. The claimants offered in evidence the note of I. Goldsmith, above mentioned, and also the deed of trust executed to secure the note on the lots sold by order of the referee, and from which the fund in the possession of the trustee was realized. There is a variance between the note described in the deed of trust and the note actually offered in evidence. This variance, however, is cured by an agreement of counsel that the note described in the application and that testified to by the deposition is one and the same instrument. Claimants also offered the deposition of Isaac Hirsch, showing that the consideration for the note was \$4,000 loaned the bankrupt on the day of its making, that the deed of trust was given to secure these notes, and that no part thereof had been paid up to the 16th day of January, 1902, when I. Hirsch & Son received \$1,200 in part payment. The referee, as he states in his certificate, is of the opinion that, "before a creditor can apply for funds in the possession of a bankruptcy court which have been realized through its procedure, he must comply with that procedure, prove his claim, and have it allowed in the manner established by the act." I. Hirsch & Son failed and refused to file any other proof than that above indicated, and simply relied upon their evidence contained in the deposition and the note and deed of trust. The referee therefore entered an order refusing their application for the proceeds of the sale. Claimants asked to have this action of the referee reviewed by the judge, and the referee certifies the question as to whether he should have proceeded to hear the claim, notwithstanding their failure to prove the same as required by the bankruptcy act.

Victor H. Hexter, for claimants.

Thompson & Thompson, for trustee.

MEEK, District Judge (after stating the facts as above). As stated by the referee, when this matter was before the court on a former hearing it was the opinion of the court that, if I. Hirsch & Son had a valid mortgage upon the lots in question, they did not lose it by reason of their failure to submit proof of claim and have it allowed by the referee within one year from the adjudication of the bankrupt. The referee was therefore directed to hear and determine the application of I. Hirsch & Son for the proceeds of the sale, upon proof as to the existence of the indebtedness and lien claimed by them. It was made manifest by this ruling that the court did not consider it incumbent upon a lien creditor to comply with

the procedure of the bankruptcy act in the matter of proof and allowance of claims as provided in section 57 [U. S. Comp. St. 1901, p. 3443], in order to secure him in the enjoyment of his lien. The referee now holds that even though, under the law of this case as enunciated by the court, I. Hirsch & Son did not have to prove their claim and have it allowed within 12 months, under the provision of section 57 [U. S. Comp. St. 1901, p. 3443] to that effect, yet, when they repair into the bankruptcy court to secure the proceeds of property upon which they have a lien, their proof must be in conformity with the provisions of section 57 [U. S. Comp. St. 1901, p. 3443], and the rules enunciated and forms adopted by the supreme court of the United States.

Several facts disclosed by the record seem pertinent to the discussion of the question at bar, and to the fixing of a proper course of procedure in like cases. The indebtedness of the bankrupt to I. Hirsch & Son, as evidenced by the notes scheduled, was in the sum of \$4,000. The property subject to the payment of this indebtedness was sold for the sum of \$475. While the record does not disclose the appraised value thereof, yet the conclusion can safely be indulged that it was far less than the amount of the indebtedness the schedule shows this property was deeded to secure. If this were not so, it is to be presumed the referee would not have affirmed the sale thereof for the sum of \$475. I. Goldsmith was adjudged a bankrupt on the 26th day of September, 1898. The trustee did not make application to the referee for an order to sell this property free from incumbrance until the 8th day of August, 1900, almost two years after the adjudication of the bankrupt. At the date of the order of sale the time within which I. Hirsch & Son might have proved their indebtedness, if they were compelled to comply with the provisions of section 57 of the act [U. S. Comp. St. 1901, p. 3443], had long since passed. The order of sale is not incorporated in the record, but it does not appear from the statement of its contents that it provided all liens upon the property sold should attach to the proceeds. It would appear from this recitation that the trustee must have realized there was no equity in the property if the lien were observed. He therefore made his application to sell, believing that I. Hirsch & Son had forfeited their lien by the failure to make proof of claim. I. Hirsch & Son evidently intended to rely upon their security, so far as it would go toward the payment of their debt, without resorting to the bankruptcy court. Upon being notified of the application of the trustee to sell the property free from liens, they were, no doubt, impressed with the belief that the referee would conclude there would be nothing realized from such sale for the general creditors, and so refuse the application, or else they determined to abide the action of the bankruptcy court, and follow the proceeds in event there was a sale.

The referee, in his findings, and in an exhaustive opinion submitted, takes the position that there is no distinction drawn in the bankruptcy act between a secured and an unsecured creditor, save and except as to the order of payment. He urges that "the secured creditor has no greater nor better right to procure or receive payments from the particular fund upon which he has a lien, and out of



which he expects his 'dividend,' as provided by section 65 of the act [U. S. Comp. St. 1901, p. 3448], without taking the preliminary steps of proving his claim, than an unsecured creditor has to proceed against and receive payment from the general fund without such proof." In support of his position the referee cites certain sections of the act relating to allowance of claims. The law so cited does nothing more than provide for the allowance of secured as well as unsecured claims. By these very provisions, secured claims can be allowed "for such sums only as to the court seem to be owing over and above the value of their [the creditors'] securities and priorities," so that secured claims, if proven, are not allowed to the extent of the value of the securities. While provision is made for the proving of secured claims, that fact cannot well be construed to mean that all secured claims must be proved before the contract of security can be enforced in a bankruptcy court or elsewhere. This, in effect, is the ruling of the referee.

Section 65a of the act [U. S. Comp. St. 1901, p. 3448] is as follows: "Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured." On the question as to whether referees and trustees are entitled to a commission on sums realized from sales of securities, and paid to secured creditors, it has been held that such payments cannot be construed as dividends. In *re* Ft. Wayne Electric Corp. (D. C.) 94 Fed. 109; In *re* Fielding (D. C.) 96 Fed. 800; In *re* Utt, 45 C. C. A. 32, 105 Fed. 754. I concur with these authorities. If such payments are not dividends in this respect, they should not be construed as dividends for the purpose of compelling secured creditors to make proof of claims in order to realize them.

Under the bankruptcy act of 1867, it was held by the supreme court of the United States, in *Yeateman v. Institution*, 95 U. S. 764, 24 L. Ed. 589, as follows:

"The established rule is that [except in certain cases] the assignee takes the title subject to all the equities, liens, and incumbrances, whether created by operation of law or by act of the bankrupt, which exist against the property in the hands of the bankrupt."

The same rule obtains under the present act, the trustee taking the bankrupt's property subject to all liens and incumbrances which existed against the property in the hands of the bankrupt; the only exceptions being those set forth and enumerated in section 67 [U. S. Comp. St. 1901, p. 3449].

Mr. Justice Harlan, in *Yeateman v. Institution*, *supra*, says:

"Nor was it right to hold them [the certificates] impaired by its failure to appear in the bankruptcy court, or its refusal to prove its debt, in the customary form, against the state of the bankrupts. The only effect of such refusal was to lose the privilege of participating in such distribution of the estate as might be ordered by that court. It had the right to forego that advantage, and look for ultimate security wholly to the certificates which it held under a valid pledge. If the assignee regarded them as of greater value than the debt for which they had been pledged, or if the interest of the creditors required prompt action, he had authority, under the statute and the orders of the court, to tender performance of the contract of pledge, or to discharge the debt for which the certificates were held. He had the right, perhaps, under the orders of the court, to sell them, sub-

ject to the claim of the defendant in error. If he desired a sale of them, and a distribution of the proceeds, or if he doubted the validity of the pledge, he could have instituted an action against the corporation in some court of competent jurisdiction in Louisiana, and thereby obtained a judicial determination of the rights of the parties. But none of these obvious modes of proceeding were adopted. The receiver and assignee seem to have acted throughout upon the theory that they had the right, immediately upon and by virtue of the adjudication in bankruptcy, to assume control of all property of every kind and description, wherever held, in which the bankrupt had an interest, without reference either to the just possession of others, lawfully acquired, prior to the commencement of proceedings in bankruptcy, or to the liens, incumbrances, or equities which existed against the property at the time of the adjudication in bankruptcy. We have seen that such a theory is unsupported by law."

Circuit Judge McCrary, in his opinion in the case of *Cottrell v. Pierson* (C. C.) 12 Fed. 805, says:

"It will be observed that the judgment of the Springfield Manufacturing Company was obtained over two years before the commencement of the proceedings in bankruptcy, and that there is no charge of fraud or collusion in obtaining the rendition thereof. Did the failure of the plaintiff in said judgment to prove its claim in the bankruptcy court deprive it of its lien? I think not. There is high authority for the proposition that the lien of a creditor on real estate of a bankrupt is not lost by his failure to prove his debt. *Wicks v. Perkins*, 1 Woods, 383, Fed. Cas. No. 17,615, 13 Nat. Bankr. Rep. 280. The creditor in such a case may rely upon his security, and omit to prove his claim in bankruptcy, and by so doing he will lose only his claim against the general estate of the bankrupt. The law did not require the lienholder to prove his debt in order to save his lien. Having a judgment in the state court by which his lien was established, he had no occasion to apply to the bankruptcy court for aid in its enforcement. Whether the judgment creditor in this case could have caused execution to issue, and had his judgment enforced by sale pending the bankruptcy proceedings, may admit of some question, since the estate was, in a certain sense, in custodia legis. In the case above cited, Judge Woods expressed the opinion that the lien could have been enforced either before or after the end of the proceedings in bankruptcy. However this may be, I am clearly of the opinion that, after the proceedings in bankruptcy had terminated, there was nothing in the way of the enforcement of the lien of the judgment in the state court by execution and sale. *Freem. Judgm.* 28, 29; *Second Nat. Bank of Louisville v. National State Bank*, 14 Am. Law Reg. 281."

If secured creditors elect to rely upon their security, they are not parties to the bankruptcy proceedings at all. There is nothing compelling them to make proof, and they may enforce their liens, if otherwise valid, subject to the power of stay set forth in section 11 of the act. *Collier, Bankr.* (3d Ed.) 315.

The position of the referee receives support in the opinion of Judge Treat in the case of *Davis v. Anderson*, Fed. Cas. No. 3,623, but I take it this case is overruled by the decision of the supreme court above quoted. In the administration of bankruptcy estates it has been the rule to carefully consider whether there is a probable interest in incumbered property for the general creditors; if it be decided there is, then to sell same, after notice, either subject to or free from incumbrance, as conditions may indicate. If sold free from incumbrance, it ought to be provided that such incumbrances and liens as may be found to exist should attach to the proceeds of the sale. If it be decided there is no interest for the general creditors,

then the bankruptcy court should not undertake to administer the property for an absent lienor. To undertake its administration is an abuse of discretion justly condemned by the authorities. In *re* Dillard, 2 Hughes, 190, Fed. Cas. No. 3,912; In *re* Schaeffer (D. C.) 105 Fed. 352; In *re* Cogley (D. C.) 107 Fed. 73; In *re* Gibbs (D. C.) 109 Fed. 627. In the case at bar it is not to be seen from the record how either the trustee or the referee could conclude that there was any equity in this property for the general creditors of the estate in event the lien of I. Hirsch & Son was a valid and subsisting one. Some suspicion was cast upon the validity of the lien by counsel for the contesting creditors in the argument before the court. If there were doubts of its validity, the trustee could have instituted an action in a court of competent jurisdiction, and thereby obtained a judicial determination of that question. But this obvious mode of proceeding was not adopted, and the parties are now before the court on the proof made, which in no wise involves the question of validity.

How did I. Hirsch & Son come into the bankruptcy court? Not as secured creditors seeking to prove up a secured claim to the extent of its excess beyond the value of security held by them. The record indicates they have a claim, in a considerable amount, that could have been proved; but they have seen fit not to prove it, and will therefore forego the privilege of sharing with the general creditors in dividends declared. *Yeateman v. Institution*, supra. I. Hirsch & Son come as interveners seeking to subject certain funds, which arose from the sale of the property on which they claim a lien, to the part payment of an alleged indebtedness. They have a right to come in this way. *Fisher v. Cushman*, 43 C. C. A. 381, 103 Fed. 860, 51 L. R. A. 292; In *re* Oconee Milling Co., 48 C. C. A. 703, 109 Fed. 866. They must plead and prove the existence of their debt and security. Their proof must be evidentiary in nature, and support the material averments of their application. It cannot conform to any provisions of the act, or rule, or prescribed form, because there is none covering it.

The referee should have proceeded to hear the application of the claimants I. Hirsch & Son, and determine their right to the fund on the proof submitted. The referee will proceed as above indicated, and, in event he concludes from the evidence adduced before him that the fund in the registry of the court should be applied on the secured indebtedness of I. Hirsch & Son, he will tax all costs of the proceeding resulting in the sale of the property against them, because they now seek to take advantage of the acts of the bankruptcy court in reducing their security, and did not protest against such acts. The costs of this certificate will be taxed against the contesting creditors.

## THE TROOP.

(District Court, D. Washington, W. D. November 5, 1902.)

**1. SEAMEN—INJURY IN SERVICE—LIABILITY OF SHIP FOR FAILURE TO GIVE PROPER CARE.**

Neither the decisions of the British admiralty courts, nor the English merchants shipping act, deny to a seaman the right given him by the general maritime law to maintain a suit in rem against the ship to recover damages caused by the failure of the master to furnish him with proper care, treatment, and supplies after his accidental injury in the service of the ship.

**2. SAME—FOREIGN SHIP—JURISDICTION TO ENFORCE LIABILITY.**

An American court of admiralty will entertain jurisdiction of a suit by a seaman against a foreign ship to recover damages for the gross negligence or misconduct of the master in failing to give the libelant proper care, nursing, and medical attention after his accidental injury in the service of the ship, by reason of which he endured great suffering and was permanently disabled, where the circumstances are such that he would otherwise be without any effective remedy.

**3. SAME—NEGLECT BY MASTER—DAMAGES.**

When a British ship was leaving a port where there was a hospital, having made but six miles from her anchorage, libelant, who was a seaman, fell to the deck, and was severely injured; fracturing the bones of his thigh and arm. Instead of sending libelant to the hospital, the captain undertook to reduce the fractures, and then sent libelant to his bunk in the forecastle, and continued the voyage, giving him no further attention until reaching another port, 36 days later. The bunk in which libelant was placed was unsuitable for one in his condition, and he was given very little attention, and neither proper care nor nursing, in consequence of which he suffered intensely. As a result of the captain's malpractice, he was compelled to undergo severe surgical treatment after reaching a hospital, and was permanently disabled. *Held*, that the captain was guilty of gross inhumanity, and violation of the duty imposed on him by libelant's contract for service, which rendered the ship liable in damages for libelant's suffering and permanent injury, assessed by the court at \$4,000.

In Admiralty. Suit in rem for damages.

A. W. Buddress, for libelant.

J. M. Ashton and W. L. Sachse, for claimant.

HANFORD, District Judge. This is a suit in rem against the British ship Troop by Albert Louie, a German sailor, to recover compensation for excessive and unnecessary suffering after a personal injury and permanent disablement caused by falling from the main upper topsail yardarm of the ship while he was performing his duties as a member of the crew of said ship. The injuries were very severe, the bones of his left arm and right thigh being fractured, and he was otherwise cut and bruised. The accident happened when the vessel was departing from the port of Fusan, bound for Puget Sound, having made only six miles, or a little more, from her anchorage in the inner harbor of Fusan, and it was calm, so that she was making no headway; but the captain, instead of sending the libelant to the hospital at Fusan, undertook the treatment of the case himself; that is to say, he applied splints and bandaged the fractured members, and then sent the libelant to his bunk in the forecastle, and did not see him again, or do anything for him, until the vessel arrived at Port Angeles, 36 days

after the injury. The nearest he came to even a pretense of giving the libellant any personal attention during the voyage was to look into the fore-castle once, when the libellant was asleep. The captain not only failed to give personal attention to the wants of the libellant, but neglected to detail another member of the crew to attend to him. He ordered the steward to look after him, but without relieving the steward from the performance of his other duties, which required all of his time. The evidence shows that during the greater part of the voyage the steward did not see the libellant oftener than once in two days. To properly reduce the fracture of a leg, it is necessary for the patient to have sufficient room to be stretched out at full length, but, according to the undisputed evidence in this case, although there was an unoccupied room in the after part of the ship, the libellant was obliged to remain, from the time of the injury until he was taken into the United States marine hospital at Port Townsend, in a bunk which was narrow and too short for him; and during many days, when the ship was rolling in heavy weather, he was obliged to use his unbroken arm, clinging to the bunk, to save himself from being thrown out. In that situation his agony was intense, and when he applied to the steward for help he was told by that functionary that he did not have time to attend to him. The vessel arrived at Port Angeles on the 21st day of February, 1902, and passed quarantine inspection the same day. She was then about 20 miles from the United States marine hospital, and there was nothing to hinder the prompt removal of the libellant to that institution, and in the argument in behalf of the claimant it is contended that the captain made every possible effort to have the libellant placed in the hospital as soon as it could be done. Yet it is a fact that he was still detained an additional five days in his horrible bunk, where he had been from the time of the injury without being washed, and without any change of clothing. It is useless to parade more of the sickening details of this case. It is a shocking instance of "man's inhumanity to man," and the excuses which are made in behalf of the captain are transparently false and puerile. For instance, the claim is made that it was impossible for the ship to return to Fusan after the accident happened, because it was calm at that particular time, and when the wind sprang up, a few hours later it was dark; that the man could not be sent ashore in a small boat, because the subordinate officers were intoxicated; and that the ship could not run into Nagasaki or Kobe, because the captain had never visited those ports, and was ignorant of the conditions there. The captain refers to the calm and the darkness, and the intoxication of his subordinates as if those conditions were unchangeable and perpetual and as if the loss to the owners of the ship occasioned by a few hours of delay created an insurmountable barrier, making return to Fusan or calling at another near-by port absolutely impossible.

I give to the claimant all the advantage to his side of the case to be derived from consideration of British law, and I hold that no liability, except for expenses and wages, attaches to the ship or owners for a personal injury to a seaman happening while he is in the service of a British ship, in consequence of the negligence of the captain; but that rule is not applicable to a case like this, where complaint is

made of suffering long continued in consequence of failure to observe the dictates of humanity for the relief of a sufferer, after an accidental injury. By the sixth article of the laws of Oleron, it is provided that:

"If, by the master's orders and commands, any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship." 30 Fed. Cas. p. 1174.

See, also, the Black Book of the Admiralty, published in 1871, by authority of the lords commissioners of her majesty's treasury, under direction of the master of the rolls (volume 1, p. 95).

The laws of Oleron were introduced into England by King Richard, the crusader, and are to a large extent the basis of the maritime law of that country, as well as of the United States, and the principle of this particular article is observed by maritime courts in all countries. It is contended in this case that the English merchants' shipping act has superseded the general maritime law on this subject, by providing that the expenses incidental to the cure of sick and disabled seamen shall be paid by the owners of the vessel, and that this provision exempts the ship from liability. It appears, however, by the provisions of that act itself, that there was no intention to deprive seamen of a remedy by proceedings against the ship, for it is expressly provided that if a seaman or apprentice becoming ill has, through the neglect of the master or owner of the ship, not been provided with proper provisions and water, and with such medicines and medical stores as are required by said act, then the owner or master shall be liable to pay all expenses, not exceeding three months' wages, properly and necessarily incurred either by the seaman himself or by the crown, "but this provision shall not affect any further liability of the master or the owner for the neglect, or any other remedies possessed by the seaman or apprentice."

In *MacLachlan, Merch. Shipp.* (4th Ed.) pp. 264, 265, the author, referring to a proviso to the section of the act with respect to the providing of medicines and antiscorbutics, and the supply thereof on proper occasions to the crew, which proviso is very similar to that above quoted, makes the following statement of what the law is held to be in England:

"By the neglect of such duty, the owner or master incurs a penalty, besides liability for expenses occasioned thereby, and also for damages recovered, by any one of the crew who suffers injury in consequence;" citing as authority *Couch v. Steel*, 3 El. & Bl. 402, 23 Law J. Q. B. 121.

Each of the opinions in the case of *Atkinson v. Waterworks Co.*, 2 Exch. Div. 441, contains dicta questioning the soundness of the decision in *Couch v. Steel*; and it was held in that case that a man whose house was burned did not have a cause of action against a water company for its failure to maintain a sufficient supply of water for use, free of charge, in extinguishing fires, and that a statutory penalty was the only liability incurred by the company. That decision, however, does not militate against the proposition that a statute prescribing a penalty for failure to discharge an obligation created by contract and enjoined by the general law, and containing a saving

clause, does not by implication take away the remedy of a man who has been wronged by a breach of the contract obligation to him.

In the very able argument in behalf of the claimant, no decision by an English court was cited denying the right of an injured seaman to recover damages for deprivation of care and attention by suit in rem in admiralty. *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, *Hedley v. Pinkney*, 7 Asp. 483, and *Johnson v. Lindsay*, 65 Law T. (N. S.) 97, do not seem to touch the question in this case; and, as it has not been made to appear by citation of English decisions that the courts having jurisdiction of admiralty causes in that country hold to a different rule, this court must apply the principles of the general maritime law.

The relief which sick or wounded seamen are entitled to when they become ill or have suffered injuries without being themselves grossly in fault includes food, lodging, medicines, skillful treatment by physicians and surgeons when obtainable, and nursing; and, when these are not supplied by reason of the cruelty or incompetency of a captain or owners in charge of the vessel, the ship herself is, in the eyes of the maritime law, a guilty thing. And upon that theory the courts enforce the liability by appropriate proceedings in rem against the ship. In a decision by Judge Betts in the case of *The Atlantic*, Fed. Cas. No. 620, Abb. Adm. 451, the rule is stated as follows:

"So, also, in case due attention to his necessities has been unjustly omitted by the ship abroad, or his case has been improperly treated, the courts may properly enforce against the ship this great duty towards disabled mariners, even after her contracts are terminated, upon the ground of a failure to perform towards them the obligation in the shipping contract."

See, also, *The City of Alexandria* (D. C.) 17 Fed. 395; *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 292; *The Iroquois* (D. C.) 113 Fed. 964.

The jurisdiction of this court is disputed on the ground that the *Troop* is a British ship. I consider, however, that it is the imperative duty of this court to take cognizance of the case. It is the mission of ships to wander from their home ports, and they may be employed for many years sailing from port to port in different parts of the world, without visiting the countries in which their owners reside, and for this reason,—to protect distressed seamen,—courts of admiralty are obliged to serve, to a certain extent, as courts of the world. They leave controversies between the owners or masters and crews of foreign ships to be settled by the courts of the country to which each vessel belongs, when they arise upon a return voyage to that country, and in all cases when practicable to do so without denying to a party who has been wronged the only opportunity which he may have to obtain redress. *The New City* (D. C.) 47 Fed. 328; *Bolden v. Jensen* (D. C.) 70 Fed. 505; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 285, 17 Sup. Ct. 572, 41 L. Ed. 1004. In the case under consideration it would be an inexcusable denial of justice to disclaim jurisdiction, and leave this libellant, who is a German, to go to England to seek in the courts of that country enforcement of his rights. The *Troop* may not visit any port of England for many years, and, even were the libellant to meet her in an English port, he would be unable to estab-

lish his rights, because all the witnesses upon whom he must depend to prove the facts would be absent. The British vice consuls residing at Port Townsend and at Tacoma have both disclaimed authority to adjudicate the libellant's claim for damages. Therefore this court must take cognizance of his case, or he will be remediless, and the ship will be permitted to escape liability for a monstrous wrong, inflicted in disregard of the just principles of maritime law.

By reason of the captain's malpractice upon the libellant, he was obliged to undergo very painful surgical treatment after his arrival at Port Townsend, and his disability to work and follow his calling as a mariner has been made permanent, whereas, if he had been sent ashore and placed in a hospital at Fusan or Nagasaki, it is probable that his injuries might not have made him a cripple for life. Considering all the circumstances of aggravation, I consider the sum of \$4,000 to be a reasonable amount to award as damages.

A decree will be entered in favor of the libellant for \$4,000, with interest thereon at the rate of 6 per cent. per annum from the date of filing the libel, and costs.

# WHITMIER & FILBRICK CO. V. CITY OF BUFFALO et al.

(Circuit Court, W. D. New York. November 5, 1902.)

No. 176.

## 1. MUNICIPAL CORPORATION — ORDINANCES — POLICE POWER — BILLBOARDS — REGULATION.

Under Buffalo city charter authorizing the common council to enact ordinances to prevent and abate nuisances and for the good government of the city, etc., the city had power to pass an ordinance prohibiting the erection of billboards exceeding seven feet in height within the city, without the council's permission, and authorizing the abatement of any board erected in violation of the ordinance as a nuisance.

## 2. SAME — FEDERAL COURTS — DECISIONS OF STATE COURT — EFFECT.

A judgment of a state court of last resort sustaining the validity of a city ordinance prohibiting the erection of billboards is binding on the federal courts sitting in such state in an action to enjoin the enforcement of the ordinance.

## 3. SAME — PROSPECTIVE OPERATION.

Buffalo City Ordinances, § 48, prohibiting the erection of billboards more than seven feet in height without permission from the city council, and requiring the abatement of any billboard erected in violation of the ordinance as a nuisance, is prospective in its operation only, and does not authorize the destruction of boards erected before its enactment.

In Equity.

Spaulding & Sullivan (Tracy C. Becker and A. S. Gilbert, of counsel), for complainant.

Charles L. Feldman, for defendants.

HAZEL, District Judge. The question here presented for the decision of the court depends upon the validity and constitutionality of

¶ 2. State laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

See *Courts*, vol. 13, Cent. Dig. §§ 956, 957.



section 48 of chapter 4 of the ordinances of the city of Buffalo. If the section be void, its enforcement impairs the property rights of the complainant, which this court, sitting in equity, has the power to protect. The jurisdiction of the court is invoked through diversity of citizenship of the parties. The restrictive section of the ordinance relied on by the defendants reads as follows:

"Sec. 48. No person shall hereafter erect any fence or billboard more than seven feet in height within the city of Buffalo without the permission of the common council; and any fence or billboard erected contrary to the provisions hereof shall be abated as a common nuisance by any officer of the fire department after two days' notice to remove the same. Any person, firm or corporation violating this section shall upon conviction, be punished by a fine of not less than \$25, nor more than \$50."

It is claimed by the defendants that the enactment of the ordinance by the common council of the city of Buffalo is justified by the city charter (Laws 1891, c. 105, § 17), by which it is provided:

"Sec. 17. The common council shall, from time to time, enact ordinances: \* \* \* (8) To prevent and abate nuisances, \* \* \* to locate, regulate and remove slaughter-houses, butcher stalls, fish stands, livery stables, tanneries and unwholesome or noisome buildings or places, and to compel the cleaning of the same whenever necessary. \* \* \* (11) And such other and further ordinances not inconsistent with the laws of the state, as shall be deemed expedient for the good government of the city, the protection of its property, the preservation of peace and good order, the suppression of vice, the benefit of trade and commerce, the prevention and extinguishment of fires, the exercise of its corporate powers and the performance of its corporate duties."

Notice to remove the billboards required by the ordinance was duly served upon complainant corporation, and upon its failure to comply the fire commissioners proceeded to remove them. It is conceded that the billboards erected by the complainant are more than seven feet in height, and that they were erected without the permission of the common council of the city of Buffalo, nor is it disputed that the city of Buffalo had the power to enact a restrictive ordinance. The counsel for complainant contends that the provisions of the ordinance by which a summary removal or destruction of the billboards is affected is void and unconstitutional. This question was recently twice considered by the appellate division of the supreme court, Fourth department, in the case of *Gunning System v. City of Buffalo*, 62 App. Div. 498, 71 N. Y. Supp. 155; *Id.*, 75 App. Div. 31, 77 N. Y. Supp. 987. In the *Gunning Case*, an action similar to this brought against the city in the state court by a corporation maintaining similar structures, an injunction pendente lite was denied by the trial court. The appellate court declined to pass upon the validity of the ordinance or the existence of the nuisance upon the application for an injunction in limine, and such an injunction was issued. The case was then tried out upon the merits, and the validity of the ordinance judicially determined. The court then held that the structures were illegal on two grounds: First, that the ordinance designating them as nuisances was legal and valid; and, secondly, that, irrespective of this ordinance, the board structures brought to the court's attention were common-law nuisances per se. It was further decided that the legislature had the power to delegate to the municipality the right to de-

clare the structures condemned illegal, and to abate the same, and therefore the ordinance under consideration was legal and valid. The decision in the case of *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659, is cited as an authority for holding the ordinance constitutional. On appeal from the decision of the trial court, the decision of the lower court was affirmed on the ground that the action of the common council in enacting the ordinance in question was for the general welfare and good government of the city and its inhabitants. The appellate court in the *Gunning System* decision (75 App. Div. 32, 77 N. Y. Supp. 987) did not deem it necessary to review the evidence, in view of the decision of the court of appeals in the case of *City of Rochester v. West*, supra, and sustained the ruling of the trial court that the ordinance was authorized by the charter of the city of Buffalo. In the *West Case* a like ordinance of the city of Rochester was reviewed. No provision for destruction of the billboards, however, was included in the Rochester enactment. The court of appeals passed upon two questions certified to it by the lower court. The second question was thus decided:

"The ordinance in question is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private property."

In that case, as here, the fences or billboards were erected on private property. Judge Martin, who wrote the opinion for the court, in speaking of the validity of the statute authorizing the enactment of the ordinance, said:

"It is obvious that its purpose was to allow the common council to provide for the welfare and safety of the community in the municipality to which it applied. If the defendant's authority to erect billboards was wholly unlimited as to height and dimensions, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them. That the legislature had power to pass a statute authorizing the city to adopt an ordinance which, if enforced, would obviate the danger, we have no doubt. Nor was it in conflict with any provision of the state or federal constitution."

Municipalities are frequently invested by law with the right to summarily abate nuisances. The welfare and good government of populous cities demands that their officials shall possess summary jurisdiction in certain cases. The imposition of a penalty would but punish the offender, but it would not remove the source of danger. *Hart v. City of Albany*, 9 Wend. 592, 24 Am. Dec. 165; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89.

In view of the doctrine announced in the cases cited, the billboards have the character of nuisances, and were constructed, as said in the case of *King v. Davenport*, supra, "In the face of the general ordinance of the city, long before passed, prohibiting any such structure, and declaring it to be a nuisance, and subject to be abated as such. It was a reasonable regulation for the future, and plaintiff's defiant disobedience of it leaves her no reason for complaint of the general consequences." The ordinance having been held valid by the highest courts of the state of New York, it must be held here that the ordinance, under the circumstances, in its most progressive scope, comes

within the purview of the police power of the city. The enactment prohibiting the erection of fences and billboards more than seven feet in height is not unreasonable, and the right of abatement as therein provided does not go beyond the extent of the police power as delegated by the supreme legislative authority of the state of New York to the city. *In re Wilshire (C. C.)* 103 Fed. 620; *Griffin v. City of Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684. The abatement and removal is not taking private property for a public use, but must be construed as a salutary restraint on a noxious use by the owner, and within the police power of a city of municipality whose charter brings such ordinance within its legislative authority. *Dill. Mun. Corp.* 212. Such is the holding of the state courts. The interpretation and construction of the highest courts of the state placed upon the constitutionality of ordinances enacted pursuant to authority from the legislature of the state will be considered as final where no right secured by federal enactment is invaded. The principle of following the construction given by the state courts to the enactments of its legislature, unless they come in conflict with the constitution, laws, and treaties of the United States, is based upon the theory that such decisions become a part of the state law. *Cooley, Const. Lim.* p. 20, notes. The complainant asserts, and it is not controverted, that many of the billboards now sought by the defendants to be removed were located on private property prior to the enactment of the ordinance. The existing law declaring billboards more than seven feet in height as a common nuisance does not apply to such billboards or signs. The affidavits presented by the defendants do not disclose such a state of facts as will justify setting aside the injunction as to billboards that were erected prior to the ordinance. In general terms the affidavit of Mr. Malone points out the necessity for abating such boards as a nuisance, principally on account of their menace to adjoining houses in case of fire, but none of the specific acts which might occur have ever happened. Such structures are not per se illegal by reason of this ordinance, which has been declared valid. The ordinance cannot be retroactive. Such structures may only be abated on the theory of common-law nuisances, the existence of which can only be determined on final hearing. It is further contended by complainant that the injunction should be continued during the pendency of the suit, so as to enable it to give proof on the trial of the number of billboards and their location which were erected before the ordinance restricting the height of billboards or signs was adopted. If any such structures are destroyed by the fire commissioners knowing or having reason to know that they were erected before the ordinance of 1896 was passed by the common council, this court doubtless would be empowered to dispose of the disobedience in the usual manner. Complainant could also avail itself of its remedy at law.

The injunction heretofore granted on the order to show cause why it should not be continued *pendente lite* is now modified to conform to this opinion. As to the billboards erected before the restrictive ordinance under consideration, the injunction is continued; as to those subsequently erected, it is vacated. So ordered.

## RAPHAEL v. TRASK et al.

(Circuit Court, S. D. New York. August 28, 1902.)

## 1. JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS.

A suit to restrain private persons from selling the stock of a railroad company is not ancillary to one to foreclose a mortgage on property of such company, to which the stockholders are not parties.

## 2. SAME—DIVERSITY OF CITIZENSHIP—SUIT AGAINST PARTNERSHIP.

To a suit to restrain a partnership from selling the stock of a railroad company, in which it is acting for itself and as agent for other stockholders, all the partners are necessary parties defendant, and a federal court is without jurisdiction of such suit where some of the partners are citizens of the same state as complainant.

In Equity. On plea to jurisdiction.

Charles Locke Easton, for complainant.

Parsons, Shepard & Ogden (Shepard & Smith, of counsel), for defendants.

THOMAS, District Judge. The present question relates to the jurisdiction of the court. It appears from the bill that the complainant, in 1901, filed a bill in the United States circuit court for the district of Utah against the Wasatch & Jordan Valley Railroad Company, the Rio Grande Western Railway Company, and the Union Trust Company of New York, as trustee, to foreclose a mortgage given by the first-named company, and to redeem from two underlying mortgages certain spurs of railroad sold on foreclosure, and thereafter continued in possession under claim of title by Rio Grande Western Railway Company for nearly 20 years before the bill was filed, of which company an accounting is also demanded. The defendants in the present action, composing the firm of Spencer Trask & Co., undertook to obtain certain of the stock of the Rio Grande Western Railway Company, and to sell the same to the representatives of the Denver & Rio Grande Railroad, which company proposed to acquire the "railroad of the Rio Grande Western Company by acquiring the common and preferred stock of that company." It is not understood from the bill that any sale or incumbrance of the railway or its franchises, directly or indirectly, was intended. Spencer Trask & Co., as private individuals, so far as appears, acting for stockholders of the Rio Grande Western Railway Company, and not for that company, proposed to sell stock issued by such company to persons acting for the Denver & Rio Grande Railroad Company. After the undertaking was under way, Spencer Trask & Co. learned of the foreclosure of the second mortgages, and in their public advertisement soliciting stock made the following statement:

"Since the commencement of the negotiations, one Raphael has instituted in the United States circuit court of Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in

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¶ 1. Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 O. C. A. 195.

making the contract for the vendors our firm gave its personal guaranty against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guaranty be ratably shared by all who avail themselves of the contract made by us for the vendors. From the \$80 per share and interest, mentioned above, we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guaranty. Such amount will be held in a special trust."

The bill states:

"That the members of said firm of Spencer Trask & Co. are not parties to the suit pending in Utah, and that there is no agreement existing between complainant and the other holders of the outstanding bonds similar to complainant's bonds and Spencer Trask & Co. by which the said proposed 'fund' shall be applied toward the satisfaction of complainant's bonds and the other outstanding bonds."

There are further allegations that the complainant—

"Is informed and believes that, if said consolidation, as set forth in the scheme contemplated by the advertisements referred to, is allowed to be carried out, without some stipulation between your orator and the members of the said firm of Spencer Trask & Co., as to the custody of the said fund proposed to be created as aforesaid, the rights of remote purchasers of the mortgage premises, upon which complainant claims a lien, will have intervened pending complainant's suit in Utah; so that, if complainant succeeds at the final hearing of his suit in Utah, it will require the bringing into the suit as defendants such remote purchasers as the Denver & Rio Grande Western Railway Company and their proposed successors."

The prayer for relief is:

"That a preliminary injunction be issued restraining the said members of the firm of Spencer Trask & Co. from selling the said shares of the capital stock of the Rio Grande Western Railway Company to the Denver & Rio Grande Western Railway Company, as set forth in the said advertisements of Spencer Trask & Co., and which injunction your orator prays may be made perpetual upon the final hearing of this suit, unless the firm of Spencer Trask & Co. shall agree to turn over to some trust company in the city of New York at and before the completing of said sale of said shares a sum of money, which may be determined by this court, out of the proceeds of said sale, as will be sufficient to satisfy complainant's claim and the other outstanding bondholders similar to his own upon the final hearing of complainant's suit in Utah."

From the above it appears that the complainant, seeking to foreclose a second mortgage covering a railroad in Utah, has filed a bill in New York against the members of the firm of Spencer Trask & Co. to prevent them from selling the stock of a company that for nearly 20 years has held the apparent title of such railroad derived from the sale thereof upon prior mortgages.

The first question is whether a suit to restrain private persons from selling the stock of a company is ancillary to a bill filed to foreclose the mortgages on the railway of such company. The defendants in the second suit are in no wise related to the cause of action in the first suit. They hold no property of the obligated corporations. They may not be asked to discharge the judgment, or to render any account looking to its payment. They have made no agreement with the complainant, or that inures to him. They chanced to be dealers, on their own account or that of others, in no wise in privity to

any party in the first suit, in the stock of a company whom the complainant hopes to show has no better title to the railway than that of earlier mortgagees in possession; and yet the complainant asks to restrain the transfer of such stock lest the mortgaged premises should not remain "in statu quo until the final hearing of complainant's suit in Utah." Under neither bill is any demand for any relief made against the stockholders. No process could run against them in case of favorable judgment in the first suit, and it would be indifferent to the complainant where or by whom the stock was held. Spencer Trask & Co. are entire strangers to them, and to all persons owing them any duty, and no fund reserved by that firm belongs to complainant, or could be reached by him; nor is such relief asked. The entire absence of privity between the parties in the second suit to any and all parties in the first suit or to the subject-matter thereof, the entire absence of any duty from the defendants personally or as trustees to the complainant, forbids even the suggestion that this suit is ancillary in its nature. A suit is not necessarily ancillary solely because it pretends to be such, and much less because the complainant so names it. The present bill on its face shows that it cannot be ancillary. The legal relation of the defendants to the former suit as attempted to be alleged is impossible. Mr. Peabody's affidavit doubtless stated his view that the fund was advantageous, rather than inimical, to the complainant, and such is the fact; but such expression of view does not estop the firm from procuring a judicial interpretation of the agreement between them, the vendors, and vendees. But, if this suit be not ancillary, this court has not jurisdiction, for two of the defendants and the complainant are residents of the state of New Jersey, while three are residents of New York. The complainant does not call attention to any authorities to the effect that jurisdiction of less than all the individual copartners would be sufficient, while the defendants multiply decisions tending in the holding or expression of views to show that jurisdiction may be acquired only in case all the partners be brought duly before the court. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *Mason v. Eldred*, 6 Wall. 231, 235, 18 L. Ed. 783; *Adams v. May* (C. C.) 27 Fed. 907; *Duchesse d'Auxy v. Porter* (C. C.) 41 Fed. 68; *Bell v. Donohoe* (C. C.) 17 Fed. 710. The conclusion to which these authorities point is aided by *Hooe v. Jamieson*, 166 U. S. 395-399, 17 Sup. Ct. 596, 41 L. Ed. 1049; *Gage v. Carraher*, 154 U. S. 656, 14 Sup. Ct. 1190, 25 L. Ed. 989; *Holland v. Ryan* (C. C.) 17 Fed. 1.

A decree will be entered dismissing the bill, with costs.

## UNITED STATES v. HORMAN.\*

(District Court, S. D. Ohio. April 6, 1901.)

No. 444.

## 1. POST OFFICE—USING MAILS TO DEFRAUD—INDICTMENT.

An indictment under Rev. St. § 5480, as amended March 2, 1899 [U. S. Comp. St. 1901, p. 3696], alleging that defendant devised a scheme to defraud certain persons out of large sums of money, in pursuance of which scheme letters were sent through the mails, threatening to accuse said persons of crimes and disgraceful matters, which threats were not to be carried out if said money was paid as the price of silence, states a case of what is commonly called "blackmail," and is a scheme to defraud, and a crime, under said section of the United States statutes.

On Demurrer to the Indictment.

H. M. Rulison and Thos. Darby, for the demurrer.

W. E. Bundy, U. S. Atty., and S. T. McPherson and E. P. Moulinier, Asst. U. S. Attys.

THOMPSON, District Judge. I come now to the important question in the case,—whether the facts stated in these indictments show that any offense has been committed, either under section 5440 [U. S. Comp. St. 1901, p. 3676] or under section 5480 [U. S. Comp. St. 1901, p. 3696]. It is claimed that the facts stated do not constitute an offense within the provisions of either of those sections, and the point is this: that the facts stated show that a scheme was devised, not for the purpose of obtaining money from Douglass by persuading him, through deceit and misrepresentation, to voluntarily part with his money, but to induce him, through fear, to pay the money as the price of immunity from threatened attack upon his character; being the difference between a voluntary and an involuntary payment of money, the one induced by false persuasions, the other by threats. Now, if this case was presented to one of the courts of the state of Ohio, there would be no question but that the objection made here would be well taken, because under the laws of Ohio the facts stated would constitute the offense or crime of blackmail; but no such offense or crime is recognized by the laws of the United States; nor was any such crime or offense known to the common law. And the question to be decided here is whether this scheme is such a one as is contemplated by section 5480 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3696], to wit, a scheme to defraud. The offense defined by section 5480 [U. S. Comp. St. 1901, p. 3696] is one against the postal laws of the United States, and the policy of this statute is to prevent the misuse of the mails of the United States,—the prostitution of the mails of the United States in furtherance of dishonest schemes. The government intends that the post-office establishment shall be used by the people for the purposes of legitimate business and social

\*Affirmed by circuit court of appeals, 116 Fed. 350.

intercourse, and that it shall not be used for the purpose of furthering dishonest schemes or practices, or for disseminating immoral and indecent literature. All such matter and kindred matter are declared by the laws of the United States to be nonmailable. Now, in the restricted sense in which the word "defraud" is ordinarily used in legal proceedings, the scheme set forth in these indictments would not be a scheme to defraud, but, in a broader sense, any scheme by which it is sought to obtain another man's money wrongfully, without giving him any equivalent for it, is a scheme to defraud; and I think that, fairly construed, this law found in section 5480 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3696] prohibits the use of the mails for any such purpose. The word "defraud" is defined by Bouvier as follows: "To defraud is to withhold from another that which is justly due to him, or to deprive him of a right, by deception or artifice." And any artifice, any trick, any scheme, by which a man is induced to part with his money, either voluntarily, in hope of some benefit, or involuntarily, through fear, in the broad sense I have indicated, is a scheme to defraud, within the policy of this law.

Now, in this case [Weeber v. U. S.], decided by Judge Brewer [C. C.] 62 Fed. 740, while the precise point does not seem to have arisen there, and although there was an element of deception in that case which is not present in the one at bar, yet the purpose there was to be accomplished by blackmailing. It was a scheme to collect a pretended debt, which never existed, by putting the man in fear, and inducing him to pay a price to avoid the danger threatened against him. The defendant there caused to be passed through the mails a letter purporting to be from the United States district attorney to himself (defendant was a lawyer, and had the claim for collection) in reference to the furnishing of testimony to show Stephens liable to the government, and then caused the letter thus passing through the post office to be sent to Stephens by one apparently a stranger; the intention and expectation being that thereby Stephens would be frightened—blackmailed—into paying the claim of Kearney, in defendant's hands for collection, in order to prevent any disclosures by defendant to the United States district attorney. Now, there was a scheme to obtain money from Stephens, the victim, which was not due or owing to the claimant, Kearney; and it was to be accomplished by threatening Stephens,—by operating upon his fears so that he would not voluntarily, but involuntarily, part with his money, as the price of protection against disclosures to the district attorney which might affect him hurtfully in a case then pending in the United States court against him. So that if the decision in that case is in accordance with the true construction of this section, it does away with the distinction which I have been suggesting between money obtained through fear and money obtained through persuasion; being the broad line of distinction between blackmail and fraud. The narrow construction claimed for this law would permit the use of the mails to further every dishonest scheme to obtain money and property which would not fall strictly



within the definition of fraud; and the misuse of the mails to further schemes by which men are bullied, frightened, and driven, through fear of unenviable notoriety, public criticism, or newspaper attack, to pay money, as the price of being delivered therefrom, would go unpunished.

I confess that when the question was first presented I was inclined to think that the demurrer was well taken; but, considering the policy of this law, and the broad purposes it was intended to serve, in preventing the prostitution of the mails of the United States in furtherance of dishonest schemes or practices of any kind, I have reached the conclusion that the objection is not well founded, and that the motions to quash and the demurrers to these indictments should be overruled, and the case set down for trial.

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RANDALL et al. v. NEW ENGLAND ORDER OF PROTECTION et al.

(Circuit Court, D. Vermont. December 4, 1902.)

1. REMOVAL OF CAUSE—PETITION—RECORD.

A petition for the removal of a cause to the federal court, though filed in the state court, is transmitted to the federal court as a part of the record, and is a pleading on the allegations of which the right of removal rests, and to which the pleadings of the adverse party must refer.

2. SAME—APPLICATION TO REMAND.

Where a petition for the removal of a cause, filed February 13, 1902, alleging that defendant was required to appear within 42 days from December 3d, but that the time to plead was to be regulated by a rule of court, and that defendant's time to answer or plead did not expire until February 14, 1902, a motion to remand the case alleging that under the court rules of the state court defendant's time to plead had expired when its petition for removal was filed, but failing to set up the rules relied on, could not be sustained.

3. SAME—COURT RULES—JUDICIAL NOTICE.

While the federal courts take judicial notice of the laws of the state in which they are sitting affecting procedure, they do not take judicial notice of the rules of such state courts, and such rules, if relied on, must be specially pleaded.

At Law.

Clarke C. Fitts, for plaintiffs.

Ernest W. Gibson, for defendants.

WHEELER, District Judge. This suit was begun by the plaintiffs, as "of New Hampshire," against the defendant, as a corporation duly established by the laws of the commonwealth of Massachusetts, and corporations and partnerships, as trustee, having goods, chattels, rights, or credits of the defendant in their hands or possession, of

¶ 3. Judicial notice of public laws and regulations, see note to *Smith v. City of Shakopee*, 44 C. C. A. 4.

Vermont, in the county court of the county of Windham, in the state of Vermont, by writ dated December 3, 1901, returnable within 21 days, and requiring an appearance within 42 days by a statute that left the time of pleading to be regulated by rule of court. The defendant, on the 13th day of February, 1902, filed a petition, with bond, in the state court, for removal of the case to this court, setting forth that the plaintiffs were citizens of New Hampshire and the defendant of Massachusetts, and "that the time of your petitioners as defendants in this action to answer or plead to the complaint in said action has not expired, and will not expire until the 14th day of February, A. D. 1902," and entered the suit in this court on February 25th, the first day of its stated February term, 1902, according to rule 13 of this court, which requires suits to be docketed on the first day of the term. Rule 21 of this court provides that "dilatory pleas shall be filed before noon of the second day of the term and the plaintiff may reply within a time to be allowed by the court." That term of this court was adjourned without day March 27th. On March 28th the plaintiffs filed in the clerk's office in this cause this motion:

"Now comes the plaintiff, and moves this court to remand the above-entitled cause to the county court in and for the county of Windham and state of Vermont, on the ground that the plaintiff's writ and process in the above-entitled cause was dated and issued by the clerk of said Windham county court on the 3d day of December, 1901; that by the laws of the state of Vermont, and the court rules governing the procedure in the several county courts in the state of Vermont, the defendant in the above-entitled cause was required to enter his appearance in said cause with the clerk of the Windham county court on or before the expiration of 42 days from the date of the writ and process in said cause, and to file all dilatory pleas and dilatory motions within 10 days after the time for entering such appearance should expire, and to file all special pleas, the general issue, with notice, pleas, and declarations in set-off and demurrers, within 12 days after the time for entering such appearance should expire, and, if neither special pleas nor the general issue with notice is filed within the time limited, the general issue shall be considered as pleaded; that the defendant in the above-entitled cause did not file with the clerk of the Windham county court, in the state of Vermont, his petition and prayer for the removal of said cause to the circuit court of the United States for the district of Vermont within the time for filing dilatory pleas and dilatory motions and special pleas, the general issue, with notice, pleas, and declarations in set-off and demurrers, as aforesaid, and did not file said petition and prayer with the clerk of said Windham county court until the 13th day of February, 1902; and on the ground that the said petition and prayer was not filed with the clerk of said Windham county court within the time prescribed by, and according to the statute of, the United States of America in such case made and provided."

The motion to remand has been submitted upon these pleadings and proceedings.

The petition for removal, although filed in the state court, comes to the circuit court as a part of the record, and is the pleading of the party seeking removal, and on the allegations of which the right of removal rests, and to the pleadings of the other party, if any, in that respect, must refer. *Carson v. Dunham*, 121 U. S. 421, 10 Sup. Ct. 1030, 30 L. Ed. 992; 2 Fost. Fed. Prac. (3d Ed.) § 393. This is not such a case in which it might appear at any time that it "does not really and substantially involve a dispute or controversy

within the jurisdiction of the circuit court, or in which the parties \* \* \* have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable," and which the court may, on such fact appearing, dismiss or remand at any time under the act of 1875 (18 Stat. 472 [U. S. Comp. St. 1901, p. 511]), but is one on its face cognizable in or removable to a circuit court of the United States, as being between citizens of different states, involving a proper amount, although the citizenship was not fully set forth in the writ. The petition and bond are to be filed in the state court at the time or any time before the defendant is required by the laws of the state or the rule of the state court to answer or plead to the declaration or complaint. 25 Stat. 433 [U. S. Comp. St. 1901, p. 510]. In the petition for removal the citizenship of the parties and time for filing the petition and bond were alleged, and a right of removal was thereby fully set up. *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690. Under these circumstances a denial that the filing of the petition and bond were in time would be wholly dilatory, and could properly be made only by a traverse of that allegation, or by a traversable allegation of the rule of the state court and of the expiration of the time of pleading to the declaration under it before the filing of the petition in some form, within the time for filing dilatory pleas here. This court takes judicial notice of the laws of the state affecting its procedure, but not of the rules of the state courts which may be involved. Such rules are matters of fact to be set up as such when relied upon. The reference to those rules in the motion as the ground of it is not a traversable allegation of their existence, but is the mere assignment of them as reasons for granting the motion otherwise known, like the setting down of causes of special demurrer. The motion does not refer to the petition, and it must stand as founded on the face of the other proceedings, filed out of time, and after the term. The other proceedings appear to be sufficient as to such a motion, and it would have to be overruled if it had been in time; but more regularly it should be dismissed as out of time.

Motion dismissed.

**LANDER, Treasurer of Cuyahoga County, Ohio, v. MERCANTILE NAT.  
BANK OF CLEVELAND, OHIO.**

(Circuit Court of Appeals, Sixth Circuit. November 5, 1902.)

No. 1,048.

**1. TAXATION—NATIONAL BANK SHARES—OHIO STATUTE FOR SUPPLYING OMISSIONS.**

Rev. St. Ohio, § 2781a, enacted March 22, 1900, and which is supplementary to the original section 2781, under the decisions of the state supreme court construing the original and cognate sections, does not authorize a county auditor to place upon the duplicate tax list sums which have been allowed as deductions from the valuation of national bank stock in previous years on account of the indebtedness of the stockholders, as property omitted from taxation or not taxed according to its true value, although such deductions were not authorized by law.

**2. SAME—ILLEGAL ASSESSMENT—STATUTORY REMEDY BY INJUNCTION.**

The remedy given by Rev. St. Ohio, § 5848, expressly authorizing suits to enjoin the illegal levy of taxes or assessments or the collection thereof, may be enforced on the equity side of the federal courts.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 109 Fed. 21.

A. B. Benedict, for appellant.

Norton T. Horr, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case was based on bill and supplementary bill to enjoin the treasurer of Cuyahoga county, Ohio, from collecting certain taxes assessed by the auditor of that county against stockholders in the complainant's bank. It appears from the allegations in the pleadings and the stipulations of the parties at the hearing that the auditor of Cuyahoga county, in the years 1894, 1895, and 1896, had permitted certain of the stockholders in the bank to deduct from the value of the shares assessed against them for taxation the amount of the indebtedness owing by them during those years. This was done under the authority of *Whitbeck v. Bank*, 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. Ed. 118, in which it was held that stockholders in a national bank were entitled to deduct from their holdings of stock for taxation the amount of their bona fide debts. In the later case of *Chapman v. Bank*, 56 Ohio St. 310, 47 N. E. 54, approved in *Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669, it was determined that stockholders had no right to set off their debts as against the value of stock held in national banks. After these decisions, and after the passage of the act of the legislature of Ohio of March 22, 1900, hereinafter referred to, the auditor of Cuyahoga county charged against the persons who had been theretofore allowed said deductions the amount of taxes thereon as taxes upon omitted property. The treasurer having said taxes for collection, this proceeding was begun to enjoin him from so doing.

One of the grounds relied upon for an injunction was that, by certain adjudications in the federal courts, the treasurer was estopped

from undertaking to collect these taxes. The recent decision of the supreme court of the United States in *Lander v. Bank* (decided June 2, 1902) 22 Sup. Ct. 908, 46 L. Ed. 1247, holding that the former judgments are not res adjudicata between the parties as to the right to deduct debts from the value of bank shares, except the fact of each year's discrimination shall be established as to the taxation of that year, effectually disposes of this ground of relief against the complainant's contention.

The case, as now presented, is to be determined upon the answer to the question whether the act of the Ohio legislature passed March 22, 1900, supplementary to section 2781 of the Revised Statutes of Ohio, authorized the auditor to place the amount of the taxes upon the deductions for the years in question upon the duplicate against the stockholders in the complainant's bank, who had been allowed the same by the action of the auditor in the years 1894, 1895, and 1896. The final action of the auditor, it is established in the record, was taken after notice to the several stockholders upon hearing after the passage of the supplementary section 2781a, Act March 22, 1900. This section is as follows:

"Sec. 2781a. If any person whose duty it is to list property, or to make a return thereof for taxation to the assessor or county auditor or to any board, officer, or person, other than a board composed of officers of more than one county shall in any year or years fail to make a return or statement, or if such person shall make a return or statement of only a portion of his taxable property, and fail to make a return as to the remainder thereof, or if he shall fail to return his taxable property or any part thereof, according to the true value thereof in money, as provided by law, the county auditor shall, for each year, as to such property omitted and as to property not returned or taxed according to its true value in money, ascertain as near as practicable the true amount of personal property, moneys, credits and investments that such persons ought to have returned or listed, and the true value at which the same should have been taxed in his county for not exceeding the five years next preceding the year in which the inquiries and corrections provided for in this section and in sections 2781 and 2782 of the Revised Statutes, are made, and multiply the omitted sum or sums by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect the same as other taxes. The term personal property, as used in this section, shall be held to apply to all kinds of omitted property for the taxation of which, for any of the years in which it was omitted, provision has not been made by law. The power and duty of the auditor under the provisions hereof shall be held to extend to all cases where property, taxable within his county, has for any reason not been assessed and taxed according to its true value in money, as provided by law, except that where provision is made by law for the appraisement and assessment of property by a board composed of officers of more than one county, and such property or any part thereof has escaped taxation, the duties herein provided for shall be performed by such board, which shall have jurisdiction at any subsequent meeting to appraise and assess such omitted property for the year or years so omitted, and certify its assessment to the proper officer or officers to be placed upon the tax lists of the proper county or counties for the collection of omitted taxes thereon in the same manner as current assessments are certified by said board, and such officer or officers shall give a certificate therefor to the county treasurer, as in other cases. The provisions of sections 2782 and 2783 of the Revised Statutes, as to notice and procedure shall, in so far as the same may be applicable, apply to the proceedings under this section, and nothing herein contained shall be construed to repeal any statute now in force as to the taxation of omitted property. And this act

shall apply as well to property heretofore omitted or not taxed according to its true value in money as provided by law, as to property that may hereafter be omitted or not so taxed. The provisions of section 1071 of the Revised Statutes shall not apply to cases arising under this supplemental section 2781a.

"Sec. 2. This act shall take effect and be in force from and after its passage." 94 Ohio Laws, p. 62.

The original section 2781 is found in the Revised Statutes of Ohio, in title 13, "Taxation," in chapter 2, relating to the listing of personal property, under the subhead of "Correction of Taxes," and is as follows:

"If any person whose duty it is to list property or make return thereof for taxation, either to the assessor or county auditor, shall, in any year or years make a false return or statement, or shall evade making a return or statement, the county auditor shall, for each year, ascertain, as near as practicable, the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed, for not exceeding (the) five years next prior to the year in which the inquiries and corrections provided for in this and the next section are made; and to the amount so ascertained, for each year, he shall add fifty per centum, multiply the sum or sums thus increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate thereof to the county treasurer, who shall collect the same as other taxes."

This section as construed by the Ohio supreme court pertains only to those persons whose returns are false, or who have evaded making returns, and not to those who have honestly, though mistakenly, returned their property for taxation. A "false return," within the meaning of this section, must be one in which there appears, if not a design to mislead or to deceive, at least culpable negligence on the part of the taxpayer. *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168. This requirement as to the character of the returns which come within the purview of the original section must be borne in mind in construing the supplementary section 2781a, wherein there is no requirement that the return shall be false, and it is sufficient if the property has been omitted from the returns, which should have been made in the five years covered by the law. The original section was clearly aimed, as its language imports, at persons whose duty it is to list property or make returns for taxation, and the auditor, having ascertained the amount such persons "ought to have returned," is required to enter the taxes upon the same, with a penalty of 50 per centum, on the tax lists in his office, and certify the same to the treasurer for collection.

The taxation of shares in banks, state and national, is provided for by another part of the same chapter under the subhead, "Incorporated Banks," being sections 2762-2769, inclusive. These sections were before the supreme court of Ohio for construction in *Miller v. Bank*, 46 Ohio St. 424, 21 N. E. 860. In that case it was pointed out that under the sections regulating the taxation of bank shares the same are not required to be listed by the stockholders. This is done by the auditor of the county. The return to the auditor is required to be made by the cashier, not by the stockholder. The cashier's return must show the liabilities and resources of the bank, the names and

residences of the shareholders, with the number of shares held by each, and the par value of each share. This, the supreme court held, constituted the listing of the stock for taxation. The auditor is thereupon required to fix the total value of the shares in money, deducting therefrom the value of the real estate as the same appears upon the duplicate. After equalization by the state board, the auditor of state certifies the value of the assessed shares to the respective county auditors for entry upon the proper tax lists. In this scheme of taxation no return is required by the shareholder. Under other provisions of the law the bank may pay the taxes against the shareholder. It was held that section 2782, which, like section 2781, provides a method of correcting false returns of property by persons required to make proper returns, did not apply to false returns by cashiers, as relief against such returns is solely under the sections relating to the taxation of bank shares. Of this subject Chief Justice Minshall, delivering the opinion of the court, said:

"But an adequate remedy was provided for the case under section 2769, and constitutes the only remedy where a cashier makes a false return to the auditor. Under this section the auditor may examine the books of the bank, and any officer or agent of it under oath, together with such persons as he may deem proper, 'and make out the statement'; and any officer of the bank may be fined not exceeding \$100 for failing to make the statement, or for willfully making a false one. This would seem to be as efficient as it is rigid for the purpose of securing true returns of bank shares for taxation."

These decisions throw light upon the legislative purpose in enacting section 2781a. The Miller Case, holding that the remedy for false returns by a cashier was exclusively under section 2769, had been decided about 10 months before the enactment of section 2781a. While the supreme court did not hand down the decision in the Ratterman Case until afterwards, the remedy provided by the original section 2781 was obviously directed against false returns. The legislature in passing the supplementary section must be presumed to have known of the construction of the bank sections in the Miller Case. No attempt was made to amend them, or to provide other means for directly reaching bank shares, already a matter of special provision in the sections cited.

The act under consideration is entitled "An act to supplement section 2781 of the Revised Statutes of Ohio relating to the taxation of omitted property." There can be no claim that the case now under consideration is one of property omitted. The shares were returned, were equalized, and, according to the allegations of the treasurer's answer, were duly listed for taxation, when the county auditor, by certificate of deduction, relieved the shareholders from paying thereon to the extent of the debts allowed to be deducted. Section 2781a is not only in *pari materia* with the original section, but is directly and specifically supplementary thereto. The construction of a supplementary act is to be preferred which best harmonizes with the tenor and spirit of the act supplemented. *Endl. Interp. St. § 40.* The section (2781a) in its opening paragraphs shows that it is aimed at persons whose duty it is to list property for taxation and is intended to provide a remedy against such a person. Such person is amenable

to the process of the statute if he fails to make a return or statement, or if he only makes a partial return, or if he fails to return any of his property according to the true value thereof in money. It is claimed by the appellants that the following words of the section broaden its scope so as to include within its meaning a tax on bank shares under the circumstances now under consideration:

"The power and duty of the auditor, under the provisions hereof, shall be held to extend to all cases where property, taxable within his county, has for any reason not been assessed and taxed according to its true value in money, as provided by law. \* \* \* And this act shall apply as well to property heretofore omitted or not taxed according to its true value in money, as provided by law, as to property that may hereafter be omitted or not so taxed."

The "power and duty of the auditor under the provisions hereof" relate to the cases named in the section of omitted, partial, or undervalued tax returns by persons whose duty it is to list property. All parts of the statute must be read together in order to determine its true meaning. The detached sentence relied upon is very broad in its terms, but it must be construed as a part of the section having relation to the declared purpose of the law to reach omitted property and to compel full and true returns by those whose duty it is to make them. The stockholder in banks, as we have already seen, is not required to return his shares. That duty devolves upon the cashier. The legislature is presumed to have known of the decision in the Miller Case, *supra*,—that sections 2781 and 2782 had nothing to do with the return of such property. The section supplemented was aimed at persons who made false returns. The supplementary section was still aimed at persons whose duty it is to make returns, and reached beyond the original section in the inclusion of the property which should have been returned, whether the original return was "false" or otherwise. This seems to us the proper construction of the statute.

Furthermore, we think this question foreclosed by the construction placed upon the section by the supreme court of Ohio, whose decision upon a question of this character is binding upon the federal courts.

*State v. Akins*, 63 Ohio St. 182, 57 N. E. 1094, was an action in mandamus brought in the supreme court of Ohio on relation of the state auditor against the then auditor of Cuyahoga county to compel the latter to place upon the duplicate the sums which had been allowed as deductions from the value of bank shares. The court refused to award the writ, and made the following *per curiam* decision:

"A stockholder in a national or incorporated bank has not the right to have his indebtedness deducted from the value of his shares by the auditor, but when this has been done in former years there is no law by which the deduction can thereafter be placed on the duplicate as an omission and the taxes collected thereon. Sections 2781 and 2782 apply only to persons required to make returns of their property for taxation, and the stock of a shareholder in a bank is returned, not by himself, but by the cashier, and is assessed by the auditor. The remedy for a false return by a cashier is provided for in section 2769, Rev. St. There was, however, no false return by the cashier in this case."

This case was decided after the passage of Act March 22, 1900, § 2781a. In the decision just quoted no reference was made to the



supplementary section. We are advised by the appellants in their brief that, the attention of the supreme court being called to this section, a rehearing was granted. Upon the rehearing the supreme court, on the 22d of January, 1901, announced its decision as follows:

"The State ex rel. W. D. Guilbert, Auditor, etc., v. Albert E. Akins, Auditor of Cuyahoga County. In mandamus. On rehearing judgment adhered to. All concur." 65 N. E. 1184.

It is claimed by the appellants that it does not appear on what ground the supreme court rested its decision. We have been furnished by counsel with the briefs in that case, and we find that the proposition argued by the attorney general and his associates, as well as by counsel for the bank, upon the rehearing, was as to the applicability of section 2781a; it being contended on the one hand that it did not apply to returns of bank stock, and on the other that it is broad enough to include the same, and to require the auditor to put the deductions formerly allowed upon the tax list. In its first decision the supreme court held that the original sections 2781 and 2782 only applied to persons required to make returns of property for taxation, and not to the stock of the shareholder in the bank, which is to be returned by the cashier, and followed its decision in the Miller Case, supra, that the remedy for a false return by the cashier is under section 2769 of the Revised Statutes.

The record in this case, we are advised, was not printed, but the prayer of the petition is copied in the brief of the attorney general, and informs us that the auditor was asked to be required to do everything enjoined upon him in respect to the correction of said duplicate, necessary to the levy and collection of taxes on the true value of the shares, without offsets, counterclaims, or deductions, and for all other proper relief, and it was argued that the relief should be such as the law showed the relator to be entitled to upon the trial. Had the supreme court been of opinion that the supplementary act was broad enough to reach bank shares under the circumstances of the present case, the pleadings as quoted in the attorney general's brief seem broad enough to warrant such a judgment. As argued therein, no new demand upon the auditor would be necessary; the direction of the court that he proceed under the law to correct the tax lists would have been all sufficient. For the purpose of determining the effect of this section a rehearing was granted. Its applicability was the thing elaborately discussed by counsel on both sides. We cannot escape the conclusion that the supreme court of Ohio "adhered" to its former decision because it did not deem the supplementary section applicable to the case in hand.

Two letters are shown by counsel at the argument written by the chief justice of the supreme court of Ohio, the first of which was written a few days after the decision, in which the chief justice, after conferring with the other members of the court, writes that the point decided was that section 2781a, being the act of March 22, 1900, did not authorize the listing of back taxes for former years on the amount of deductions from the value of bank shares on the account of the indebtedness of the owner. Counsel for the appellant exhibit a

letter written some three months later in which the chief justice is not willing to state with absolute certainty the grounds upon which the decision was rested. We are of the opinion that we cannot consider these letters in determining what the court did decide. We ground our conclusion upon the considerations already advanced.

It is further argued by the appellants that the bank did not exhaust its remedy at law by further proceedings under the Ohio Statutes. The Revised Statutes of Ohio (section 5848) expressly declare that suits may be brought to enjoin the illegal levy of taxes or assessments or the collection thereof. It has been held in authoritative decisions that this statute will be enforced on the equity side of the federal courts. *Grether v. Wright*, 23 C. C. A. 498, 75 Fed. 742; *Cummings v. Bank*, 101 U. S. 153, 25 L. Ed. 903.

It being conceded that the authority for correcting tax lists so as to include the deductions of previous years from the value of bank shares, if it exists, is under section 2781a, and, construing this section as we do, we reach the conclusion that the circuit court did not err in granting a perpetual injunction against the collection of the taxes in controversy.

Judgment affirmed.

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FERGUSON CONTRACTING CO. v. MANHATTAN TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 5, 1902.)

No. 1,090.

1. APPEAL—REVIEW—FINDINGS OF MASTER.

Findings of fact made by a master on conflicting evidence, and confirmed by the court, will not be reviewed on appeal, unless a plain case of error or mistake is shown.

2. EQUITY—AMENDMENT OF PLEADINGS—DISCRETION OF COURT.

Leave was granted to amend a cross-bill, which had been referred to a master for hearing, by a date specified, and the hearing was postponed to permit the reformation of the pleadings; but the cross-complainant filed no amended cross-bill, and proceeded with the hearing without asking further time. *Held*, that it was within the discretion of the court to refuse to permit an amended cross-bill to be filed on application made more than six months after the hearing had been closed, and the master had filed his report.

3. REFERENCE—ISSUES BEFORE MASTER—EFFECT OF PRIOR INTERLOCUTORY DECREE.

A provision of a decree directing a sale of railroad property in a foreclosure suit, giving priority to a subcontractor's lien set up in a cross-bill, "to the extent that it shall be established," did not determine the validity of such lien, where that question was at issue under the pleadings, and had not at the time been tried, but left that issue, as well as the amount due the cross-complainant, to be determined on a subsequent reference to a master to take testimony and report his findings "on the issues arising under said cross-bill \* \* \* and the answers and amendments thereto."

4. EVIDENCE—RELEVANCE TO ISSUES.

Under a cross-bill to enforce a statutory lien on railroad property in favor of a subcontractor, evidence to prove an agreement, unsupported by allegations in the pleading, by the principal contractor to take, at a stipulated price, certain bonds of the company, which the subcontractor had contracted to receive in part payment for the work done, is irrelevant and inadmissible.

**5. SAME.—ADDING TO WRITTEN CONTRACT BY PAROL.**

A parol agreement cannot be shown, to add new and distinct conditions to a written contract made between the parties at the same time, where neither fraud nor mistake is shown.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

John H. Miller and Cable & Parmenter, for appellant.  
Doyle & Lewis, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, J. This case arises upon exceptions to the action of the circuit court in affirming the report of the master, to whom a controversy as to the lien of the appellant had been referred. It has been argued by counsel for the appellant apparently upon the assumption that this court may review such findings as to disputed matters of fact. The findings of a master as to disputed matters of fact have every reasonable presumption in their favor, and must stand unless error or mistake is clearly shown. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Callaghan v. Myers*, 128 U. S. 619, 9 Sup. Ct. 177, 32 L. Ed. 547; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. The rule is thus stated in 1 Fost. Fed. Prac. § 315:

"Every presumption is in favor of the correctness of the decision of a master. If the testimony is conflicting, the court will rarely interfere with the master's decision on the facts, provided he made no errors of law which affected the result."

In the present case the master has made a finding, and the circuit court a decree of confirmation of the report. Such circumstances require a very plain case of mistake to authorize the appellate court to go behind such a report upon matters of fact. *Kiewert v. Juneau*, 24 C. C. A. 294, 78 Fed. 708. In the light of this thoroughly settled practice, we shall proceed to examine the errors assigned, so far as reviewable here.

The Ferguson Contracting Company, appellant, claimed a lien upon the property of the Detroit & Lima Northern Railroad Company, Columbus & Northwest Division, for work and labor done thereon as a subcontractor. It is unnecessary in this connection to recite the various proceedings which led up to the foreclosure case in which it was sought to assert this lien. Proceedings progressed so far that on December 16, 1899, a decree was entered in the circuit court for the sale of the property. In that decree a provision was made for the lien claimed by the appellant, in the following words:

"The Ferguson Contracting Company having filed a lien for \$78,836.14 against the portion of the property only which is located in Logan, Union, and Auglaize counties, and, in its cross-bill filed in the consolidated cause, having in its prayer for relief demanded that its claim shall be deemed a first lien upon that portion of the property of the railroad company in the aforesaid counties only, it is further ordered, adjudged, and decreed that the lien of the said Ferguson Contracting Company, to the extent that it shall be established in the consolidated cause, shall receive and be entitled to priority over the liens and claims of the said Strang and said Joshua J. Harmon, complainants, against Columbus & St. Mary's Extension, and, by

consent of John T. Adams, over any claims he may have for any amounts due him for payments made for right of way."

After decreeing a sale of the property for not less than the sum of \$200,000, this further provision was made for the protection of the lien filed by the Ferguson Contracting Company:

"Upon such sale being made, a sufficient sum, representing the amount of the lien filed by the Ferguson Contracting Company, to wit, \$78,836.14, shall be held by the clerk of this court to abide the ascertainment in the consolidated cause of the amount to which the said Ferguson Contracting Company shall be entitled under the lien so filed as aforesaid, or of any appeal that may be taken in said proceedings by said Ferguson Contracting Company, or the court may make such order as will protect said claim."

Afterwards, and by consent of parties, on January 29, 1900, a special master was appointed, with the following clearly-defined duties:

"To take the testimony, and report his findings of fact and conclusions of law to the court, with all convenient speed, on the issues arising under said cross-bill and proposed amended cross-bill of the Ferguson Contracting Company."

The case, up to the time of this reference order, stood, so far as the Ferguson Contracting Company was concerned, upon its cross-bill setting up a lien for work and labor done as a subcontractor upon the railroad. The Ferguson Contracting Company, preparatory to the hearing before the master, took leave to amend its cross-bill on or before February 7, 1900. When the parties appeared before the master on January 25, 1900, it is recited that considerable discussion was had between counsel as to the filing of amended pleadings, and as to when the hearing should be resumed, and it was stated by the master that the counsel for the Ferguson Contracting Company should have the amended cross-bill filed on or before February 7th, amended answers on or before the 10th, the hearing to be resumed on February 20th, replication to be filed on or before the day of hearing. When the parties appeared before the master on the day named, attention was called to the fact that the Ferguson Contracting Company had not filed its amended cross-bill. Nevertheless, without further application to the master for delay, or application to the court for further time, the counsel for the Ferguson Contracting Company proceeded to call witnesses to make out its claim, and the hearing was had. On July 3, 1900, the master's report was filed. Exceptions were filed to the report by the Ferguson Contracting Company on July 31, 1900. On March 11, 1901, that company made a motion in the circuit court for leave to withdraw its cross-bill and file an amended cross-bill. The circuit judge refused to allow this amendment, filing an opinion upon the application, in the course of which he said:

"No good reason is shown for the failure of the Ferguson Contracting Company to file an amended cross-bill within the time limited by the order of reference, to wit, on the 7th day of February, 1900, and prior to the hearing before the master; and an inspection of the proposed amended cross-bill, in view of all the circumstances of the case, fails to satisfy me that the leave should be granted."

When this application for leave to file an amended cross-bill was made, the cause had been heard before the master. At that stage of the case the granting of the amendment was clearly discretionary

with the court. 1 Bates, Fed. Eq. Proc. § 143; Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590. We can perceive no abuse of discretion in the refusal to grant the amendment. Leave had been granted to amend, ample time for compliance had intervened, and not until long after the hearing was any attempt made to have an order for further leave to amend. Clearly the circuit court did not abuse its discretion in the order made, refusing further opportunity for amendment.

We come to the question as to whether the master erred in his rulings of law in excluding testimony under the issues as they stood before him upon the pleadings filed. It is argued by counsel for appellants that after the decree of December 16, 1899, no question of pleading was involved, and it remained only to determine the amount due on the claim of the Ferguson Contracting Company for whatever amount the testimony might show it was entitled to recover. That decree does not, in our opinion, bear such construction. The Ferguson Contracting Company had filed a lien upon the railroad property. That lien it had duly set up in its cross-bill filed in the case. It was such lien, to the extent that it might be established, that was to be given the priority fixed in the decree. At that time pleadings were on file denying the validity of the lien claimed by the Ferguson Contracting Company, and denying that the same had been procured in conformity to the laws of Ohio, as averred in the cross-bill. The decree did not find that the lien was valid or invalid. It is true, it is given priority over certain other liens, but only to the extent that it is established in the subsequent proceedings. Counsel evidently regarded it necessary to duly plead their additional claims, as is evidenced by the application for leave to file an amended cross-bill. The subsequent order of reference to a master relieves this subject of any doubt. He was ordered to take the testimony, and report his findings "on the issues arising under said cross-bill of the Ferguson Contracting Company and the answers and amendments thereto." This order was at once the chart and limitation of the master's authority. He was to hear the issues made upon the pleadings as they stood, or might be amended in conformity to the leave granted by the court. Did the master, in his refusal to receive the testimony offered under the issues made, commit error? As already stated, the case stood on issues made as to the cross-bill of the Ferguson Contracting Company, setting up a lien for work done and material furnished. It is unnecessary for the present purpose to set out at length the several contracts that had been entered into between the parties prior to the receivership in the original cause, in which the proceedings under review were had. The master finds, as the proofs show, that the representatives of the Ferguson Contracting Company and one Strang, who was the principal contractor of the road, on October 12, 1898, entered into a certain agreement in writing, by the terms of which the Ferguson Contracting Company, upon the payment of the final estimate of \$26,000, agreed to accept the same as a compromise and in full of all work and material furnished up to September 6, 1898, the date of the receivership, and agreed to sign receipts for any and all claims and

demands for work so done upon the payment of the amount agreed upon. There was conflicting testimony before the master, but his finding is conclusive upon us that this proposal was accepted in writing, and became a contract between the parties. To the offer to show by parol that Strang agreed before the execution of the contract to carry out the terms of a certain prior agreement to take care of bonds of the railroad which the complainant had contracted to receive, at the rate of 90 cents on the dollar, the master, as well as the circuit court in confirming the report, made answer that to receive such testimony would be to alter, vary, and add to the terms of a written contract, and furthermore would, if received, permit proof of a contract not set up in the cross-bill upon which the case was heard.

We think both positions were well taken. It is elementary law that the proof and the allegations must correspond. The most liberal construction of the cross-bill on a lien for work and material could not include an agreement to take the bonds at 90 cents on the dollar. The attempt to show that the contract was not what it appeared to be in writing,—to take \$26,000 in full payment of all claims,—but included an agreement to take the bonds of the complainant at 90 cents on the dollar, was in plain violation of the rule of evidence which excludes parol evidence when offered to vary, qualify, contradict, or to take from or add to the terms of a written contract. In the absence of fraud, accident, or mistake, the rule is the same in equity as at law,—that parol evidence of an oral agreement cannot be permitted to vary, qualify, or contradict the terms of a written contract. *Forsythe v. Kimball*, 91 U. S. 291, 23 L. Ed. 352; *Bast v. Bank*, 101 U. S. 93, 25 L. Ed. 794. Surrounding circumstances may be shown for the purpose of ascertaining the subject-matter of a contract, but not for the purpose of adding a new and distinct undertaking. *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713. The evidence offered was not for the purpose of putting the court in the possession of the surrounding facts to enable it to properly interpret an ambiguous contract, or to show an independent parol agreement, based on consideration, upon a subject-matter not covered by the writing. Nor is the situation bettered for the appellant upon the theory that the written agreement of October 2, 1897, required Strang to take the bonds at 90 cents on the dollar, which he agreed to carry out when the written agreement of May 11, 1898, was made between the parties. In the latter contract the Ferguson Contracting Company agreed to accept the sum of \$26,000 as a final estimate for all work done and material furnished upon the Detroit Extension of the Detroit & Lima Northern Railroad, upon the condition that a certain subscription to the bonds of the company should be canceled, and the amount paid thereon refunded. It was also agreed therein to accept the railroad company's bonds at 90 cents on the par value to the extent of 30 per cent. of the estimates in favor of the Ferguson Contracting Company under the contract for that portion of the road—the Columbus Extension—upon which the lien in controversy is claimed. To show the proposed parol agreement as to this contract would be no less in violation of the settled rule of law which

prevents contemporaneous or previous parol agreements being shown to vary written contracts. The contract of October 2, 1897, in writing, upon which so much reliance is had, contains no agreement to take the bonds of the Ferguson Company at 90, or, as we construe it, at any price. It was one of the two subscription contracts for bonds of the railroad company. It was for 60 bonds at 90, to be paid for by applying 30 per cent. of the contractor's estimate to the extent of 40 cents on the dollar; the remaining 50 cents to be "carried" with the bonds as collateral until the completion of the work, and thereafter, if required, until they could be sold at 90 cents on the dollar. The Ferguson Company could doubtless, if it chose, pay up the 50 cents on the dollar and acquire the bonds. But we find no agreement in the writing to take the bonds from it at 90, or make them good for that amount to the Ferguson Contracting Company.

This ruling as to the correctness of the master's holding disposes of the questions of law reviewable here, so far as the attempt to establish the lien is concerned. In attacking the credits claimed in Strang's answer on account of the balance due on a certain note of \$17,000, after applying bonds put up as collateral, the like claim is made as to an agreement not to sell these bonds at less than 90. This offer was to violate the terms of the written agreement giving authority to sell the bonds upon the nonpayment of the notes.

Nor is the conclusion different in view of the order of confirmation of sale, October 27, 1900, not in the printed record, but filed by the consent of parties since the argument, as follows:

"The claim of the Ferguson Contracting Company now standing on exceptions to the report of the master as to the amount due said company shall proceed according to the rules of this court to final hearing, and for any amount finally found due to the said Ferguson Contracting Company upon its cross-bill hereinafter filed, or any amendment thereto which may be allowed by the court, it shall be entitled to payment in full, without reference to any other distribution and as a preferred claim, as provided in said decree of sale; and the said purchaser, or his assigns or successors in the said property, or any part thereof, shall, within ten days from the entry of final judgment determining said amount, pay the same into the registry of this court for the use and benefit of the Ferguson Contracting Company, or its assigns, or whomsoever shall be found to be entitled thereto; and in default of such payment the court reserves the right to retake the property, or so much thereof as may be necessary, and resell the same for the purpose of making such payment."

That order was evidently made for the purpose of preserving the lien and securing payment of the Ferguson Company's claim for the amount which might finally be found due "upon the cross-bill herein filed, or any amendment thereto which may be allowed by the court." At that time the court had not passed upon the exceptions to the master's report, or the application to file amended cross-bill. There is no complaint here that the amount found due will not be paid. The real controversies are as to whether the master and the court correctly decided the issues made on the cross-bill, and properly disallowed the application for leave to further amend. Near the conclusion of the order of confirmation of sale, it is further provided as to the claim of the Ferguson Contracting Company:

"But it is expressly ordered that no distribution herein made shall have the effect of in any manner postponing the priority of the Ferguson Contracting Company for any amount which shall be due it, as the same is preserved and provided in said decree; and as to the claim of said Ferguson Contracting Company, or D. H. Campbell, the complainant, the same having been set up by pleadings already filed, it will not be necessary for them, or either of them, to present their claims to said master under this order."

This does not enlarge the claim of the cross-complainant beyond that set up in its pleadings.

We are better satisfied to allow the rulings of law above referred to to stand, in view of the master's findings, which are fully supported by the testimony as to the extent and character of the lien of the Ferguson Contracting Company. After the appointment of the receiver, September 6, 1898, the parties in interest, at a conference held for the purpose of devising ways and means to obtain payment of their claims against the insolvent company, and after diligent attempts at inflation, were only able to get the Ferguson Company's claim up to \$26,261.22. Upon settlement it was incorporated in the lien taken by Strang for \$26,000. The master finds this sum to be in excess of the true sum due by \$15,000. No claim is made in the lien filed by the Ferguson Company that bonds were to be redeemed at 90. The master further finds that prior agreements as to the work and material were merged in the agreement in writing of May 11, 1898, as to the cancellation of the subscription for 70 bonds, payment of \$29,000 on Detroit Extension; and on Columbus Extension, to take 30 per cent. of estimate in bonds at 90. The master also finds the lien of the Ferguson Company void for failing to give the notice required by the Ohio law. As we have seen, the original decree of December 16, 1899, did not undertake to validate the lien, but gave it priority so far as established. Doubtless these considerations, with others, appealed to the circuit court in exercising its discretion upon the application for amendment of the pleadings.

Much argument is had as to the correctness of the master's allowance of credits on the \$26,000 which he finds was the amount for which the Ferguson Company's claim may be considered as a lien, because of its incorporation into the Strang lien. These credits were allowed upon the testimony, which was, to say the least, conflicting; and the master's conclusions of fact, affirmed by the circuit court, are binding upon us in the absence of plain mistake or unsupported conclusions.

Finding no error in the proceedings complained of, the decree of the circuit court is affirmed.

We feel constrained to notice the comments made in appellants' brief upon the report and rulings of the master, which are referred to as "pitifully ridiculous,"—one of his findings being characterized as a "mere subterfuge, almost a fraud on its face,"—and an alleged error is charged to be "intentional." There is nothing in the record and the reported rulings of the master calling for or in any wise excusing such comments, and they should not have been made in the brief. The master is well known to the court as a gentleman of high character



and a lawyer of ability. The rulings referred to have been sustained by the courts before which they have passed in review. The expressions may be regarded as stricken from the brief.

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BANK OF OVERTON v. THOMPSON.

(Circuit Court of Appeals, Eighth Circuit. November 3, 1902.)

No. 1,671.

1. KNOWLEDGE OF AGENT AS NOTICE TO PRINCIPAL—ADVERSE INTEREST OF AGENT.

The rule that knowledge possessed by an agent while transacting business for his principal is imputable to the principal is based on the presumption that he will communicate such knowledge as his duty requires, and is subject to exception where in the transaction he acts not only for his principal, but also for himself individually, and his interest or conduct is such as to render it certain that he would not make such disclosure.

2. SAME—CASHIER OF BANK.

The cashier of a bank sold cattle in which he and complainant were jointly interested, receiving payment in a draft and credit slip payable to the bank. These he deposited to his own credit, and collected and thereafter checked out the entire amount, and converted it to his own use. He transacted the entire business on behalf of both the bank and himself, and no one else connected with the bank had any knowledge of complainant's interest in the cattle or their proceeds. *Held*, that the bank was not chargeable with notice that complainant had any interest in the fund deposited, and occupied no trust relation to him which rendered it accountable for such interest.

3. PARTNERSHIP—SALE OF PROPERTY BY PARTNER—RIGHT OF COPARTNER TO FOLLOW PROCEEDS.

A contract between an owner of land and his tenant by which the former agreed to furnish money for the purchase of stock to be placed on the land and cared for by the tenant,—the amount to be repaid, with interest, from the proceeds of the stock when sold, and the profit or loss to be divided equally,—created a partnership in the venture; and, on a sale of the stock by the tenant at a price which realized a profit, the landlord had no interest in the specific money received therefor, and no claim against a bank in which it was deposited by the tenant to his own credit on account of such deposit, even though the bank had knowledge or notice of the source from which it was obtained, his only right being to hold his partner to a personal accounting.

Appeal from the Circuit Court of the United States for the District of Nebraska.

The appellant (defendant below) is a banking corporation doing business at Overton, in the state of Nebraska. From some time prior to the year 1897, until October 4, 1899, G. S. Hardinger was its cashier, and had the charge and practical management of its affairs; its president and other directors residing at Lexington, in the same state. On March 1, 1897, the appellee (complainant below), by an agreement in writing, leased to said G. S. Hardinger nearly a section of land in Dawson county, Neb., for the term of three years from that date, and agreed to furnish money to stock the farm with hogs and cattle, as might be agreed on, to consume the pasture and hay on the place. Hardinger agreed to do all the labor on the place, and

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¶ 2. See Banks and Banking, vol. 6, Cent. Dig. § 285.

take care of the farm and stock. The title and possession of the stock were to remain in complainant until he was repaid all moneys advanced by him and 7 per cent. interest thereon; and, after such payment and payment of all debts, all profits or losses were to be evenly divided between said complainant and said Hardinger. Complainant during the year 1898 advanced and paid out, for 237 cattle placed on the said farm under said agreement, \$4,180.36. There was probably some increase of this stock on the farm, and some losses by the death of animals. On July 7, 1899, said Hardinger, having been authorized by complainant to sell the said cattle, made sale of them all, together with about 15 cows to which complainant had no title, to one H. P. Stryker, for the sum of \$5,500. Said Stryker obtained the money to pay said Hardinger by a loan to that amount which he obtained from the First National Bank of Lexington, Neb., giving as security therefor his chattel mortgage of said cattle. To be insured that the money so loaned would be applied to the payment for the cattle covered by the chattel mortgage, said First National Bank, with the consent of said Stryker, gave him, instead of cash, its draft on the Omaha National Bank of Omaha, Neb., payable to the order of the Bank of Overton, for \$3,000, and a slip or ticket acknowledging that it had credited the Bank of Overton with the sum of \$2,497.75, which with the stamps and filing charges for the chattel mortgage, amounted to the sum loaned. Said Hardinger accepted said draft and credit slip as cash from said Stryker in payment for the cattle so sold, and immediately, on the same day, deposited both of them as cash in the defendant bank; taking credit therefor to himself on his individual deposit account in the sum of \$4,738.31, and withdrawing from the bank the balance of said draft and credit slip in money. The amount of said draft and of said credit slip was duly received by defendant bank; and said Hardinger, between that date and October 1, 1899, by his checks, withdrew from said bank the entire amount of his said deposit, and of all others which were there to his credit, and, having about the same time embezzled other moneys belonging to said defendant bank, ceased to be its cashier or to be connected with it about October 4, 1899, and has since been insolvent. In receiving said draft and credit slip as cash, and in the collection of each, said Hardinger alone acted for the defendant bank, and was the only officer of that bank, or person connected therewith, who had any knowledge that such draft or credit slip had any connection with the sale of cattle in which complainant had any interest. On August 25, 1899, Hardinger informed complainant by letter that he had sold all the cattle in which they were interested for \$5,000; the cattle to be taken between September 15th and 20th. Hardinger never paid complainant anything on account of the money for which the cattle were sold; but complainant afterwards sold hay on the farm in which Hardinger had an interest, and some machinery, and, on account of the same, credited Hardinger \$694.70, and brought this action, alleging that Hardinger sold the cattle he was interested in to Stryker for \$5,000, and that defendant bank received the proceeds, through said draft and credit slip, knowing the facts, and that it was a trust fund belonging to the complainant, by reason of his ownership of the cattle. Defendant bank, by its answer, denied any knowledge of complainant's transactions with Hardinger, or that complainant had any interest in the money represented by the said draft or credit slip, or that these represented anything out the individual money of Hardinger, and were received as cash belonging to Hardinger, and paid out afterwards to him on his checks by the defendant bank. The circuit court held that the moneys represented by said draft and credit slip, when deposited in defendant bank, were trust moneys belonging to complainant, to the extent of his interest in the same, and that Hardinger's knowledge of the facts was imputable to defendant bank, and rendered its decree in favor of the complainant for the sum of \$4,761.31 and costs.

T. J. Mahoney (Marcellus L. Temple, on the brief), for appellant.  
A. S. Churchill, for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The question as to whether the books of account of defendant bank were properly admitted in evidence, though much discussed in the briefs of counsel, is not presented by this appeal. The complainant who objected to this evidence does not appeal, and the evidence must be considered as properly admitted.

2. But assuming that the moneys which Hardinger obtained for the cattle sold to Stryker were trust funds, and that complainant had an interest in the specific money represented by the draft and credit slip which Hardinger received from Stryker as cash for the cattle, to the extent of what complainant was entitled to receive on such sale, and that the deposit by Hardinger to his personal credit in his individual deposit account in that bank was a fraud on the complainant, completed by his drawing out the same money by his checks paid by that bank, and by converting the whole to his own use, the defendant bank cannot, on the facts of this case, be charged with any responsibility to the complainant. Aside from Hardinger, no one connected with the bank had any knowledge or notice that the complainant had any interest in the cattle sold to Stryker, or in the proceeds of such sale, or that the deposit by Hardinger in the bank was other than his own moneys, which he had a right to withdraw and use at any time.

But it is claimed on behalf of the complainant that as Hardinger certainly had full knowledge of complainant's interest in the cattle, and in the money for which Hardinger sold them, and as he was the cashier of the defendant bank, when, as such, he took into that bank the deposit made there by himself as an individual depositor, his knowledge of all the facts connected with the rights of the complainant to that money is imputable to that bank, under the well-settled general rule that the knowledge of an agent, or notice to an agent, while acting within the scope of his authority, is notice to his principal, because within that scope he is the alter ego of the principal, and because the law will presume that the agent has performed his duty to disclose to his principal all notice to himself necessary to his principal's protection or guidance. The officer of a corporation, like a cashier of a bank, is such agent. There are, however, well-settled exceptions to this rule, where notice or knowledge on the part of the agent will not be imputed to the principal, and one of these is "where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it." *Mechem, Ag. § 721*. "In such cases the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it." *Id. § 723*; *Koehler v. Dodge*, 31 Neb. 329, 336, 47 N. W. 913, 28 Am. St. Rep. 518; *Bank v. Sharpe*, 40 Neb. 123, 127, 58 N. W. 734; *Benton v. Bank (Mo.)* 26 S. W. 975; *Bank v. Lovitt*, 114 Mo. 519, 21 S. W. 825. In the case last cited it is said:

"An officer of a banking corporation has a perfect right to transact his own business at the bank of which he is an officer, and in such transaction his interest is adverse to the bank, and he represents himself, and not the bank. The law is well settled that, when an officer of a corporation is dealing with it in his individual interest, the corporation is not chargeable

with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction."

Notwithstanding some dicta and one decision—*Bank v. Blake* (C. C.) 60 Fed. 78—to the contrary it is fairly well settled that knowledge of an agent, actually concealed from his principal, while the agent is dealing with the principal on his own account, is not to be imputed to the principal, even though the agent, assuming to act as such, did whatever was done on the part of the principal in the transaction with himself, if disclosure of the matter concealed would have had a tendency to defeat his purposes. His position would be as antagonistic to his principal, and his motive for concealment as great as, and easier of accomplishment than, if he were dealing with the principal directly, or with another agent. In *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, the court says:

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. *Kennedy v. Green*, 3 Mylne & K. 699; *Cave v. Cave*, 15 Ch. Div. 639; *In re European Bank*, 5 Ch. App. 358; *In re Marseilles Extension Ry. Co.*, 7 Ch. App. 161; *Bank v. Harris*, 118 Mass. 147; *Loring v. Brodie*, 134 Mass. 453. One of the most recent cases on this point is *Dillaway v. Butler*, 135 Mass. 479. A., to whom B. was indebted, advised C. to lend money to B. on the security of a mortgage of personal property, and acted as C.'s agent in completing the transaction. With the money thus obtained, B. paid A. the debt he owed him. Both A. and B. acted in fraud of Gen. St. c. 118, §§ 89, 91, but C. had no knowledge of the fraud. It was held that the knowledge of A. was not, in law, imputable to C., although A. had acted for C. in the negotiation."

In *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 12 C. C. A. 643, 65 Fed. 341, one Dahlgren was the nephew and agent of Mrs. Read, and had \$50,000 of her money to loan. He was also the secretary, treasurer, and general manager of the Capitol Electric Company, and had possession of some of its bonds. He, in an indirect way, borrowed \$2,250 of this money of Mrs. Read, in his hands, and pledged for its repayment \$4,000 of such bonds. It was held that his knowledge of the fraud which he committed in thus misappropriating the bonds was not imputable to Mrs. Read. The court (Taft, Circuit Judge) said:

"We do not think that, under the circumstances of this case, Mrs. Read can be charged with notice of the facts which Dahlgren knew concerning the issue of these bonds. As a general rule, the principal is held to know all that his agent knows in any transaction in which the agent acts for him. *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167. This rule is said to be 'based on the principle of the law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty.' Such presumption cannot be indulged, however, where the facts to be communicated by the agent to the principal would convict the agent of an attempt to deceive and defraud the principal. The truth is that where an agent, though ostensibly acting in the business of the principal, is really committing a fraud for his own benefit, he is acting outside the scope of his agency and it would therefore be most unjust to charge the principal with knowledge of it. In *Allen v. Railroad Co.*, 150 Mass. 206, 22 N. E. 917, 5 L. R. A. 716,

15 Am. St. Rep. 185, the plaintiff bought shares of stock in the defendant railway through a broker who was treasurer of the company. He fraudulently filled a blank certificate and delivered it to her. It was sought to impute to her the broker's knowledge of the invalidity of the certificate, in an action by her for damages for refusal to transfer the stock. The court held that this could not be done, because the legal effect of the fraudulent act of the broker was to cheat his principal."

In *Bank v. Foote*, 12 Utah, 157, 42 Pac. 205, the action was brought by the bank against one Hague, its cashier, and the other defendants, as joint makers of a promissory note to the bank for \$3,000. The signatures of the other makers were obtained by Hague upon his agreement that the note should not be used unless it was also signed by one Whitmore, the president of the bank. Without obtaining such signature, Hague negotiated the note, and obtained the money thereon from the bank. The defendants claimed that Hague's knowledge of his own representations to his co-makers was imputable to the bank of which he was cashier. The court said:

"In such a case the representations of Hague to his co-makers were not binding on the bank, and his knowledge of such representations could not be imputed to the bank without violating rules of law well settled both upon principle and authority. *Innerarity v. Bank*, 139 Mass. 334, 1 N. E. 282, 52 Am. Rep. 710; *Mechem, Ag.* §§ 723, 729; *Frenkel v. Hudson* (Ala.) 2 South. 758, 60 Am. Rep. 736; *Wickersham v. Zinc Co.*, 26 Am. Rep. 786. The case of *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698, was referred to and much relied on by appellants. The facts of that case clearly distinguish it from the case at bar. It announces the doctrine that an agent's knowledge of his own fraud is to be imputed to the principal in a transaction where the agent alone represents the principal. This is a distinction which seems to us less substantial than technical, and we cannot give it our assent. The rule of law which imputes the knowledge of an agent to his principal, according to most of the authorities, is based upon the presumption that the agent will communicate to his principal whatever he knows concerning the business he is transacting; and the exceptions to the rule, upon the contrary presumption,—that the agent will not communicate to his principal his knowledge of his own independent frauds, committed in the course of transacting the principal's business, and that he will not communicate to his principal his knowledge in a transaction where he is interested on the opposite side. In a case where the presumption arises that an agent will not communicate his knowledge to his principal, or to another acting for the principal, it would seem to be unreasonable to hold the principal responsible for the knowledge of the agent solely because the agent in the particular transaction appeared himself for the principal. The presumption would naturally be, in such a case, that he would fail to act upon such knowledge as the principal would act, just as he would fail to impart his knowledge in a case where another appeared for the principal."

In the case of *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698, which is criticised in the extract from the case last cited, one Gray was the treasurer of both the plaintiff and defendant companies, and for some time had been embezzling largely from each. To cover his defalcations in the plaintiff company at an expected periodical examination, he had placed with its funds fraudulent checks of the defendant company, which he had drawn payable to the order of plaintiff company, to the amount of more than \$200,000, and these were in possession of plaintiff company when the defalcations were discovered. Prior to that no officer of

either company, except Gray, knew anything of such checks. Plaintiff sought to recover on them, as having received them innocently in payment of Gray's indebtedness to it through his defalcations. The court held that as no officer of the plaintiff, save Gray, had acted on its behalf in receiving the checks, the plaintiff was bound by Gray's knowledge of the fraudulent character of the checks, and could not recover. It also placed the decision on the stronger reason, deducible from the real character of the transaction, namely, that the placing of these checks by Gray among the funds of plaintiff was never intended by Gray or any one as a payment of Gray's indebtedness to plaintiff, nor as vesting the title to them in plaintiff, but only as a temporary ruse, to hide Gray's defalcation for the time. The court added that, had Gray intended to pay his indebtedness to plaintiff by thus secretly transferring to it the property of a third person, the plaintiff could not adopt such intention of Gray without adopting the fraud. This is but holding that a principal cannot claim a positive benefit to himself from the fraudulent act of his agent. But suppose that Gray, by placing these fraudulent checks in plaintiff's funds during the examination, had escaped the discovery of his defalcations at that time, and had immediately afterwards taken the same fraudulent checks and indorsed plaintiff's name upon them, and negotiated them and embezzled the proceeds, and defendant company had paid them before discovering their fraudulent character; no one connected with plaintiff company, except Gray, having had any knowledge of the existence of any such checks. Would the fact that Gray had, before negotiating them and embezzling their proceeds, placed them secretly among plaintiff's funds to hide his own frauds, render the plaintiff liable to the defendant for the amount of such fraudulent checks? Would the plaintiff in such case be any more responsible to defendant because of such secret placing of the checks by Gray in plaintiff's funds for his own purposes, and not for plaintiff's benefit, than if Gray as treasurer of defendant company had secretly made the fraudulent checks, and as treasurer of plaintiff company had as secretly indorsed them, and negotiated them without ever putting them with plaintiff's funds?

In the present case, Hardinger, for his own purposes, and without the knowledge of any one else connected with the defendant bank, deposited the proceeds of the sale of the cattle, as his own money, in defendant bank, and, while the facts remained wholly unknown to any one connected with the bank but himself, by his own act he withdrew the same money from the bank. As depositor, both in making and withdrawing the deposit, his interests were adversary to the bank. If he was engaged in defrauding the complainant, the presumption is that he would not disclose to the bank his fraud, or complainant's interest in the fund, and the evidence of the actual fact corresponds to this presumption. The bank had no knowledge of any interest of complainant in the fund, and was under no obligation to him. The complainant, by authorizing Hardinger to sell the cattle, authorized him to receive the money for them and to care for it. In caring for it, he placed it temporarily in defendant bank, but retained, as he properly might, the control over it, and afterwards resumed, as he had a right to, the possession of it. If it was a trust fund, Hardinger

was the complainant's trustee. He might put it in a bank, and remove it at his discretion to another bank, or put it in his pocket.

3. But the money deposited by Hardinger in defendant bank was not, as a whole, nor as to any definite part of it, complainant's money, nor a trust fund of any kind. By the terms of the written agreement between them, complainant and Hardinger became partners in respect to the stock venture. Complainant, on his part, was to furnish the land to subsist the stock, and the money to buy the stock, the nominal title to which he was to retain. Hardinger, on his part, was to care for the stock, cultivate the land, and do or furnish all labor. And the agreement was that, after first repaying the complainant all the moneys he should so furnish, and interest thereon at 7 per cent., all profits or losses were to be divided evenly between them. It was a not uncommon partnership venture. In respect to the sale of the cattle by Hardinger, it matters not that the nominal title to them stood in complainant, as he testified that he authorized Hardinger to sell them, so that Hardinger was not only complainant's authorized agent to make the sale, and incidentally to receive the proceeds, but as partner he had a property interest in such proceeds to the extent of one-half the profits, as the sale was for more than enough to pay complainant's advances and interest; and he had to keep and retain the entire proceeds of the sale, his obligation being to account to his partner, the complainant, and to pay him what sum he might be entitled to on such accounting. The suggestion that Hardinger had no right to receive the draft and credit slip, or anything but cash, in payment for the cattle, deserves no consideration. They were equivalent to cash, and complainant ratifies their acceptance by seeking to follow their proceeds. As Hardinger had a substantial interest as partner in the partnership fund, which was the proceeds of the sale of the cattle, and as such partner had the rightful possession of the whole of that fund, his dominion over the particular money constituting that fund was as full and complete as if no one else had any interest in it. If he appropriated the whole of it to his own use, he would not be guilty of embezzlement. *State v. Kent*, 22 Minn. 41, 21 Am. Rep. 764. If he refused to account for it, his copartner could not replevy or seize the particular money, but could only get a judgment or decree against him for the amount he might show himself entitled to. As Hardinger had rightful control over the money he received for the cattle, and a substantial interest in it, he might use it or deposit it as his own in any bank; and in case of such deposit, even if the banker knew that the money so deposited came from the sale of partnership assets, he would be charged with no duty in respect to other partners. It is needless to consider the fact that Hardinger's sale of cattle to Stryker for \$5,500 included cattle owned by Hardinger, and in which complainant neither had nor claims any interest, and which would further affect the accounting in respect to the moneys which Hardinger received on the sale for the cattle, but which would not increase his dominion, which as partner was complete, over the proceeds of the sale.

The complainant has no equities against the defendant, and the decree appealed from is reversed, with costs, and the cause remanded, with directions to dismiss complainant's bill.

## McKECHNEY et al. v. WEIR.\*

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 898.

**1. FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION—EFFECT OF STIPULATION.**

An agreement and stipulation between the parties to a suit in a federal court involving the settlement of a partnership, in which it had granted a restraining order, and, pending a motion for a receiver, that the proceedings should be stayed until the happening of a certain event, and until the parties agreed on the method of collecting and distributing the firm assets, did not deprive the court of its exclusive jurisdiction over the subject-matter or the parties, nor prevent it from exercising such jurisdiction by the appointment of a receiver after the defendants had, in effect, repudiated the agreement by consenting to the appointment of a receiver by a state court on application of a third person.

**2. RECEIVER FOR PARTNERSHIP—STANDING OF THIRD PERSONS TO OPPOSE APPOINTMENT.**

One not a party to a suit to settle a partnership, but who joins in an agreement between the parties looking to a settlement of the matters in controversy out of court, and as a part of such agreement is to receive a certain sum from the firm assets when distributed, takes such right subject to the carrying out of the other provisions of the agreement, and has no standing to oppose the appointment of a receiver in the suit where he has himself taken action which renders a settlement as contemplated by the agreement impossible.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

July 28, 1900, appellee, a citizen of Ohio, filed in the court below his bill against John McKechney and John McKechney, Jr., citizens of Illinois, for an accounting, a temporary injunction, and the appointment of a receiver of the partnership property of the late firm of Weir, McKechney & Co., composed of complainant's testator and the defendants. July 30, 1900, the court entered a temporary restraining order. August 29, 1900, the defendants answered. The same day, on complainant's motion for a temporary injunction and the appointment of a receiver, the court referred the cause to a master "to take an accounting between the parties and report the same, together with his conclusions thereon, with all convenient speed," continued the restraining order in force until the further order of the court, and postponed the decision of the question of appointing a receiver. The only remaining asset of the firm was a judgment for \$500,000 against the city of Chicago, pending on appeal in the supreme court of Illinois. September 8, 1900, the defendant John McKechney filed a cross-bill, to which his wife, Caroline L. McKechney, was made a party defendant, but she was not served with process nor did she appear. Between October, 1900, and February, 1901, various creditors, by leave of court, filed intervening petitions, asking that their claims be adjudicated and paid before any distribution should be made to the partners.

The record stood thus when on May 14, 1901, these parties and others entered into a written agreement with respect to various controversies between them. Mrs. McKechney agreed to dismiss certain suits pending in Ohio and to surrender certain stock in an Ohio corporation; and for this action on her part Mr. Weir, executor, agreed, among other things, to assign her \$75,000 of his testator's share in the assets of Weir, McKechney & Co. This part of the contract and the provision relating to the disposition of the present suit are in these words: "The affairs of Weir, McKechney & Co., a firm

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\* Rehearing denied November 15, 1902.



composed of John McKechney, John McKechney, Jr., and said Frederic C. Weir, deceased, shall be adjusted and settled by first paying out of the assets the debts of the firm and of the surviving partners incurred in connection with the affairs of the firm, including its debts to L. C. Weir individually upon three promissory notes, one for \$5,000, dated March 17, 1899, and one for \$2,500, dated March 22, 1899, and one for \$2,000, dated April 15, 1899, and by then returning to each partner the amount to the credit of his capital account. Out of the share or interest of Frederic C. Weir under the partnership articles in the remainder of such assets, if any, there shall be first paid to Caroline L. McKechney the sum of seventy-five thousand (\$75,000) dollars, which sum is hereby assigned, transferred, and set over to her out of such remainder of said share or interest by said Levi C. Weir, executor, and the residue of such share or interest to Levi C. Weir, executor. The shares or interests of John McKechney and John McKechney, Jr., under said partnership articles shall be paid to them respectively. The assets of the firm shall be collected and distributed in a manner to be hereafter agreed upon by John McKechney, John McKechney, Jr., and Levi C. Weir, executor. The capital accounts of John McKechney and Frederic C. Weir shall stand as shown by the books unless errors therein are agreed to by Judson Harmon and John S. Miller, who are hereby appointed arbitrators for that purpose, whose joint and concurrent action shall be conclusive in determining any claims for correction of said capital accounts by either of said partners. An examination of said capital accounts shall be conducted by said arbitrators promptly and with all convenient speed, and all the facts, data, and information in the knowledge of the parties hereto shall be promptly submitted to them. In case said arbitrators shall find that there are included in the credits to the capital account of either of said partners any amounts which were obtained upon loans for which the obligations of the firm were given and which are still outstanding, the partner receiving such credit (and in the case of F. C. Weir, deceased, his said executor) shall assume and pay the same, and hold said firm harmless therefrom, or such credit shall be charged off, as said arbitrators shall determine. The cross-bill of John McKechney filed in the suit of Levi C. Weir, executor, against John McKechney and John McKechney, Jr., in the circuit court of the United States for the Northern district of Illinois, Northern division, shall be dismissed, and the proceedings upon the bill shall be stayed until the supreme court of Illinois shall have rendered judgment in the case of Weir, McKechney & Company against the city of Chicago, therein pending, and until the method of collecting and distributing the assets shall be agreed upon, and a stipulation to that effect shall be filed in said suit. Upon the settlement and adjustment of the affairs of said partnership, the costs of said action shall be paid from the assets of said firm."

May 25, 1901, Mr. Weir, executor, and the Messrs. McKechney, by their solicitors, signed the following stipulation: "It is stipulated that the said cross-bill of John McKechney shall be dismissed, without cost, all costs having been paid. It is further stipulated by the parties that the proceedings upon the said original bill of complaint of Levi C. Weir, executor as aforesaid, shall be stayed until the supreme court of Illinois shall have rendered judgment in the case of Weir, McKechney & Company against the city of Chicago, therein pending, upon the appeal of said city of Chicago from the judgment of the appellate court for the First district of Illinois affirming the judgment of the circuit court of Cook county in the case of Weir, McKechney & Company vs. The City of Chicago, and until the method of collecting and distributing the assets shall be agreed upon."

February 5, 1902, Mrs. McKechney filed in the circuit court of Cook county, Ill., a bill against her husband and son and Mr. Weir, executor, asking the appointment of a receiver for the property of Weir, McKechney & Co. The only interest she had in the firm's affairs that was exhibited by the bill was based on the foregoing contract of May 14, 1901. Her husband and son immediately appeared and consented to the appointment of a receiver, and her husband was appointed. Mr. Weir, executor, had no notice of the proceeding, and, so far as the record shows, has never been served.

April 7, 1902, Mr. Weir, executor, by a supplemental bill filed herein, laid

this situation before the court below, and moved for the appointment of a receiver. From an order appointing a Mr. Garnett, this appeal is prosecuted. The supreme court of Illinois has not disposed of the firm's case against the city of Chicago. Mr. Weir, executor, and the Messrs. McKechney have not agreed upon the manner in which the assets of the firm shall be collected and distributed. As no question is made but that some court should appoint a receiver, the allegations of the various pleadings and affidavits in that regard are immaterial here.

John S. Miller and Noble B. Judah, for appellants.

Lawrence Maxwell, Jr., and Charles H. Aldrich, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, having stated the case thus, delivered the opinion of the court.

Prior to May 14, 1901, the federal circuit court had full jurisdiction of the subject-matter of, and parties to, the original bill. An order had then been entered restraining the defendants from selling or in any way disposing of the assets of the firm. A motion for the appointment of a receiver was pending. That court, therefore, had absolute control of the whole matter, free from the interference of any other court. *Farmers' Loan & Trust Co. v. Lake St. El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. And the sole question is whether the contract and stipulation of May, 1901, deprived that court of the rightful power to act as it did upon appellee's supplemental bill and motion. Counsel for appellants are entirely right in saying that a suit is under the control of the parties, and that a court has no jurisdiction to be upheld, from imagined considerations of dignity or other motive, against a binding stipulation, and the case is to be scanned exclusively from that point of view.

What was the situation of the Messrs. McKechney on May 14, 1901? They were defendants to the original bill,—under a restraining order. A motion was pending to have the assets of the firm collected and distributed by a receiver. The parties were willing to avoid that expense if possible. So they agreed,—to what? "The assets of the firm shall be collected and distributed in a manner to be hereafter agreed upon." And "proceedings upon the bill shall be stayed until the supreme court of Illinois shall have rendered judgment in the case of Weir, McKechney & Co. against the city of Chicago, therein pending, and until the method of collecting and distributing the assets shall be agreed upon." With respect to the control and disposition of the assets, a matter then pending in the court below, the parties agreed to agree; that is, they agreed to nothing. But they thereby expressed their desire and intention to endeavor to reach an adjustment later. So they entered into an armistice. They agreed to suspend hostilities until the supreme court of Illinois should dispose of their case and until they should unite upon a method of distributing the proceeds. In determining the scope of this time limit, it must not be forgotten that the evident purpose of the parties was to see if they could not reach a complete settlement. The only remaining asset was the judgment against Chicago. But that fact would not prevent the appointment of a receiver immediately. There might well be pressing

occasion for the appointment of a receiver long before a decision could be had. There might be urgent demands for money to use in that litigation or in defending the firm against claims of creditors, and the parties might be unable or unwilling to raise it. And a motion for the appointment of a receiver was pending when the agreement of May 14th was made. There would be no immediate need of a receiver, if the parties would proceed with their negotiations and take care of emergencies as they arose. The principal thing, therefore, was their agreement to strive in good faith to effect a settlement. The time limit of the stay was not until the supreme court of Illinois should act, but until the supreme court should act and until the parties should reach an agreement. The clause respecting action by the supreme court was coupled with another that evidenced the dominant purpose of the parties, and the whole clearly contemplated that the wait for the supreme court should be conditioned upon the parties proceeding honestly and successfully to a mutually satisfactory conclusion. And if they did not, and if emergencies arose, what was intended? The agreement to agree could not be specifically enforced. It neither dismissed the suit nor furnished a basis therefor. It did not even suspend the restraining order, for Mr. Weir only consented that the Messrs. McKechney might act with respect to the assets in such a manner as he might thereafter agree to. It only stayed the determination of the application for a receiver and the hearing on the merits until the parties found out whether they could close their remaining differences without the court's aid. If they could not, the armistice was at an end. If either refused or incapacitated himself to try, the stay was broken, and the other was at liberty to proceed in the court below as if no attempt at settlement had been made. Now, the Messrs. McKechney, by appearing in the state circuit court and consenting to the appointment of a receiver, abandoned the controlling object of the truce, repudiated their agreement to negotiate with Mr. Weir untrammelled, and placed, so far as they could, the manner of collecting and distributing the assets in the control of the state court. And this is true independently of the question whether they incited Mrs. McKechney to apply to the state court for the appointment of a receiver.

The court below was of the opinion, in which we concur, that the proceedings in the state court were collusive. On the basis that Mrs. McKechney allowed herself to be used as a cloak to mask the purposes of her husband and son, her appeal falls with theirs.

But, collusion aside, Mrs. McKechney has no standing. Mr. Weir did not give her an unconditional obligation to pay \$75,000. He assigned her an interest in the subject-matter of a pending suit, with reference to the handling of which the very instrument that gave her her interest made certain provisions. She could not count on these provisions otherwise than as Mr. Weir made them. To have prevented him from taking up and pressing the motion for a receiver which was pending in the federal circuit court when she bought into the suit, it was incumbent upon her to show that he had bound himself not to do so, and that such agreement was in force. There was no direct engagement with her on the subject. She could not take the

benefits of Mr. Weir's stipulation with her husband and son without its burdens.

There is no basis for the claim that Mrs. McKechney, on account of her citizenship in Illinois, could not apply to the federal court for protection of her dependent interests and was compelled to resort to the state court. *Ex parte Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689.

The contention that Mr. Weir could avail himself of the facts exhibited in his supplemental bill only as a defense to the proceedings in the state court is without merit. The federal circuit court had the right to decide for itself whether its original jurisdiction had been lost.

The intervening creditors have been permitted to file briefs in support of their position that, after their petitions had been filed, the original parties could not dismiss the suit without their consent. In view of the conclusions already reached, it is needless to decide that question.

The order appealed from is affirmed.

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UNITED STATES *ex rel.* KILPATRICK *et al.* v. CAPDEVIELLE *et al.*

(Circuit Court of Appeals, Fifth Circuit November 25, 1902.)

No 1,157.

1. FEDERAL COURTS—ENFORCING JUDGMENTS AGAINST CITY—EFFECT OF STATE STATUTE.

Act La. No. 5, Ex. Sess. 1870, which prohibits the granting of a mandamus for the collection of judgments against the city of New Orleans, is not binding upon the federal courts, which derive their power to enforce their judgments in such cases by mandamus from section 14 of the federal judiciary act of 1789, now Rev. St. § 716 [U. S. Comp. St. 1901, p. 580].

2. CITIES—CREATION OF INDEBTEDNESS—NEW ORLEANS DRAINAGE WARRANTS.

Under Act La. No. 16 of 1876, authorizing the city of New Orleans to purchase the drainage plant and franchises of the Mississippi Gulf Ship Company, and to pay for the same in drainage warrants, payable exclusively out of drainage assessments, warrants so issued did not create a new indebtedness, since they covered not only the price of the property, but a settlement of an existing indebtedness of the city to the previous owners upon assessments theretofore made against it as the owner of streets and other public property, which had been reduced to judgments; and holders of the warrants are entitled to enforce collection of such assessments for their benefit.

3. SAME—AUTHORITY TO LEVY SPECIAL TAX.

The authority given by the Louisiana drainage acts of 1858, 1859, 1861, and 1871 to make special assessments against the city of New Orleans, as owner of the streets and public grounds, for the cost of drainage work, necessarily carried with it, in the absence of express provision otherwise, authority for the levy of a special tax by the city to discharge the indebtedness created, in addition to the regular levy authorized for general municipal purposes.

McCormick, Circuit Judge, dissenting.

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¶ 1. Enforcement of judgment against municipality by mandamus, see note to *Holt Co. v. National Life Ins. Co. of Montpelier, Vt.*, 25 C. C. A. 475.

¶ 3. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 2040, 2043.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

By Act No. 165 of 1858, amended by Act No. 191 of 1859 and Act No. 57 of 1861, certain drainage districts were established covering certain territory within the city of New Orleans. The cost of the work was imposed on all the lands within the several districts. Assessments were made against private owners, and against the city as quasi owner of the streets and other public places, by the boards of the several districts prior to 1871. In that year the legislature, by Act No. 30, transferred the powers and duties of the boards to the Mississippi Gulf Ship Canal Company. Subsequent to this transfer the administration of the city made further assessments under authority of Act No. 30. All of these assessments were reduced to judgment between the years 1861 and 1872. They constituted the fund out of which the Canal Company was to be paid for the drainage work required to be done under said Act No. 30. By Act No. 16 of 1876, approved February 24th, the city of New Orleans was authorized to purchase the drainage plant and franchises of the canal company, and to discharge the price in drainage warrants, payable exclusively out of drainage assessments. Pursuant to this authority, the city, on the 7th of June, 1876, made the purchase, and issued \$300,000 of warrants in payment of the price. The Jackson warrants involved in this suit are part of that issue. Jackson intervened in the suit of Warner v. City of New Orleans, No. 12,350 on the docket of the circuit court, which was brought on part of the same class of warrants by the complainant in his own interest and that of others similarly situated, and recovered a decree against the city for the amount of these warrants, payable out of drainage assessments, as follows:

"United States Circuit Court, Eastern District of Louisiana.

"John G. Warner et als. v. City of New Orleans. No. 12,350.

"This cause came on to be further heard at the present term upon the intervention of James Jackson, the proofs and master's reports as heretofore confirmed by the court, and was argued by counsel for the respective parties. Thereupon, in consideration thereof, it was ordered, adjudged, and decreed as follows: First. That the court finds in accordance with the reports of the master, and decrees that the defendant is chargeable with and owes drainage taxes assessed against it upon the area of the streets, squares, and public places within the several drainage districts of the city of New Orleans under the provisions of the acts of the legislature of the state of Louisiana, as set forth in the original and amended bill of complaint, to the amount of one million eight hundred and fifty-three thousand and three hundred and thirty-six and  $\frac{52}{100}$  dollars (\$1,850,336.52); that defendant is indebted in said sum to the drainage fund established by the decree in this cause of December 5, 1898, as a trust fund for the benefit of the complainant and all of the holders of drainage warrants, including the intervener, James Jackson, similar to those of complainant, who have established their claims before the master; that said fund so due by the defendant is more than sufficient in amount to pay all the drainage warrants issued by defendant under authority of the act of the legislature of the state of Louisiana No. 16, of February 24, 1876, in principal and interest; and that the intervener, James Jackson, is entitled to an absolute judgment against the defendant for the sum of forty-five thousand dollars, with 8 per cent. per annum interest thereon from June 6, 1876, until paid, as found by the master in his several reports which have been heretofore confirmed. Second. It is therefore ordered, adjudged, and decreed that the said James Jackson do have and recover absolute judgment against the defendant, the city of New Orleans, for the sum of forty-five thousand dollars, with eight per cent. per annum interest thereon from June 6, 1876, until paid, with all costs of suit, and that he have execution therefor against the defendant as in cases of suits at common law in actions of assumpsit, according to the rules in equity established by the supreme court. It is further ordered that A. G. Brice, Esq., master, be allowed a fee of one thousand dollars, to be taxed against the

defendant as part of the costs in the cause. Thus done and signed in open court at New Orleans, La., on this the fourteenth day of June, A. D. 1901.

"[Signed]

Charles Parlange, U. S. Judge."

Execution issued on the decree June 26, 1901, and was returned nulla bona July 29, 1901. On the 1st of February, 1902, the petition for a mandamus in this case for the levy of a tax to pay said decree was filed in the circuit court. The answer filed by the mayor and councilmen of the city denied all the allegations of the petition as to the rendition of the decree, the issuance of an execution and the return of the marshal thereon, but substantially contains only two defenses: (1) That Act No. 5, Ex. Sess. 1870, affords the only remedy to which relators can resort for the collection of their judgment, and that said act prohibits the granting of a mandamus for its collection. This act provides that judgments shall be registered with the comptroller of the city, and paid in the order of registry. (2) That at the present time the city has no unexercised power of taxation, the present rate authorized by law being 22 mills on the dollar, which has been levied.

The evidence in the case, as set out in the bill of exceptions taken to the charge of the court below, is undisputed and without conflict. It appears from the stipulation signed by the attorney of the city that the following drainage taxes against the city have been assessed: Assessment in the First drainage district, dated September 12, 1861, and reduced to judgment March 11, 1863, \$223,110.60; in the Second district, assessment dated March 11, 1861, and reduced to judgment November 11, 1868, \$199,997.17; in the Third district, assessment dated March 30, 1872, \$207,441.46; in the Fourth district, assessment dated November 8, 1872, and reduced to judgment March 13, 1873, \$69,956.77. These assessments, as appears from the findings of the master, and by the court in the decree in favor of Jackson, amounted, in principal and statutory interest, to \$1,850,336.52, at the date of the decree. It appears that when the drainage plan or scheme was put in operation by the Acts of 1858, 1859, and 1861, which authorized the assessments to be made, Act No. 164 of 1856, which limited the rate of taxation to 1½ per cent. for all purposes, was in force, and continued in force up to 1870; that this rate of 1½ per cent. was levied each year up to 1870, except for the years 1862 and 1863, in which years only 1 per cent. was assessed, leaving an unused taxing power of one-half of 1 per cent. in each year. It appears that from 1870 to 1872 the full limit of the taxing power was used, but by Act No. 73 of 1872, § 15, p. 127, the city was authorized to levy—"First, a city debt tax, based on a detailed estimate of the sinking fund and interest falling due; second, a tax for current city expenses, including police, and exclusive of interest and schools. This tax shall in no year exceed one and one-fourth per centum." It appears from said comptroller's report that under said Act No. 73 for the year 1873 the rate allowed for city expenses and police was 12.50 mills; the tax levied for expenses was 7.51 mills; the tax levied for police was 3.20 mills, and the unused taxing power for said year was equal to 1.79 of a mill on the dollar. The supreme court of the state, however, seems to have found that the unused taxing power for this year was 2½ mills. See *State v. City of New Orleans*, 37 La. Ann. p. 13. This was based on 10 mills levy for city expenses and police. In 1874 the tax for city expenses was 6.08 mills; the tax for city police was 4.45 mills. This left the city an unused taxing power of 1¼ mills for the year 1874. In 1875 the tax for city expenses was 5.1 mills; the tax for police was 4.95. This left the city an unused taxing power of nearly 2½ mills for the year 1875.

These facts were not disputed in the court below, but the court refused to instruct the jury to find for the relators, and directed a verdict in favor of respondents, to which relators duly excepted. The case comes here upon the whole record on the following assignments of error:

"(1) At the conclusion of the trial and before the jury retired, the relators submitted the following request: 'Now, at the conclusion of the trial in this cause, and before the jury had retired, come the relators, by their attorney, and request the court, upon all the evidence adduced in the cause, to direct the jury to find a verdict in their favor,'—which charge the court refused

to give. Thereupon the respondents submitted the following request: 'Now, at the conclusion of the trial in this cause, and before the jury had retired, come respondents, by their attorney, and request the court, upon all the evidence adduced in the cause, to direct the jury to find a verdict in their favor,'—which charge the court gave as requested. Relators aver that the court erred in refusing to give the charge requested by them as aforesaid, and in giving the charge prayed for by the respondents; the ruling of the court being contrary to the undisputed evidence and the law applicable thereto. (2) The court erred in holding that the relators were not entitled to the levy of a tax to pay the amount of their judgment. (3) It appearing from the undisputed evidence that the judgment of relators was based on an extraordinary indebtedness of the city of New Orleans, to wit, assessments against the city of New Orleans, as quasi owner of the streets, squares, and other public places, for the cost of a local improvement, which the city could have incurred only by authority of the Special Laws of the State of Louisiana of 1858, 1859, and 1861 and 1871, under which said assessments were made, the court erred in holding that relators were not entitled to the levy of a special tax to pay said judgment. (4) The court erred in ruling that the indebtedness on which relators' judgment was based was created by the agreement of June 7, 1876, by which the city of New Orleans acquired the property and franchises of the Mississippi & Mexican Gulf Ship Canal Company for \$300,000 in drainage warrants, payable out of drainage assessments, and that such indebtedness is subject to the limitation on the rate of taxation contained in Act No. 30 of the legislature of Louisiana approved March 6, 1876; and that the indebtedness so created was not an extraordinary indebtedness, for which the law allows a special tax by necessary implication. (5) It appearing from the undisputed evidence that the city of New Orleans was indebted to the drainage fund for drainage assessments made in 1861 and 1872 on the streets, squares, and other public places, in amount more than sufficient to pay the sum due relators on their judgment, and that the city still possesses unused taxing power of 5 mills for each of the years 1862 and 1863, and unused taxing power of 2½ mills for each of the years 1872, 1873, 1874, and 1875, the court erred in not directing the jury to find for relators, and in refusing to order the exercise of this reserved taxing power to an extent sufficient to pay relators' judgment. (6) The court erred in holding that the limitations on the taxing power of the city of New Orleans apply to its indebtedness for drainage assessments on its streets, squares, and other public places for the local improvements authorized by the Acts of 1858, 1859, and 1861, and by Act No. 30 of 1871. The court erred in holding that Act No. 5, Ex. Sess. 1870, operates as a bar to relators' right to resort to a mandamus to enforce the payment of their judgment."

R. De Gray, John D. Rouse, and Wm. Grant, for plaintiffs in error.

Frank B. Thomas, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts as above, PARDEE, Circuit Judge, delivered the opinion of the court.

In directing a verdict for the defendants in error, the presiding judge assigned no specific reasons. The defense insisted upon in the court below, and now in this court, is based upon two propositions: First, that Act No. 5 of the Extra Session of the Louisiana Legislature in 1870 affords the only remedy to which the plaintiffs in error can resort for the enforcement of their decree, and said act prohibits the granting of a mandamus for the collection of judgments against the city of New Orleans; and, second, that since June 7, 1876, when it is claimed the debt now merged in the Jackson

decree was contracted, up to the present time, the city has had no unexercised power of taxation, and that the present rate authorized by law is twenty-two (22) mills on the dollar, all of which has been levied. Act No. 5 of the legislature of Louisiana of 1870 ought not to be permitted to defeat the relator's right to a mandamus, because, as held by the supreme court of the state in *Marchand v. City of New Orleans*, 37 La. Ann. 13, said act is not always controlling in the state courts, while the jurisdiction of the federal courts to issue writs of mandamus to enforce judgments is not derived from the state law, but *ex necessitate*, and from the fourteenth section of the judiciary act of 1789, now section 716 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 580]. See *Riggs v. Johnson Co.*, 6 Wall. 166, 18 L. Ed. 768; *Bath Co. v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743. Also, see *Railroad Co. v. Hart*, 114 U. S. 654, 661, et seq., 5 Sup. Ct. 1127, 29 L. Ed. 226. We do not understand that the defendants in error claim that since the drainage assessments were levied the authorized maximum limit of taxation on the part of the city of New Orleans has always been reached. In fact, the proof shows that in the years 1873, 1874, and 1875 the full limit was not reached. The contention that the debt of the city of New Orleans which the relator is now seeking to enforce originated in 1876 on the issuance of the drainage warrants to Van Norden, and not prior thereto, when the assessments for drainage were levied, is in direct conflict with the terms of the decree rendered in favor of Jackson, and also, with the opinion of the supreme court of the United States in *City of New Orleans v. Warner*, 175 U. S. 120, 144, 20 Sup. Ct. 44, 54, 44 L. Ed. 96, from which we quote as follows:

"The act of 1876 did not so much authorize an increase of the city's debt as a diversion of the warrants to the purchase of the drainage plant, instead of a payment to the transferee for work done. We think the amendment should receive a construction commensurate with the object intended to be accomplished, namely, the drainage of the city, whether such drainage were carried out by Van Norden or by the city itself, and that it should not be limited to such warrants as were to be issued for the work. The debt for the assessments had already been incurred and put in judgment, and the amendment was intended to recognize the existence of such debt, and to provide that the warrants issued in payment of the same should not be treated as within the scope of the amendment. Beyond this, however, these warrants were to be issued not only in payment of the drainage plant, but in settlement of Van Norden's claims against the city for damages connected with the failure of the city to carry out its contract with the canal company and Van Norden, which, in view of the fact that the drainage plant had been purchased by him for \$50,000, may be assumed to have been the greater part of the consideration. Indeed, it is open to serious consideration whether the reservation of drainage warrants in the constitutional amendment of 1874 was necessary, in view of the fact that the assessments had already been reduced to judgments against the city and the property owners, and that the further issue of drainage warrants was rather in the nature of the payment of a debt already incurred than the creation of a new obligation."

From this statement of the case it clearly appears that the answer of the defendants presents no sufficient reason why the mandamus prayed for should not issue, and that the same might well have been restricted to a general denial to put the relators on proof.



The plaintiffs in error have specifically assigned as errors many possible rulings of the court below necessitating a judgment as directed, but we think the third assignment, to wit:

"It appearing from the undisputed evidence that the judgment of relators was based on an extraordinary indebtedness of the city of New Orleans, to wit, assessments against the city of New Orleans, as quasi owner of the streets, squares, and other public places, for the cost of a local improvement, which the city could have incurred only by authority of the Special Laws of the State of Louisiana of 1858, 1859, and 1861, and 1871, under which said assessments were made, the court erred in holding that relators were not entitled to the levy of a special tax to pay said judgment,"

—Covers the case, and is well taken. The assessments for drainage against the city of New Orleans provided for by the drainage laws of 1858, 1859, and 1861 authorized an extraordinary indebtedness of the city, and, as neither those laws, nor any subsequent prior to 1876, when Jackson's warrants were issued, made any express provision for the payment of the indebtedness so authorized, it is properly and necessarily to be implied that the legislature intended to authorize the city of New Orleans, as occasion might require, to levy a special tax to discharge the indebtedness authorized. This view of the case is fully supported by *City of Quincy v. U. S.*, 113 U. S. 332, 5 Sup. Ct. 544, 28 L. Ed. 1001, and adjudged cases there cited. We quote:

"On behalf of the city it is contended that when these bonds were issued the act of 1863 prohibited any annual levy of taxes 'to pay the debts and meet the general expenses of the city' in excess of fifty cents on each one hundred dollars of the assessed value of its real and personal property. To this it may be replied, as was done in *City of Quincy v. Cooke*, 107 U. S. 549, 2 Sup. Ct. 614, 27 L. Ed. 549, in reference to similar language in the original charter of the city, that the act of 1863 related to debts and expenses incurred for ordinary municipal purposes, and not to indebtedness arising from railroad subscriptions, the authority to make which is not implied from any general grant of municipal power, but must be expressly conferred by statute. When the legislature in 1869 legalized and confirmed what the city council had previously done touching the subscription to the stock of the Mississippi and Missouri River Air Line Railroad Company, and thereby authorized bonds in payment thereof to be issued, it could not have been contemplated that indebtedness thus created would be met by such taxation as was permitted for ordinary municipal purposes. In giving authority to incur obligations for such extraordinary indebtedness, the legislature did not restrict its corporate authorities to the limit of taxation provided for ordinary debts and expenses. In *Association v. Topeka*, 20 Wall. 655, 660, 22 L. Ed. 455, the court, after observing that the validity of a contract, which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose, said: 'It is, therefore, to be inferred that, when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation, which repels such an inference.' So, in *U. S. v. City of New Orleans*, 98 U. S. 381, 393, 25 L. Ed. 225: 'When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation.' The same question arose in *Ralls Co. Ct. v. U. S.*, 105 U. S. 733, 735, 26 L. Ed. 1220, where it was said: 'It must be considered as settled in this court that, when authority is granted

by the legislative branch of the government to a municipality, or a subdivision of a state, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet at maturity the obligations to be incurred is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention.' Again: 'If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much express as the other.' See, also, *Parkersburg v. Brown*, 106 U. S. 487, 501, 27 L. Ed. 238."

The undisputed evidence shows that the city of New Orleans is indebted to the drainage fund for drainage assessments made in 1861 and subsequently on the streets, squares, and other public places in an amount sufficient to pay the relator's judgment, and that the city of New Orleans still possesses unused taxing power of 5 mills for each of the years 1862 and 1863, and 1.79 of a mill for the year 1873, 1¼ mills for the year 1874, and 2½ mills for the year 1879, all of which could be used for the payment of relators' judgment. These facts are made the basis of the fifth assignment of error, and appeal strongly in favor of relief to the relators; but we do not think it necessary to rule thereon, as maintaining the third assignment of error will give the relators plenary relief.

The judgment of the circuit court is reversed, and the cause remanded, with instructions to grant a new trial.

McCORMICK, Circuit Judge, dissents.

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TEXAS & P. RY. CO. v. REAGAN et al.

(Circuit Court of Appeals, Fifth Circuit. December 2, 1902.)

No. 1,178.

1 DEPOSITIONS DE BENE ESSE—USE AT TRIAL—ABSENCE OF WITNESSES—PROOF.

Rev. St. § 865 [U. S. Comp. St 1901, p. 663], providing that unless it appears that a witness is dead or gone out of the United States or to a greater distance than 100 miles from where the court is sitting, his deposition shall not be used in the cause, does not prevent the use of the deposition of a witness in a federal court sitting in Texas, which was taken at the witness' place of residence in Minnesota, without proof that the witness was not within 100 miles of the court, since it would be presumed that he continued to reside where he was at the time the deposition was taken.

2. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROAD FIREMAN—CONTRIBUTORY NEGLIGENCE.

Where, in an action for the death of a railroad fireman occurring in a collision, defendant charged that plaintiff's deceased was guilty of contributory negligence in failing to give the engineer on his engine a proper signal, and that such failure caused the collision, deceased was thereby charged with affirmative negligence, and the burden of proof thereof was on the defendant.

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† 1. See Depositions, vol. 16, Cent. Dig. §§ 247, 250.

**In Error to the Circuit Court of the United States for the Northern District of Texas.**

Mrs. M. M. Reagan brought this suit, for herself as widow and her minor children, for damage caused by the killing of her husband, Martin Reagan, a fireman in the employ of the Texas & Pacific Railway Company, who was killed in a wreck on said railway alleged to have been caused by the negligence of one Price, an engineer handling the engine on which Reagan was firing. Two freight trains had orders to meet and pass at Hetz. The west-bound train had arrived at Hetz, and was going in on the side track. The east-bound train came in without being under control, and ran into the rear cars of the west-bound train before it was off the main track. In this collision Reagan, who was fireman on the east-bound train, was killed.

The defendant, by amended answer, pleaded the contributory negligence of Reagan, as follows: "That the deceased, husband of the plaintiff, was guilty of contributory negligence which proximately contributed to the death, and without which it would not have occurred, in this: The train which was meeting the train on which he was firing and the one run into was on his side of the engine, and it was his duty to receive signals from such train or its crew, and give them to the engineer. He gave the engineer on his engine a signal to go on after the two engines had passed each other. Acting and relying on this signal as being correct and proper, the engineer, Price, went on, and the two trains ran together or collided."

On the trial the plaintiffs offered in evidence to support their case the deposition of M. J. Daily, which had been taken at Ft. Worth, Tex., in December, 1901, *de bene esse*. The witness was going beyond the jurisdiction of the court. To the reading of this deposition by the plaintiffs in evidence the defendant objected for the reason that it was taken *de bene esse*, and some time before the trial, and the plaintiffs had not and did not show to the court that the said witness M. J. Daily was not, at the time his deposition was offered in evidence, within 100 miles of the court where the trial was being had, and no reason was shown why he could not be produced in court to testify orally; which objection the court overruled, and the deposition was by the plaintiffs read in evidence; to all of which the defendant excepted, and tendered a bill of exceptions, which was signed and made a part of the record. The plaintiffs' attorney stated that he did not know where the witness Daily was then, and J. W. Ward, superintendent of the Rio Grande Division of the Texas & Pacific Railway, stated: "I do not know whether I can place M. J. Daily or not. At the time of this accident he lived at Big Springs. I don't know when he went from there to Two Harbors, Minn." The court remarked: "If it be shown that at the time the deposition was taken he lived in Minnesota I will overrule the objection. The court rules that it is not necessary to show affirmatively that the witness does not live within 100 miles of the court." The deposition showed that the deponent resided at Two Harbors, Minn., and that at the time of taking he was temporarily in Ft. Worth, Tex., on his road to Needles, Cal.; further, that by occupation he was a locomotive fireman who had not in the past confined his work to any one railroad, but had traveled about; also, on the trial, there was evidence offered by the railway company tending to prove the defense of contributory negligence. The bill of exceptions does not show that the plaintiff offered any evidence directly tending to show that at the time of the accident the deceased, Reagan, was exercising due care.

In his charge to the jury the court, among other things, charged as follows: "The burden of proving the deceased was guilty of contributory negligence rests upon the defendant, and unless the defendant has shown by a preponderance or greater weight of evidence that the deceased was guilty of negligence which contributed to the injury resulting in his death then the defendant would fail on its plea of contributory negligence,"—to which charge the defendant excepted in open court before the jury left the box. From an adverse judgment the defendant below sues out this writ of error.

T. J. Freeman and B. G. Bidwell, for plaintiff in error.  
S. H. Cowan, for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The first assignment of error is based on the admission in evidence of Daily's deposition taken *de bene esse*. The objection was that at the time of offering the plaintiff did not show that the witness was not within 100 miles of the place where the court was held, or, if within the 100 miles, was unable to attend. The statute authorizing the taking of depositions *de bene esse* provides as follows:

"But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. Rev. St. § 865 [U. S. Comp. St. 1901, p. 663]."

As far back as *Insurance Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243, it was held that where the witness resided over 100 miles from the court at the time of taking the deposition the inhibition of the statute did not apply, the witness being considered beyond a compulsory attendance.

In *Whitford v. Clark Co.*, 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500, the supreme court cite *Insurance Co. v. Southgate*, supra, with approval, and lay down the rule as follows:

"It thus appears to have been established at a very early date that depositions taken *de bene esse* could not be used in any case at the trial if the presence of the witness himself was actually attainable, and the party offering the deposition knew it or ought to have known it. If the witness lives more than one hundred miles from the place of trial, no subpoena need be issued to secure his compulsory attendance. So, too, if he lived more than one hundred miles away when his deposition was taken it will be presumed that he continued to live there at the time of the trial, and no further proof on that subject need be furnished by the party offering the deposition, unless this presumption shall be overcome by proof from the other side."

When Daily's deposition was taken he lived at Two Harbors, Minn., more than 100 miles from the court. There was no presumption nor proof that he had since come within 100 miles of the court.

The second assignment of error complains of the charge of the trial judge to the effect that the burden of proving that the deceased was guilty of contributory negligence was upon the defendant.

If there is error in this charge, then it seems clear that the defendant below should have asked for an instructed verdict, because the issue of contributory negligence was in the case, and there was no evidence in the case to show that the deceased was not guilty of contributory negligence or even in the exercise of due care.

Counsel for the plaintiff in error conceded the general rule in the United States courts that the burden of proof in cases involving contributory negligence to be as given by the judge in this case, but he claims that there are exceptions to the rule just as well established. He cites *Railroad Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, which furnishes no exception to the rule, but correctly holds that the burden of proving direct negligence on the part of the

railroad company's employ  s was upon the plaintiff. He also cites *Corcoran v. Railroad Co.*, 133 Mass. 507; *Riley v. Railroad Co.*, 135 Mass. 292; *Railway Co. v. Crowder*, 63 Tex. 502; *Id.*, 76 Tex. 499, 13 S. W. 381; *McCray v. Railway Co.*, 89 Tex. 168, 34 S. W. 95; *Railway Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272; and *Railway Co. v. Hester*, 72 Tex. 40, 11 S. W. 1041.

An examination of these cases will show that, in the particular case then in hand, it was held that an employ   seeking to recover damages against the railway company was required to prove that at the time of the injury he was in the exercise of due care; and in relation to this it may be noticed that in *Riley v. Railroad Co.*, *supra*, it was held that the plaintiff could be excused from proving that the deceased was in the exercise of due care where death was instantaneous. The rule declared in *Railway Co. v. Murphy*, *supra*, is:

"It is often stated that the plaintiff must show that the injury was caused by the negligence of the defendant, without any fault or negligence on his part. It would be more correct, it is thought, to say that the plaintiff must show that the injury of which he complains was produced by the negligent acts of the defendant, under such circumstances as did not develop any negligence on his part, contributing to his injury. In the absence of proof, his negligence would not be presumed."

However the rule may be with regard to proving due care, we are of opinion that in this case the specific contributory negligence which was charged to have proximately contributed to the death of the deceased, and without which it would not have occurred, was active negligence, to wit, in giving a wrong signal. This issue was presented by the defendant, and it was not to be expected, nor perhaps possible in the nature of things, that the plaintiff could prove a negative for the deceased whose death was instantaneous. We think there can be no doubt that, under the circumstances and pleadings in this case, the charge complained of was in all respects correct.

The judgment of the circuit court is affirmed.

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EBNER et al. v. ZIMMERLY.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 796.

1. DISMISSAL WITHOUT PREJUDICE—DISCRETION OF COURT.

The propriety of permitting a plaintiff to dismiss his bill without prejudice is a matter within the discretion of the court, which discretion is to be exercised with reference to the rights of both parties.

2. SAME—APPEAL—ABSENCE OF EVIDENCE.

Alaska Code Civ. Proc.    378, provides that where it is determined that plaintiff is entitled to no part of the relief demanded, on account of a failure of proof, the dismissal of his action may be without prejudice. *Held*, that where an action was so dismissed without prejudice for a failure of proof, and on appeal none of the evidence was contained in the record, the circuit court of appeals could not say that the dismissal without prejudice was an abuse of the court's discretion.

Appeal from the District Court of the United States for the District of Alaska.

Robt. A. Friedrich, R. W. Jennings, and T. J. Donohoe, for appellants.

J. F. Maloney, W. E. Crews, and Maloney & Cobb, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The complainant, in her bill of complaint, alleged, among other things, that she was the owner of 22,333 shares of the capital stock of the Windham Bay Gold Mining Company, a corporation; that she delivered the said shares of stock to William M. Ebner, one of the defendants herein, with the request that he should sell the same in the Eastern markets; that Ebner sold the stock for about the sum of \$13,000; that of said sum there was paid into the treasury of the corporation the sum of \$10,000, without consideration; that certain false representations were made to her by Ebner, whereby she was induced to accept from him the sum of \$1,000 for said stock. The prayer is for judgment for the full amount realized by Ebner for the sale of the stock, less the sum of \$1,000. In the answer of Ebner it is alleged that one A. S. Lovett was the authorized agent of the plaintiff to sell said stock; that Lovett sold the stock to him for \$1,000. The answer of the corporation denies the allegations of the complaint. The case was tried upon these issues. The court, although the suit was considered to be in equity, in the nature of an accounting, at the request of plaintiff called a jury, and submitted certain questions for determination,—among others, the following:

"(6) Did the said Arthur S. Lovett sell the said stock in controversy to the said William M. Ebner? If yea, when, and for what price? Answer. Yes; Oct. 31, 1898, for one thousand (\$1,000) dollars. (7) If you answer that said stock was sold by said Lovett to said Ebner, has the purchase price therefor been paid, and, if yea, when and to whom? Answer. Yes; one-half to A. S. Lovett, October 31, 1898, and the remaining one-half to Mrs. A. S. Lovett, on April 4, 1899."

The findings of the jury were filed May 15, 1901. The defendants moved the court to make and enter its findings and conclusions of law in accordance with the findings of the jury, and to enter a decree dismissing the bill. This motion was denied by the court. But the court, at the request of defendants, did make certain specific findings,—among others, as follows:

"The court finds that the evidence in the case, all considered, does not establish the fact that Anna L. Zimmerly on the 31st of October, 1898, transferred and delivered said stock to the defendant William M. Ebner for a consideration of one thousand dollars, or any other consideration; \* \* \* that the evidence, taken as a whole, is insufficient to establish the fact that William M. Ebner became the owner of the stock in question on the 31st day of October, 1898, or at any other time."

On May 21, 1901, the plaintiff moved to dismiss the suit without prejudice to a new action. This motion was also denied by the court. On May 28th the court considered the motion of the plaintiff, previously made, to set aside the findings of the jury, and the court being of opinion—

"That the findings of the said jury are not sustained by the weight of the evidence," and that "the matters set forth and stated in the plaintiff's com-

plaint are not supported by sufficient evidence, and that there is a failure of proof in that behalf on the part of the plaintiff, it is therefore ordered, adjudged, and decreed that the plaintiff's said bill of complaint be, and is, dismissed; that the plaintiff pay all the costs of said action, and that the defendant may have execution against the said plaintiff for his costs in this behalf expended; that the said complaint is dismissed without prejudice, and plaintiff may bring a new action in this behalf if she so elect."

No part of the evidence submitted to the jury is contained in the record. There is but one assignment of error. It reads as follows:

"The court erred in its decree of dismissal in so much and in so far only as said decree was for a dismissal 'without prejudice.' This suit was heard on complaint, answer, reply, and evidence, and the addition to the decree of permission to bring another suit was error."

The propriety of permitting a plaintiff to dismiss his bill is a matter within the discretion of the court, which discretion is to be exercised with reference to the rights of both parties. Under the English chancery practice in equity cases, the rule was not to allow the plaintiff, after a decree was rendered establishing the rights of the defendant, to dismiss his bill without the consent of the defendant. But the plaintiff had the right to dismiss his bill if the defendant was left in the same position as he would have stood if the suit had not been instituted. *Daniell, Ch. Prac. 793; Cooper v. Lewis, 2 Phil. Ch. 181.* This general rule is referred to with approval in *Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 713, 3 Sup. Ct. 594, 27 L. Ed. 1081,* and a large number of authorities, both English and American, are there cited. This general rule is again discussed in *Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 145, 18 Sup. Ct. 808, 43 L. Ed. 108,* wherein the Pullman Company, complainant in the original suit, insisted that it had the right to dismiss the suit at its own costs before any decree was obtained therein, and the court said:

"Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant."

After referring to *Chicago & A. R. Co. v. Union Rolling Mill Co., supra,* and other authorities, the court said:

"From these cases we gather that there must be some plain, legal prejudice to defendant, to authorize a denial of the motion to discontinue. Such prejudice must be other than the mere prospect of future litigation, rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion, may deny the application. *Stevens v. The Railroads (C. C.) 4 Fed. 97, 105.* Unless there is an obvious violation of a fundamental rule of a court of equity, or an abuse of discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here."

In the present case the court acted under the provisions of section 378 of the Alaska Code of Civil Procedure, which reads as follows:

"Whenever upon the trial it is determined that the plaintiff is not entitled to the relief claimed, or any part thereof, a judgment shall be given dismissing the action, and such judgment shall have the effect to bar another action for the same cause or any part thereof, unless such determination be on

account of a failure of proof on the part of the plaintiff, in which case the court may, on motion of such plaintiff, give such judgment without prejudice to another action by the plaintiff for the same cause or any part thereof." 31 Stat. 396.

This section is taken from the Oregon Code (section 403). Under its provisions the question at issue here is left to the sound discretion of the court in all cases like the present, where there is "a failure of proof on the part of the plaintiff," and in such cases this court will not review the discretion of the court unless it clearly appears that it has been abused. As no evidence submitted at the trial is contained in the record, it cannot be claimed that the court abused its discretion in the premises.

The decree of the district court is affirmed, with costs.

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JESSE D. CARR LAND & LIVE STOCK CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 734.

1. PUBLIC LANDS—LAND OFFICE—SUBSTITUTE FOR DESTROYED RECORDS—ADMISSION IN EVIDENCE—CERTIFICATE.

Where the records of a local land office are burned, and a book is prepared by the commissioner of the general land office as a substitute for the original tract book thus destroyed, and is transmitted by him in the regular course of his official duty to the register and receiver of the local office for use in disposing of the public lands in that district, the book is an official book, and is admissible in evidence as such, and does not have to be certified by the commissioner, as provided by Rev. St. §§ 891, 2469 [U. S. Comp. St. 1901, pp. 672, 1557], for admission in evidence of copies of records, books, or papers from his office.

2. SAME—EVIDENCE—TRACT BOOK.

The tract book of a local land office is prima facie evidence that the lands therein shown to be public lands are such.

Appeal from the Circuit Court of the United States for the District of Oregon.

Chickering & Gregory, J. C. Moreland, and C. A. Cogswell, for appellant.

John H. Hall, U. S. Atty.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

DE HAVEN, District Judge. This suit was instituted by the United States, under the provisions of the act of February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands." 23 Stat. p. 321 [U. S. Comp. St. 1901, p. 1524]. The bill of complaint alleges that defendant constructed and maintains a fence, which, with natural barriers, incloses about 84,335 acres of the public lands of the United States, situate in the states of Oregon and California, and particularly described, to which, when such inclosure was con-



structed, defendant had and "has no claim or color of title whatever, or any asserted right thereto, by or under any claim made in good faith with a view to entry thereof" under the laws of the United States. The bill was filed in the circuit court of the United States for the district of Oregon, and prays for an injunction and for a summary destruction of such fence. The defendant in its answer denies that "any inclosure made by the defendant incloses lands described in the bill of complaint or any portion thereof, or that said lands are the lands of the United States, or that this defendant has no claim or interest therein." The complainant introduced evidence at the trial in support of the allegations of the bill of complaint. The defendant declined to offer any evidence, and a decree was entered in favor of the United States for the relief prayed for in the bill. From this decree the defendant has appealed to this court.

1. The appellant insists that the evidence shows that the fence described in the bill formed, in connection with a division fence not referred to therein, two separate inclosures, one of which is wholly within the state of California; and it is claimed that the circuit court of Oregon had no jurisdiction to decree the destruction of that portion of the fence used in making the inclosure situate in California. In answer to this contention it will be sufficient to say that whether the land described in the bill was so fenced as to constitute two separate inclosures, or only one general inclosure, which for the convenience of appellant in separating stock was divided by a fence having gates and openings therein, was a question of fact; and we cannot say, from the evidence appearing in the record, that the court erred in finding that there was only one inclosure, which included all of the lands described in the bill.

2. The ground upon which the appellant most strongly relies for a reversal of the decree appealed from is that the court erred in refusing to strike out the evidence of the witness Brattain. This witness was register of the United States land office at Lakeview, Or., and he was the only person who testified that the land described in the complaint, situate in the state of Oregon, was vacant public land of the United States, and his testimony was based wholly upon knowledge derived from a book which he had before him at the time of giving his evidence. This book was a tract book in use in the United States land office at Lakeview, Or., and purported to show what portions of the land of the various townships named therein is public land of the United States. It appears that the records of the United States land office at Lakeview were destroyed by fire, and the book in question was subsequently prepared under the direction of the commissioner of the general land office as a substitute for the original tract book thus destroyed, and was transmitted by him in the regular course of his official duty to the register and receiver of the local land office for use in disposing of the public lands in that district. It is not disputed that duplicates of all entries made in the local land offices of the United States, and a copy of the record showing what action has been taken thereon at each office, are required to be forwarded to the general land office, and from such

data a duplicate of the original tract book in use in any local office can be made at any time. This particular book which the witness had before him was not, however, certified by the commissioner of the general land office to be a correct copy of any record or paper on file in his office, and upon this ground the appellant insists that the witness should not have been allowed to read therefrom. To support this contention appellant relies upon section 891 of the Revised Statutes [U. S. Comp. St. 1901, p. 672], which provides:

"Copies of any records, books, or papers in the general land office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. \* \* \*"

And also upon section 2469 of the Revised Statutes [U. S. Comp. St. 1901, p. 1557], which is as follows:

"The commissioner of the general land office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office, as may be applied for, to be used in evidence in courts of justice."

These sections do not in our opinion affect the question here presented. The book from which the witness testified, and which was in effect received in evidence, was in our opinion an official book, and admissible as such. As before stated, it was made under the direction of the commissioner of the general land office. That officer had before him all of the data necessary for its preparation, and it was his official duty to see that, as prepared, it was a true copy of the records of his office. The presumption is that this duty was properly performed, and it was not necessary for him to attach to the book a certificate of its correctness in order to justify its use by the officers of the local land office and make it admissible in evidence as an official book. Its character as such was sufficiently established by proof that it was in use as a tract book in the local land office, that it was made under the direction of the commissioner of the general land office, and had been transmitted by him to the register and receiver for their official use. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, sustains this conclusion. In that case, under the ruling of the trial court, a book used in the office of the county recorder was received in evidence for the purpose of proving the location of the mining claim, title to which was in controversy. It was urged in the supreme court that the book was not properly authenticated, and for that reason not admissible in evidence. In passing upon that question, the court said:

"It was one of the books of record kept in the proper office, and transmitted as such from one officer to another. The original recording appears to have been in a temporary book, and, at a very early date in the history of the county, transcribed by the deputy recorder, under the general supervision of his principal, into the book which has since been recognized as part of the public records of the office. It was sufficiently shown that the original book had been lost or destroyed. This we think enough to justify the use of the present book in its place. Having been recognized as part of the official records of the county almost from the time of the organization

of civil government in the territory, it would be dangerous to exclude it now without any proof of fraud or mistake."

It may be stated in conclusion that the book, being an official tract book, was prima facie evidence that the lands therein shown to be public lands were in fact such. *Galt v. Galloway*, 4 Pet. 332, 7 L. Ed. 876; *Bly v. U. S.*, 4 Dill. 464, Fed. Cas. No. 1,581.

3. The appellant's motion to strike from the bill of costs the amount claimed by the appellee for mileage and fees of certain witnesses, who came from without the state and more than 100 miles from the place of trial, was properly denied. *U. S. v. Sanborn* (C. C.) 28 Fed. 299.

There is nothing in the record which entitles the appellant to a reversal or modification of the decree appealed from. Decree affirmed.

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WESTERVELT et al. v. LIBRARY BUREAU.

(Circuit Court of Appeals, First Circuit. November 13, 1902.)

No. 435.

**1. EQUITY PLEADING—OVERRULING OF PLEA—RIGHT TO ANSWER UNDER RULES.**

Under the decisions of the supreme court, applying equity rule 34, although it is not in terms construed or explained, the rule applies to a defendant desiring to answer after an issue of fact, joined on a plea, has been determined against him.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

See 114 Fed. 487.

Thomas A. Connolly, for appellants.

Nathan Heard, for appellee.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

PUTNAM, J. This is a bill in equity, alleging an infringement of letters patent for an invention. The bill being in the common form, it was, of course, subject to an answer setting up the various usual defenses to such suits. The respondent, however, pleaded priority of invention by the person named in the plea. A replication was duly filed and an issue of fact was tried by the court, and decided in favor of the complainants. Thereupon the defendant filed an answer, setting up numerous defenses. The answer was filed without leave of court first obtained therefor. Thereupon the complainants moved that it be stricken from the files. This motion was overruled, and an order made that the "answer be allowed to stand pursuant to equity rules 33 and 34." Of course, the order had the same effect by retroaction as though the answer had been filed by special leave. Subsequently, the complainants, insisting that the court was not justified in its refusal to strike out the answer, failed to file any replica-

tion or to take other action, and the bill was thereupon dismissed, the dismissal being expressed as pursuant to equity rule 66. The complainants appealed to us.

According to the ordinary equity practice, after a plea to the merits is disproved on an issue of fact, the respondent can set up no further defense, and a decree will be made against him. Adams, Eq. (8th Ed.) \*342. Of course, this does not deprive a complainant of his right to insist on an answer so far as he may desire to obtain discovery thereby. In view of the liberal rules by virtue of which equity ordinarily adjusts itself to meet unexpected contingencies, it may well be supposed that, even under the ordinary practice, and independently of any general orders, chancery might relieve a respondent, and permit him to answer, when justice shows clearly that such leave should be granted; although we find no instance thereof. However, it is not necessary to determine this particular proposition, because the practice in this respect, so far as the federal courts are concerned, is governed by the rules already referred to. Rule 33 provides that if, on an issue, a plea is determined for the defendant, it shall avail him only as far as in law and equity it ought to avail him. In this case the respondent set up what was a complete bar to the bill, and what would have entitled him to a decree if the issue had been decided in his favor. Rule 34, after making provision for costs, which we need not explain, directs that, "upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill or so much thereof as is covered by the plea or demurrer."

In the strict language of equity practice, overruling a plea relates only to an overruling on the argument of a demurrer, or something else involving mere questions of law; while, if an issue of fact is made, the plea is ordinarily said to be sustained or disproved. Rule 34, as originally adopted in 1822, appeared as rule 20, 7 Wheat. x. Apparently, its only purpose then was to prohibit another plea, or a demurrer following a plea. It was re-enacted in 1842 (1 How. lii), and there brought into its present form.

1 Bates, Fed. Eq. Proc. 1901, p. 360, affirms that rule 33 has changed the practice of the federal courts from the old chancery practice; but this rule relates only to instances where the complainant has hazarded his case on an issue raised by a plea, and has lost. The author proceeds, at page 361, to discuss the effect of falsifying a plea, and he gives the English chancery practice without any reference to rule 34. In this connection he makes no reference to the decisions of the supreme court, which we must accept as decisive of the construction of this rule. Therefore we can give no weight to his discussion, so far as the question now before us is concerned.

It is true that rule 34 uses the expression "in point of law or fact" in connection with its first sentence, relative to costs; but we find in it nothing which clearly requires us to hold that it authorized one issue of fact to be tried after another. It, however, is capable of a broad construction; and, although we fail to find anything in any opinion of the supreme court in explanation of its purpose, or of the amendments made in 1842, yet we are compelled to accept the action

of that court in *Farley v. Kittson*, 120 U. S. 303, 318, 7 Sup. Ct. 534, 30 L. Ed. 684, and in *Dalzell v. Manufacturing Co.*, 149 U. S. 315, 326, 327, 13 Sup. Ct. 886, 37 L. Ed. 749, as conclusively sustaining the order of the circuit court now appealed against.

The attempted explanations by the complainants of these decisions are in no way satisfactory; especially their suggestion that the judgments entered by the supreme court in the cases cited were so entered because, possibly, the complainants desired discovery, so that, therefore, they were entered on their request. Neither can the complainants derive any help from *Kennedy v. Creswell*, 101 U. S. 641, 25 L. Ed. 1075, which they urge on us so strongly, because that case originated in the courts of the District of Columbia, to which the equity rules of the supreme court do not apply. The discussion in that opinion is with reference to the ordinary equity practice, and without any allusion to rule 34. It is plain beyond argument that in the two cases above cited the supreme court, without hesitation, although, it is true, without explanation, interpreted rule 34 as the circuit court interpreted it.

The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellee.

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JUDD et al. v. NEW YORK & T. S. S. CO.

(Circuit Court of Appeals, Third Circuit. October 18, 1902.)

No. 18.

Petition for Rehearing. Granted.

For former opinion, see 117 Fed. 206.

PER CURIAM. It is, this 18th day of October, 1902, ordered that the said petition for a rehearing of this cause upon points covered by the assignments of error other than the first be granted, and the court will hereafter fix a time when the same may be heard.

## PEERLESS RUBBER MFG. CO. v. WHITE.

(Circuit Court of Appeals, Third Circuit. September 22, 1902.)

No. 16.

## 1. PATENTS—INFRINGEMENT—PACKING.

The White patent, No. 337,100, for a packing consisting of a tubular, practically nonelastic core, capable of being bent or flattened, covered with an elastic material, described in claim 2 as a tubular lead core encased in a tube of rubber, requires, to accomplish the purposes of the invention as set forth in the specification, that the core should extend through the entire length of the inclosing tube of rubber; and it is not infringed by the use of a tubular lead dowel, only two inches in length, to unite the ends of a tubular rubber or other elastic packing to form a gasket.

Acheson, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Ernest Hopkinson and Livingston Gifford, for appellant.

Marshall A. Christy, for appellee.

Before ACHESON and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from a final decree of the circuit court for the western district of Pennsylvania (111 Fed. 190), finding infringement by the Peerless Rubber Manufacturing Company, the appellant, of letters patent of the United States No. 337,100, granted to William White, Jr., the appellee, and dated March 2, 1886. The patent in suit is for "Improvements in Packings" and contains two claims, both of which are alleged to have been infringed. The description of the patent is as follows:

"This invention has relation to packings for pistons, valves, pipes, and for other uses to which packings are usually or may be applied, and has for its object the provision of a novel form of packing which shall possess all the requisites of an air-tight, fluid-tight, or liquid-tight seal, and which shall be susceptible of being fitted snugly into all positions or seats and of retaining its shape and position. The value of both lead and india-rubber as packing materials is well understood and appreciated, and these materials have been combined in various ways for the purpose of making packings for vapors and liquids. My purpose is to employ these materials or their substantial equivalents under novel conditions and to better advantage than they have been heretofore used. My object in employing the lead is to provide a filling material or core which may be bent, flattened, or compressed into shapes corresponding to the seat or recess into which the packing is to be fitted, while I use the rubber as a covering or casing, and distinctly and specifically as a seal, which will be forced and held in place by the lead core. My invention as distinguished from other packings composed of the same materials consists, essentially, of a core made of lead or other material which may be bent or compressed, and which is practically non-elastic, such core being in the form of a tube, so that it may be readily flattened or spread, and a covering or casing of rubber or other elastic material possessing qualities which especially adapt it to use as a close and effective seal. The core and casing may be formed into a ring, or they may be of any desired shape, according to the specific use to which the packing is to be put. In the accompanying drawings, Figure 1 is a sectional view of a packing-ring; and Fig. 2, a side

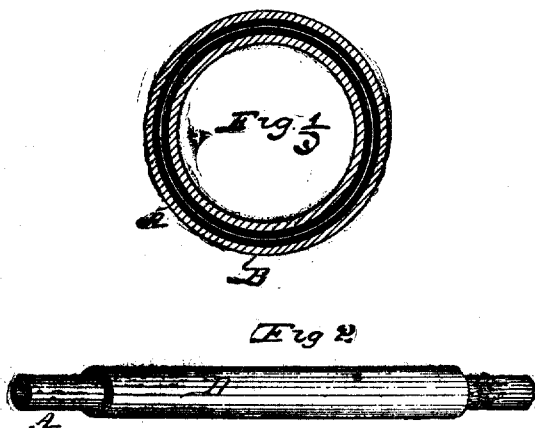
view of a form, which may be bent to any required shape. A designates the lead core, of any suitable dimensions, but of tubular form; and B is the tubular casing, which consists of india-rubber—preferably pure rubber. When the packing is manufactured in the ring shape shown in Fig. 1, the ring will be unbroken, so as to avoid seams. A packing made in conformity with my invention possesses obvious advantages. It may be packed or placed in positions for which other or elastic packings are not adapted and where a perfectly-tight packing is required. When subjected to the pressure of gland sections or caps, the lead core is spread or flattened, and thus caused to conform to the shape or surface upon or against which it rests while the rubber is closely pressed upon the joints, where it remains, held permanently and tightly in place by the core."

The claims are as follows:

"1. As a new article of manufacture, a packing consisting, essentially, of a tubular practically non-elastic core, capable of being bent or flattened and a casing or covering of elastic material adapted to constitute a seal, substantially as described.

"2. As a new article of manufacture, a packing consisting of a tubular lead core incased in a tube of rubber, substantially as described."

The following drawings accompany the specification:



The alleged infringing device is made under and pursuant to letters patent of the United States No. 462,278, granted to Edward L. Perry, for "Improvements in Steam-Joint" packing, and dated November 3, 1891. The description is as follows:

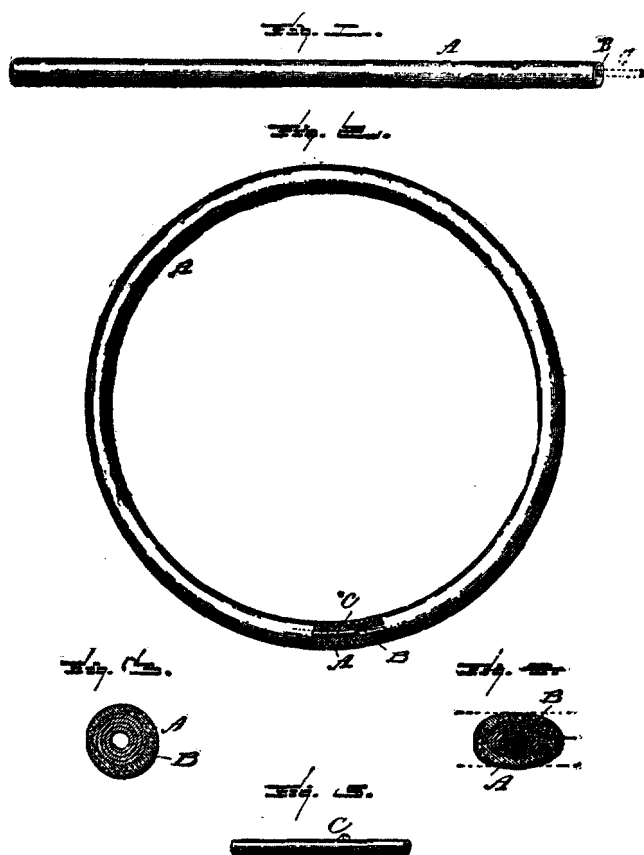
"Figure 1 of the drawings represents a view of my improved steam-joint packing previous to the ends being connected together by the tubular coupling. Fig. 2 represents a plan view, partly in section, showing the two ends of the packing connected together; Fig. 3, a cross-section through the packing; Fig. 4, a similar view showing the packing and coupling-tube compressed; Fig. 5, a detailed view in perspective of the coupling-tube. The present invention has relation to that class of steam-packing or gaskets for hand-holes, man-holes, cylinder-heads, and in other places where a packing of this description would be found useful; and it consists in a packing constructed substantially as shown in the drawings, and hereinafter described and claimed. In the accompanying drawings, A represents the outer covering, of rubber compound or other suitable elastic material, and B the core of cotton-duck or other well-known woven fabrics wound in layers to form the core of the desired size. It is necessary for the more perfect construction of the packing and to render

it sufficiently strong to resist the pressure of the steam and prevent blowing out to form the core of a woven fabric which possesses the requisite strength and durability for the purpose intended. The packing above described may be round, oval, square, or of any other preferred shape in cross-section, and any diameter as found most desirable, such changes coming within ordinary mechanical skill, and I therefore reserve the right to make them without departing from the principle of my invention. In order to secure the compression of the packing more readily, the core B is made hollow, which also provides means for attaching the ends of the hollow coupling-tube C to join the two ends of the packing together, after which the joint thus made is covered with a piece of suitable material. The coupling-tube is preferably of metal, but other material may be used, and it is made hollow to enable it to be compressed with the packing. Although it is considered materially advantageous to have the coupling in the form of a hollow tube, a solid coupling may be used, but possibly not with as good results."

The claim of this patent is as follows:

"A steam-joint packing consisting of a hollow core of cotton-duck or other woven fabric, a covering of elastic material, and a coupling the ends of which enter the ends of the packing, substantially as and for the purpose specified."

The drawings of the Perry patent are as follows:





It is not contended that the appellant's packing, aside from the employment of the lead coupling tube, constitutes any invasion of the rights of the appellee under the patent in suit. The appellant's tubing not only is essentially different in construction and function from that of the appellee, but was well known to the public for years before application was made for the patent in suit. Prior to the hearing in the court below counsel stipulated as follows:

"It is hereby stipulated and agreed, as matter of record in this case, for use on the final or other hearing thereof, that prior to December 17, 1883, rubber-insertion tubing—that is, tubing composed of adhering layers of rubber, and of duck, cotton cloth or like fibrous material, the outer layer of said tubing being rubber—has been publicly used by a number of steam fitters and engineers in the City of New Haven, Conn., as gaskets or packing, for packing manholes and handholes of boilers and steam-pipe connections."

Hence it is evident that, aside from the tubular lead couplings employed or furnished by the appellant for the purpose of joining the ends of its packing to form a gasket, the appellant had full right to make, use and sell such packing for steam joints, pistons, valves, pipes, and other similar uses, and cannot be held an infringer on account of the exercise of that right. But it is contended that the appellant's lead coupling tube is a lead core within the scope of the claims of the patent in suit, and that the appellant, in making, using or selling it in connection with its rubber and cotton-duck packing, violated both of the claims, in that it together with the portion of the tubing in which it is inserted, and to the extent to which it is so inserted, is, first, a "tubular practically non-elastic core capable of being bent or flattened and a casing or covering of elastic material adapted to constitute a seal, substantially as described," and, secondly, a "tubular lead core incased in a tube of rubber, substantially as described." In order to determine the weight, if any, to which this contention is entitled, we proceed in the first place to ascertain the essential elements and principle of the invention covered by the patent in suit. The patentee did not seek to secure a monopoly of each and every combination of lead and rubber which might be used for packings or gaskets, but only the combination of those materials or their equivalents in a certain form and disposition described and claimed in the patent. He says:

"The value of both lead and india-rubber as packing materials is well understood and appreciated, and these materials have been combined in various ways for the purpose of making packings for vapors and liquids. My purpose is to employ these materials or their substantial equivalents under novel conditions and to better advantage than they have been heretofore used."

He then states his object in employing lead and rubber and the essence of his invention as follows:

"My object in employing the lead is to provide a filling material or core which may be bent, flattened, or compressed into shapes corresponding to the seat or recess into which the packing is to be fitted, while I use the rubber as a covering or casing, and distinctly and specifically as a seal, which will be forced and held in place by the lead core. My invention as distinguished from other packings composed of the same materials consists, essentially, of a core made of lead or other material which may be bent or compressed, and which is practically non-elastic, such core being in the form of a tube, so that it may be readily flattened or spread, and a covering or casing of rubber or

other elastic material possessing qualities which especially adapt it to use as a close and effective seal."

He further says:

"When subjected to the pressure of gland sections or caps, the lead core is spread or flattened, and thus caused to conform to the shape or surface upon or against which it rests while the rubber is closely pressed upon the joints, where it remains, held permanently and tightly in place by the core."

Careful examination of the entire specification has satisfied us that the claims read in the light of the description contemplate and require that in any given length of the appellee's packing, when used for the purpose for which it was designed, the tubular core of lead or other "practically non-elastic" material, and the "tube of rubber" or "casing or covering of elastic material" shall be co-extensive with each other, and that all the lead core entering into such length of packing should be unitary or entire, each portion thereof being integral with every other portion. This conclusion, we think, naturally and necessarily flows from the language of the patent in suit, and the manifest design of the patentee as therein disclosed. It also receives strong support from the testimony of the expert witnesses on both sides. Foster on behalf of the appellant says:

"The patentee proposes to make a packing consisting throughout its entire extent of two parts, to wit: 1. 'A filling material or core'—such core being in the form of a tube. 2. 'A covering or casing of rubber or other elastic material,' and tubular so as to enclose the core and preferably of pure rubber. I understand that the entire packing from end to end or throughout its length, consists thus of the tubular metallic core and the tubular rubber casing. \* \* \* The statement as to the character of the core and the covering aptly apply to an article consisting throughout its entire extent of a core extending throughout the length of the covering, and a covering extending the length of the core. \* \* \* The specification sets forth the advantages of a packing thus constructed, that it may be formed into a ring or of any desired shape, according to the specific use to which the packing is to be put; that it may be packed or placed and will retain its shape in all positions, for which other or elastic packings are not adapted, and that the conjoint action of the lead core and rubber casing is such that the rubber is closely pressed upon the joints where it remains, while the core holds the rubber permanently and tightly in place."

Spencer on behalf of the appellee says:

"The packing set forth in said patent consists of two essential elements, namely, a flexible, compressible, metallic core of tubular form and an external elastic tubular covering enclosing said core. The material described as composing such tubular core is lead, and the elastic covering therefor as india rubber—preferably pure rubber. The advantages attributed to the lead core are the compressibility of the tube under pressure, and the fact that it may be bent to the desired shape, which shape it would tend to retain so as to hold the packing in position to be applied to the closing of any joint. The yielding cover of rubber or its equivalent adapts the packing as a whole to fill any inequalities in the surfaces of the joint to be packed, such elastic covering being supported from within by the compressible core of lead. \* \* \* xQ. 15. Referring to the White patent in suit, please state the element or elements which there give the strength and the elasticity? A. The elements of the White patent packing as described and shown are a tubular practically non-elastic core, capable of being bent or flattened, and a casing or covering of elastic material adapted to constitute a seal. In this structure, the core would provide the element of strength and the covering the element of elasticity. xQ. 16. It is therefore necessary, is it not, that in the White patent, the metal core should be co-extensive with the rubber covering? A. It

is desirable that it should be co-extensive, and in the drawings of the patent it is so shown. \* \* \* The White packing was undoubtedly designed to have as a continuous core a tube of lead capable of being bent, flattened and compressed. \* \* \* xQ. 94. Do you not think that the language of the specification, when considered by you as an expert familiar with the subject-matter, clearly indicates the presence of a metal tube co-extensive with the rubber covering? A. They indicate the presence of a compressible tube throughout the casing. I have no doubt that the White patent contemplates the presence of the two tubes at all parts of the packing. \* \* \* xQ. 101. Do you find anything in the White patent which allows you to dispense with having the metal tube co-extensive with the elastic covering any more than it allows you to dispense with having the elastic covering co-extensive with the metal tube? Please notice that the question confines itself to the patent. A. No."

The combination of the patent in suit consists essentially "of a tubular practically non-elastic core capable of being bent or flattened and a casing or covering of elastic material adapted to constitute a seal, substantially as described," or "of a tubular lead core incased in a tube of rubber, substantially as described." As before stated, the core and casing are co-extensive in any length of the appellee's packing when used for the purpose for which it was designed. The core is of uniform diameter throughout any portion constituting a gasket. Before being applied to the joint to be packed, the packing through the bending of the practically non-elastic core can be made to conform to the seat or recess for which it is intended, whether of circular or any other shape or figure; and when so bent is calculated to retain before and until its application to the joint such shape or figure. It may, as stated in the description, be "packed or placed in positions for which other or elastic packings are not adapted."

The alleged infringing device or construction consists of a rubber tube with a hollow core or interior lining of cotton-duck co-extensive with the tube, and a hollow lead coupler or dowel-pin, the ends of which enter the hollow core or interior lining at the ends of the packing when used for the purpose for which it is designed. The covering or casing of the packing, as that of the appellee's packing, is elastic; but the core or lining, unlike the core of the patent in suit, is not "practically non-elastic." On the contrary, it consists of cotton-duck and is used, not to perform the function of the lead core, but simply because, as stated in the Perry patent, and shown by the evidence, "it is necessary for the more perfect construction of the packing and to render it sufficiently strong to resist the pressure of the steam and prevent blowing out to form the core of a woven fabric which possesses the requisite strength and durability for the purpose intended." An essential difference between the packing of the appellant and that of the appellee is that the latter may, through the bending of the practically non-elastic core of lead, be made to assume and retain any desired figure or shape prior to its application to the seat or recess of the joint to be packed, while the former, by reason of its elastic composition of cotton cloth incased in rubber tubing, is not capable before such application of assuming and retaining the desired figure or shape. Foster, the appellant's expert, on this point says:

"The specification sets forth the advantages of a packing thus constructed, that it may be formed into a ring or of any desired shape, according to the

specific use to which the packing is to be put; that it may be packed or placed and will retain its shape in all positions; for which other or elastic packings are not adapted. \* \* \* Owing to the presence of the lead core extending the length of the packing, the latter may be bent into the form of a ring or square or triangle, or any regular or irregular shape, and will retain its place and position so that it may be readily adjusted upon seats of regular or irregular form, and there clamped to make the joint; and this cannot be done with other elastic packings which do not have cores of non-elastic material, such as lead. \* \* \* I understand by non-elastic, to be meant that the core shall be of a material which, after having been brought to a given shape or position, will not tend to restore itself to its original shape or position. \* \* \* So far as the main body of defendant's packing is concerned, that is, that part which is not in immediate proximity to the joint, it possesses none of the characteristics specified as incident to the packing of the White patent. That is, it is not, as a packing, susceptible of being bent or formed into any desired shape. It is incapable of retaining a shape to which it is bent, but is elastic and on the removal of pressure will assume an annular shape. It is not susceptible of being packed or placed in positions for which other elastic packings are not adapted. \* \* \* xQ. 29. Hence, if I understand you, you consider that unless the packing by reason of the presence of the core is capable of being bent into irregular form, as well as the simple ring form, and of retaining such irregular form, it would not embody the White invention, is that correct? A. It is certainly correct. It was the obvious purpose of the patentee to make just such a packing."

The appellee's expert says:

"Mr. Foster is also of the opinion that ordinary elastic packings cannot be bent into irregular shapes and placed in position between packing faces or sheets, and hence that a packing which had a practically non-elastic core within an elastic body is substantially unlike one which is elastic only. In this he is undoubtedly correct. \* \* \* The elements of the White patent packing as described and shown are a tubular practically non-elastic core, capable of being bent or flattened, and a casing or covering of elastic material adapted to constitute a seal. In this structure, the core would provide the element of strength and the covering the element of elasticity. \* \* \* No attempt is made in the White patent to cover the use of these two materials in general or in any construction which does not embody a tubular core, capable of being bent in shape and compressed when in use, and covered with a tubular elastic casing."

The elasticity and flexibility of the appellee's packing are so dominated by its continuous core of lead that the packing as a whole retains the figure or shape to which it is bent. The appellant's packing, on the other hand, is so flexible by reason of its composition of rubber and cotton-duck as to be incapable, before application to the joint to be packed, of retaining the desired figure or shape.

The hollow lead coupler or dowel-pin employed by the appellant to join the ends of its packing or tubing in forming a gasket is about two inches long, one half of it being inserted in the cotton-duck core or lining at one end of the tubing, and the other half in the cotton-duck core or lining at the other end of the tubing, thus coupling the two ends of the tubing together. It is not claimed that the coupler is of excessive or improper length for that purpose. That the appellant had, in view of the state of the art, a right to make, use and sell packing consisting of a hollow cotton-duck core of lining incased in a rubber tube is, as has appeared, beyond controversy. It is equally clear that the appellant had a right to fasten the ends of his packing together with twine, wire or rubber, but it is claimed that it could not use for that purpose a tubular or other practically non-elastic

core without infringing the patent in suit. That patent does not either in its claims or description mention a coupler of any kind. It does not contain a suggestion of the means or manner in or by which the ends of the tubing are to be fastened together. Whether the patentee intended that the ends should be spliced together or, owing to the comparative rigidity of the tubing, merely be brought together by bending, or otherwise disposed of, is purely matter of conjecture so far as the disclosures of the patent are concerned. If, then, the appellant has been guilty of infringement, the infringement cannot be predicated from the fact that at one or more points in its gaskets it has used a tubular lead coupler merely as a coupler, unless the use of such coupler has performed or been capable of performing in greater or less degree, but to some substantial extent, the function of the tubular lead core of the appellee when used with its elastic casing of rubber for the purpose for which it was designed and patented. If it is true that, wherever a tubular coupling or dowel-pin is used in forming gaskets of the appellant's tubing, there is to be found for a space of about two inches, representing the length of such coupler or pin, a combination of the same materials, or their equivalents, as are contained in the tubing of the appellee throughout the entire length forming a gasket; and it is further true, according to the evidence, that the appellant's tubular coupling pin serves to strengthen its gaskets at the point or points where the ends of its tubing are brought together to complete such gaskets, and at such point or points to produce a closer and more effective seal for the joint or joints to be packed. These considerations, however, are by no means determinative of the question of infringement. The patent in suit, while not for a completed gasket as such, composed of certain materials, is nevertheless for a combination of certain materials in a specified form for the purpose of being used as a packing. It contemplates that a tubing of any given length necessary to form a complete gasket shall, when used for that purpose, be unitary, longitudinally homogeneous and the whole of uniform rigidity, whatever may be the degree of such rigidity. It does not contemplate that the tubing composing a gasket shall in any part or parts of the periphery be of comparative rigidity and in any other parts of comparative flexibility. Such a construction would be aside from the gist of the invention as gathered from a fair reading of the specification as a whole. The two essential features of the appellee's tubing are, first, its capability, by reason of its comparative rigidity, of retaining the figure or shape to which it may be bent before its application to the seat or recess into which it is to be compressed, and, secondly, its capability, by reason of its uniformity in composition and its strength, when formed into a gasket, placed in position and subjected to pressure, of serving as a tight and effective seal for all parts of the joint to be packed. The appellant's coupler or dowel-pin does not perform either of these functions. We are not to be understood as holding that by no possibility could infringement result from the employment of such couplers. If they were so inserted throughout the entire length of the tubing forming a gasket as to be co-extensive with the tubing and by some means, not readily comprehensible, rigidly attached to one another in such manner as practically to constitute a continuous and integral leaden core, in-

fringement would doubtless result. But no such case is before the court. White's object was "the provision of a novel form of packing which shall possess all the requisites of an air-tight, fluid-tight, or liquid-tight seal" for the joint to be packed, and which consequently should be of uniform composition and qualities throughout the gasket. In order to form "a close and effective seal," as those words are employed in the patent in suit, the tubing was, when constituting a gasket, to be a homogeneous entirety, serving to seal all portions of the periphery of the joint to be packed. If the appellee were to dispense with one half or other substantial proportion of the tubular lead core from the tubing constituting a gasket, then, so far as such a core may be necessary to produce a close and effective seal for the joint to be packed, while the remaining portion of the core would throughout its length serve to produce such a seal, the gasket would not in its entirety be either close or effective. To be a close and effective seal in any useful sense or in the sense of the patent in suit, the gasket must be a close and effective seal in its entirety. The tubular coupler of the appellant is employed strictly as a coupler and wholly fails to perform the function of the unitary construction of the appellee, whatever other advantage the appellant may derive from its use. In *Sewall v. Jones*, 91 U. S. 171, 183, 23 L. Ed. 275, Mr. Justice Hunt, delivering the opinion of the court, said:

"To constitute an infringement, the thing used by the defendant must be such as substantially to embody the patentee's mode of operation, and thereby to attain the same kind of result as was reached by his invention. It is not necessary that the defendant should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be the same in degree; but it must be the same in kind. \* \* \* In an action for infringement, the first question is, whether the machine used by the defendant is substantially, in its principle and mode of operation, like the plaintiff's. If so, it is an infringement to use it. \* \* \* If he has taken the same plan and applied it to the same purpose, notwithstanding he may have varied the process of the application, his manufacture will be substantially identical with that of the patentee."

The patent in suit does not claim or require that the lead composing the tubular core shall be of any specified thickness, and it is undoubtedly true that, if the appellant had used in its packing a tubular core of lead, although too thin and of little effect, co-extensive with the continuous length of composition rubber casing composing the gasket in its entirety, the appellant would have been guilty of infringement; for such a construction, though varying in degree, would have been the same in kind as that of the appellee. But on the facts in this case we think that sameness in kind is, in view of the foregoing considerations, inseparable from and dependent upon an extension of a tubular lead core or practically non-elastic core throughout the whole extent of the gasket.

It is a well-established rule that "that which infringes, if later, would anticipate, if earlier"; and, conversely, that a device cannot be held to be an infringement unless it would have been held, if used earlier than the patent, to have been an anticipation thereof. *Tobacco Co. v. Streat*, 28 C. C. A. 18, 83 Fed. 700. Had the appellant years before the application for the patent in suit received a patent for its present tubing, including the coupling pin as used by it, such a patent, if valid,

could not, in our opinion, have served to anticipate the invention covered by the patent in suit. The coupler in the earlier patent would not have suggested or been calculated to suggest to those skilled in the art the continuous tubular core of the appellee. The patent in suit, notwithstanding the existence of such earlier patent, would have embodied an independent and wholly distinct construction involving an exercise of the inventive faculty and differentiated from the earlier construction in conception, plan, design, and functions.

There is another ground on which the decree of the court below must be reversed. The appellant, in the employment of its tubular coupler, has not, in our opinion, used anything which it did not have a right to use, nor has it appropriated anything which the appellee had a right to cover by the patent in suit. The employment of such a coupler in packings was open to the public, as not involving patentable invention, for a period long antedating the patent in suit. In *Perry v. Rubber Co.* (C. C.) 86 Fed. 633, the Perry patent was in suit. Judge Putnam, speaking of the tubular metal coupling, said:

"It is clear beyond question that the only novelty which the complainants can presume to maintain is the use of the coupling, or dowel, in connection with the tubing. It is not easy to perceive that such a use is within the range of patentable invention. Dowels, and couplings in the nature of dowels, are common to all the arts, and this application to any particular art cannot, therefore, be regarded as indicating inventive faculty unless the circumstances are more peculiar than those found in the case at bar. The propositions relied on by the complainants, that the earlier applications of the dowel to these purposes were incidental, so far, under the circumstances, from strengthening their case, weakens it; because it indicates that various persons, when the emergency arose, laid their hands promptly on this as an available resource, so that its use was simply an exhibition of ordinary skill in the art to which it appertains. The presumption of the want of the inventive faculty in the application of a dowel to any particular art cannot be overcome by mere proof of novelty, or by the presumption arising from the issue of a patent, or by proofs of the indecisive character which we have here, to the effect that it met a want which had long existed, but which persons skilled in the art had not been able to overcome, or by all combined."

The bill was dismissed and on appeal the decree was affirmed. 43 C. C. A. 248, 103 Fed. 314. Judge Colt, in delivering the opinion of the circuit court of appeals, spoke of one of the grounds of affirmation as follows:

"There is nothing new or novel in a tubing made of rubber and fabric as described in the patent. This is abundantly shown by the record. The coupling which forms the other element of the combination is simply a dowel-pin. \* \* \* Turning to the rubber art, we find it was common to unite the abutting end of two pieces of rubber tubing, such as hose, by a coupling inserted in the ends. As was said by complainants' expert: 'It has been a common practice almost ever since rubber tubing began to be used, and so far back as I can remember, to couple together the ends of two rubber-tube sections by means of a coupling inserted in the ends.' Such being the common practice respecting two pieces of tubing, there was manifestly no invention in so uniting the ends of a single piece of tubing to form a gasket or packing. But it is said the old forms of coupling were rigid, and that in the Perry device the coupling must be compressible, and that this feature establishes patentable novelty. Whether a coupling-pin is made compressible or incompressible would seem to depend upon whether the tubing or packing was designed to be solid or compressible. To make a coupling-pin solid and incompressible for use in an incompressible tubing or packing, or hollow and compressible for use in a compressible tubing or packing, does not involve inventive thought. As the Perry packing is made hollow and compressible,

it would occur to any ordinary mechanic that it would be better to make the coupling-pin hollow or compressible."

We do not regard the language above quoted from Judge Putnam and Judge Colt as mere dicta or inapplicable to this case. While we are not bound by the Massachusetts decision, it is entitled to much weight on the question whether the appellant can be held as an infringer because of its use of its hollow lead coupler. If the appellant, suing with Perry, could not sustain a bill for infringement of the Perry patent on account of the use by another of the coupler of that patent, for the reason that the patent was void as to such coupler for lack of invention, we cannot perceive how under substantially the same evidence as to length of user of packing tubing and couplers the appellant can be held in this case liable as an infringer for using or selling the same coupler. The appellant had the right in common with the rest of the public to use such a coupler in packings as it now employs long prior to the patent in suit, and, having such right, could not be deprived of it by that patent. This conclusion cannot in any legitimate sense prejudice the appellee in the enjoyment of his invention, but conforms to the substantial equities of the case.

The decree of the court below is reversed, with costs to the appellant.

ACHESON, Circuit Judge (dissenting). I am constrained to dissent from the reversing decree in this case. The controlling question here is that of infringement. This appears from the elaborate discussion of that question in the opinion expressing the views of the majority. It is true that at the close of the opinion the want of novelty is advanced as good ground of defense; the suggestion being founded upon the decision in *Perry v. Rubber Co.* (C. C.) 86 Fed. 633, affirmed in 43 C. C. A. 248, 103 Fed. 314. But in that case the suit was for the infringement of the Perry patent, which is junior to the White patent, upon which the present suit was founded. The White patent was part of the prior art, and clearly, as it seems to me, the remarks of the learned judges of the First circuit in the cited case, quoted and relied on by the majority of this court, have no legitimate bearing upon the case now before us. Upon the question of infringement, the judgment of the majority rests upon the view that there can be no violation of either of the claims of the White patent, except by the use of a non-elastic core extending throughout the entire length of the outer tubular casing. I am not able to read the claims of the patent in such a restricted and destructive sense. The claims are for a packing material composed of specified elements in combination, and, in my judgment, a completed gasket which at any part contains to a beneficial extent the patented combination constitutes use of the invention and infringes the patent. Undoubtedly the defendant uses the article described and claimed in White's patent. It is no answer to say that the defendant's use of the patented article is small. The defendant uses the patented article to the extent it desires. The learned judge of the circuit court well said:

"At the joint, which is the most vulnerable place in the packing, and at the point where there are inequalities in the surface, which is the most



difficult place to seal, the respondent uses the identical elements of White's combination operating in the same way. If it secure the same result as White by using his device where its use is essential and substantial and discards it where it is non-essential and immaterial, we must still hold, if the patent serves to substantially protect, that the respondent has taken the substance of White's device. We, therefore, hold the respondent an infringer, for one who appropriates an invention so as to gain imperfectly or to a limited extent the advantages which may be derived therefrom, does not thereby free himself from infringement. *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275, and cases cited. To the extent the respondent uses White's combination, to such an extent it acquires the full measure of benefit from it. *Celluloid Mfg. Co. v. Crollithion Collar & Cuff Co. (C. O.)* 23 Fed. 397, is akin to this case: "By using some of the complainant's packing respondent uses enough to make it an infringer."

I am in accord with the above views of the circuit court, and would affirm its decree.

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AMERICAN FUR REFINING CO. et al. v. CIMIOTTI UNHAIRING  
CO. et al.

(Circuit Court of Appeals, Third Circuit. November 14, 1902.)

No. 42.

1. PATENTS—ORDER GRANTING PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

On appeal from an interlocutory order granting a preliminary injunction against infringement of a patent, the order being made for special reasons after a hearing on full proofs and pending the consideration thereof, the question of infringement will not be determined on its merits, but the court will confine itself to the question whether the legal discretionary power of the court below was fairly exercised under all the circumstances, and upon such question the fact that complainant was required to give ample security, and defendant was given the privilege of dissolving the injunction by furnishing counter security, is entitled to consideration.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Henry Schreiter and Wm. Rumsey, for appellants.

Louis C. Raegenner, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal from an interlocutory order entered on August 28, 1902 ([C. C.] 117 Fed. 623), granting a preliminary injunction against the defendants below (the appellants) restraining them from "making, operating, using, or selling unhairing machine like or similar to twenty-five certain unhairing machines which in April, 1902, the defendants were operating at No. 26 Morris street, Jersey City, and referred to in this suit as 'Lake Machines'; and from directly or indirectly making, operating, or selling machines like or similar to machines as claimed in the eighth claim of J. W. Sutton's patent, 383,258, of May 22, 1888." The order was upon condition that the complainants give a bond with ap-

¶ 1. Review of interlocutory decree granting or refusing injunction in circuit court of appeals, see notes to *Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co.*, 3 C. C. A. 572; *Southern Pac. Co. v. Earl*, 27 C. C. A. 189; *Emigration Co. v. Gallegos*, 32 C. C. A. 484.

proved surety in the sum of \$15,000 to indemnify the defendant corporation, "until the entry of an interlocutory decree upon final hearing herein, against loss or injury due to the improvident or erroneous grant of this order, and provided the court finally dismisses the bill of complaint herein." And the order further provided that the defendants might terminate the preliminary injunction by giving bond with approved surety in the like amount conditioned for the payment by the defendant corporation of any final judgment or decree against it which might be rendered by the court in favor of the complainants. The order was granted after the hearing of the case upon the merits on full proofs, and pending the consideration thereof by the court. The special reasons assigned by the judge for granting the injunction are: First, the recent decisions in the Second circuit in the cases of *Cimiotti Unhairing Co. v. American Unhairing Mach. Co.* (C. C. A.) 115 Fed. 498, and *Same v. Comstock Unhairing Co.* (C. C.) Id. 524, sustaining the Sutton patent, and adjudging infringement of the eighth claim thereof; and, second, because (upon the moving affidavit) "there is much to suggest that the plaintiffs in the present case are dealing with the very same parties as before under a new corporate name, and transposed to a convenient neighboring locality." Undoubtedly, this means parties who had been defeated in suits brought by these plaintiffs upon the Sutton patent in the Second circuit. In *Consolidated Electric Storage Co. v. Accumulator Co.*, 3 U. S. App. 579, 580, 5 C. C. A. 202, 55 Fed. 485, which, like the present case, was an appeal from an order granting a preliminary injunction, this court said:

"This being an appeal from an interlocutory decree granting a provisional injunction, the only question properly before us for determination is whether or not the legal discretionary power of the court below was fairly exercised under all the circumstances. It would be altogether premature for us to pass upon the merits of the case, or to consider, with a view to a definitive judgment, the important and close questions involved in this litigation."

In the present case we see no reason for departing from the rule thus laid down. The case is now in the hands of the learned judge below, who heard it upon the merits, and who states in his opinion granting the preliminary injunction that his purpose is to look into the subject anew, and form an individual judgment of his own. We are entitled to the benefit of his views upon the serious question whether or not the defendants' machines infringe the patent in suit, and upon the merits of the case generally under the plenary proofs. We therefore will confine ourselves to the single question whether or not the court erred in granting the preliminary injunction. Having regard to the special circumstances, and in view of the proofs to sustain the motion for a preliminary injunction, we are not prepared to hold that the order complained of was improvidently made. The condition for security imposed upon the complainants and the privilege accorded to the defendants to dissolve the injunction by giving counter security show a cautious exercise by the court of its legal discretion. We are not convinced that the court erred in granting the preliminary injunction upon the terms prescribed. Therefore, and without intending to intimate any opinion as to the final rights of the parties, we affirm the interlocutory order.

## ARMAT MOVING PICTURE CO. v. AMERICAN MUTOSCOPE CO.

(Circuit Court, S. D. New York. October 21, 1902.)

## 1. PATENTS—VALIDITY AND INFRINGEMENT—PICTURE-EXHIBITING APPARATUS.

The Jenkins and Armat patent, No. 586,953, for a picture-exhibiting apparatus, for giving the impression to the eye of objects in motion, in which the picture-carrying film is moved intermittently, in such manner as to expose the pictures thereon successively, in an illuminated field, for an interval of time exceeding the interval of motion, and which may be, and preferably is, operated without the use of a shutter, in the latter features, which constitute the essence of the invention, was not anticipated, and discloses patentable invention. Claims 1, 2, 3, 4, 5, 7, and 8 also held infringing.

In Equity. Suit for infringement of letters patent No. 586,953, for a picture-exhibiting apparatus, granted July 20, 1897, to Charles Francis Jenkins and Thomas Armat. On final hearing.

Church & Church, for complainant.

Kerr, Page & Cooper (Thomas B. Kerr and Parker W. Page, of counsel), for defendant.

HAZEL, District Judge. This is a suit in equity to restrain the alleged infringement of United States letters patent No. 586,953, granted July 20, 1897, to Charles Francis Jenkins and Thomas Armat, upon application filed August 20, 1895. The bill, in its original form, was by the Animated Photo Projecting Company, but the patent upon which the bill is based has since the commencement of the suit been assigned to the complainant, a West Virginia corporation, which thereafter, by stipulation, became the complainant in the case. The construction of the apparatus embodying the invention was begun at some time during the months of July or August, 1895, but no earlier date is claimed to prove the conception of the invention than that of the filing of the application. The specifications say that the patent purports to relate to that branch of photographic art which has for its primary object the exhibition of a series of pictures superimposed upon transparent tape films or strips, so as to impart an animated or moving appearance to the pictures when displayed or projected upon a suitable canvas or screen. Apparently the distinctive purpose to be attained by the patent is the reproduction of projected pictures, without the use of a shutter device, in such a manner that they will retain the semblance of objects in motion through different phases, with lifelike and unblurred effect. The claims of the patent alleged to be infringed are the first, second, third, fourth, fifth, seventh, and eighth, and read as follows:

"(1) An apparatus for exhibiting pictures so as to give the impression to the eye of objects in motion, comprising a picture-carrying surface, means for supporting said surface and permitting it to be moved so as to cause the pictures or objects therein to be successively exposed for the required interval of time in an illuminated field, and mechanism adapted to intermittently quickly move said surface at short intervals for exposing or exhibiting the pictures in the order of their succession, and for holding the surface stationary during the interval of illumination of the picture being made to exceed the interval of motion or change, substantially as described.

"(2) The combination, in an apparatus for exhibiting pictures so as to give the impression to the eye of objects in motion, of a movable picture-carrying surface, and means for intermittently moving said surface at short intervals, exceeding the interval required in effecting the movement, so that the interval of pause and illumination shall exceed the interval of motion, substantially as described.

"(3) The combination, in picture-exhibiting apparatus for giving the impression to the eye of objects in motion, of a picture-carrying surface, means for supporting the same, and means for feeding such surface intermittently in such manner that the interval of illumination of the picture shall predominate the interval of motion, substantially as described.

"(4) The combination, in picture-exhibiting apparatus for giving the impression to the eye of objects in motion, of a picture-carrying surface, means for supporting and intermittently quickly moving the same, and means for illuminating the pictures successively between the intervals of motion in such manner that the interval of pause and illumination of the picture shall predominate the interval of movement, substantially as described.

"(5) In a picture-exhibiting apparatus for giving the impression to the eye of objects in motion, the combination with a transparent picture-carrying surface of means for intermittently moving the same step by step, so as to present to view the pictures thereon in the order of their succession,—the interval of time between the exhibition of successive pictures being instantaneous, while the period of illumination is comparatively greatly prolonged,—substantially as described."

"(7) In picture-exhibiting apparatus for giving the impression to the eye of objects in motion, the combination with the picture-carrying film, and means for intermittently moving said film so as to expose the picture thereon successively in an illuminated field for an interval of time exceeding the interval of motion, of the tension device, comprising two members, between which the film is adapted to pass,—one member being adapted to yieldingly press the film toward the other so that it is held taut, and prevented from flexing or puckering at the point of exposure of the picture,—substantially as described.

"(8) In a picture-exhibiting apparatus for giving the impression to the eye of objects in motion, the combination, with an illuminator and a projecting lens, of a transparent picture-carrying surface, arranged in the focus of the objective of the projecting lens, means for intermittently moving the said surface in such manner that the interval of illumination shall exceed the interval of change, and a tension device adapted to keep the picture taut, and prevent flexing or puckering at the point of exposure, substantially as described."

The expert witness for complainant testifies that all of the claims in issue substantially cover the invention, and are identical with the first, except the fifth, which contains the additional element of a transparent picture-carrying surface. The claims, in their entirety, are for a combined mechanism that will cause the interval of illumination and exposure of successive pictures, ranged upon an intermittently moving picture-carrying surface, to exceed the interval consumed in changing them. It is admitted that a combination by which the interval of illumination and exposure of the picture shall be equal to or less than the interval of motion or change of pictures is not new. The achievement, according to the views of Mr. Armat, one of the patentees, and expert witness for complainant, consists of a combination by which means are provided "for effecting the displacement of a picture, and the substitution of another in its stead, in an interval of time less than the interval of illumination and exposure of the picture, so as to cause the interval of illumination to predominate, and render the act or effect of a change imperceptible

to the eye." This new and original result is obtained by moving the film intermittently in the manner hereinafter described. The rapid substitution of pictures renders the change imperceptible, producing an optical illusion of objects in motion. The means for carrying out the object to be attained by the apparatus in suit comprises the mechanism, including a film or strip, adapted to provide a surface for carrying photographic pictures in series, representing successively different objects in motion. The film is wound upon reels, one of its ends passing over a drum suitably supported to permit the film to be wound upon one reel as it is unwound from the other, and so arranged that as the film is moved the pictures thereon will be brought successively into the focus of the object lens. The film is moved far enough to displace the exposed picture, and another substituted, over which a gear, which is attached, is partly moved. To facilitate the movement of the film, it is provided with a series of perforations along its edges to engage teats in the drum or sprocket. In this manner the pictures are brought successively into an illuminated field, each picture being illuminated without interruption the instant it enters such field, until displaced by the picture following in sequence. The movement of the film is imperceptible. The specifications say that various contrivances and forms of mechanism may be employed for effecting the intermittent movement. The drawings attached to the specifications show—

"A peripherally notched or tooth gear wheel affixed to one side of the drum, which is driven by a smaller gear wheel having a single tooth, which is adapted to engage one of the notches in the wheel at every revolution, and move the latter a part of a revolution, proportionate to the relative diameters of the two gears; such part revolution of the gear being adapted to bring the several pictures successively into the focus of the object-lens. The periphery of the wheel between each pair of notches is formed with a concave or semicircular depression, which is adapted to form a seat for the toothless peripheral portion of the gear, whereby, when the tooth has escaped from a notch, the larger gear may be locked and held in a stationary position by said toothless portion of the gear engaging and moving in sliding contact with one of the depressions until the smaller gear has made a complete revolution, whereupon the operation of moving the larger gear a part revolution, and again locking it coincidentally with the exposure of the picture-carrying surface, will again be repeated, and so on indefinitely."

The defenses are anticipation, want of patentable invention, and non-infringement. The proofs show that in the year 1895, before filing the application for the patent in suit, machines for projecting pictures were constructed by the patentees, who were then associated together for the exhibition and exploitation of a picture-exhibiting device. Prior thereto, Jenkins, one of the patentees, constructed a mechanism for continuously moving the film in making exposures, applying a rotating incandescent light to periodically illuminate the moving picture strip. This machine was similar to that employed in the taking and reproduction of pictures known to the art, and suitable only for exhibiting by direct vision. Alterations were made in the apparatus of Mr. Jenkins, patentee, by which the intermittent movement of the film was gradually accelerated. In experimenting, the old device of a rotating shutter with an opening was used in the operation of the machine to intermittingly obscure the light while the pictures were

substituted. In the prior art this shutter had been revolved past the lens in order to give the impression to an observer of a continuous moving picture displayed or projected upon the canvas, the rapidity of motion not conveying to the eye the mechanical change from one picture to another. Subsequently other changes in the Jenkins construction were made, by which the film fitting the drum or sprocket formed a continuous intermittent function, which permitted the desired excessive period of illumination and exposure. This was a deviation from what was known. The structure, when operated, owing to the intermittent movement of the drum, emitted vibrating and disagreeable noises, which led to its abandonment. Means were then substituted for a rapid intermittent movement of the film, independent of the drum or sprocket. Hence the patent in suit. A shutter device is not made an essential element of the claims. The patentees, however, did not confine themselves to the employment of their invention without the use of a shutter. The specifications, which were amended to include a shutter, state that a shutter may, with advantage, be used; that for practical purposes a shutter of any kind is preferably dispensed with. The gist of the invention, however, consists in the manner by which the interval of temporary inaction of the film-bearing device and the illumination of the pictures exceeds the interval of change, owing to the rapid substitution of one picture for another, and yet conveys to the eye a distinct impression of an animated, moving object. The illumination is unaccompanied by a flickering or scintillating appearance. It was plainly the purpose of the patentees that the intermittent operation of the film-carrying strip should produce an excess of the interval of illumination. They practically disclaimed the mechanical combination for giving the impression to the vision of objects in motion. To intermittingly move pictures, and to illuminate them successively between intervals of motion, during which they are exposed, these intervals being equal to or less than those required for a change, is conceded to be old. Is, then, the invention which structurally claims and permits a greater period of illumination and exposure, instead of the period equal to or less than the period of change, a patentable invention? The practical state of the art at the time of the invention in suit embraced a series of pictures imprinted upon a tape or other surface moved at a speed relative to that at which the pictures were taken, and, by means of a shutter or light-obstructing surface, to interchangeably cover and expose the pictures successively in the manner of exposing a sensitive film in taking the original pictures. This resulted in bringing the opening through the shutter centrally over a picture at equal intervals. When the pictures were brought into vision, they were projected successively upon a canvas at high rate of speed, and a persistence of vision followed. The shutters used were ordinarily in disc form, with openings. The specifications of the patent in suit, in referring to the employment in prior analogous devices, read as follows:

"The openings in such shutters, which are ordinarily in the form of revolving discs having openings near their circumferences, usually cover but a fractional part of the circumference of the disc, so that a view of the picture is afforded through an interval of time much less than the period

of interruption; and, as the illuminated pictures and the cloud effect or darkness of interruption caused by the passage of the shutter across the light are blended or mixed together in the eye of the observer, the darkness continues to impress upon the retina so much longer than the light that the value of the illumination is very greatly diminished, and the picture appears to be poorly lighted or blurred."

The specifications then proceed to make clear that, by the invention described, a different, distinct, and satisfactory result is produced. The combination for producing that result consists in the method of holding the picture to view a much longer time than is required to remove it and substitute another in its stead. By following the method described in the patent, apparent shadowed effects in the prior art are effaced, and more realistic and vivid pictures are thrown upon a canvas or screen. The defendant contends that the essential elements of the claims of the patent in suit are anticipated, and that the prior art accomplished the result claimed to have been achieved by the patent in suit. I do not deem it necessary to specifically traverse all the patents cited in anticipation. They are chiefly illustrative and descriptive of machines and apparatus by which pictures are disclosed to the vision for an instant of time through a rapidly moving shutter, or latterly, in which the picture surface is continuously moved, and where a direct-vision view only is obtainable. They show no special analogy to the claims under consideration. Much of the prior apparatus consists of instruments in which the pictures are painted or photographed in a rigid plate or disc, and where they are moved continuously, and instantaneously exposed through an opening in an opaque body, operated to move in unison with the pictures, and serving to alternately display and obscure them. Other citations disclose an apparatus for producing and exhibiting pictures in which the picture-bearing surface is intermittently moved so as to come into the field of vision interchangeably obscured by a shutter, and exposed during the period of rest. Were the patentees the first to intermittently move the picture-bearing surface before the eye of the observer in such a manner that the period of exposure of each picture was longer than the period of nonexposure? The proofs quite clearly show, and, indeed, it is not disputed, that in prior devices for producing and projecting animated moving pictures the periods of nonexposure or of movement or change due to the use of a shutter have been either equal to or more than the period of exposure.

The question involved is within an exceedingly narrow compass. The defendant vigorously contends that if in the prior art a rotating shutter of more than 180° is employed, functionally carrying out the object of the patent in suit, there is no invention in complainant's apparatus, which, as we have seen, describes and claims an exposure (the desired rapidity of manipulation being assumed) in which the interval of illumination is greater or predominates over that of interruption or nonexposure. The complainant insists that by the combination in suit a new result is produced, and that the use of a shutter for the purpose merely of interrupting illumination at the instant of change of pictures so as to expose the picture by prolonging the periods of illumination relative to motion or nonexposure obviously

tends to the employment of such facilities, and performs the functions of the claims in suit, and consequently comes within their broad scope. Of the more important references are the Edison United States patent, No. 589,169, dated August 31, 1898, the Johnson British patent, No. 1,443, May 2, 1868, the Linnett British patent, No. 925, March 16, 1868, the United States patent to O. B. Brown, No. 93,594, August 12, 1869, and Lumiere Belgian patent, No. 14,911, April 4, 1895, together with certificates of addition. The Edison patent, application filed August 24, 1891, is an improvement in kinetoscopes. In the employment of producing animate pictures in motion, and for reproducing them, a single camera is used. The specifications provide means for intermittently projecting moving objects at such a rapid rate as to result in persistence of vision. Images of successive positions of an object, or objects in motion, are observed from a fixed or single point of view. The patent says the successive movements of the sensitized tape film may be continuous or intermittent. The latter is preferable. It states further that the period of rest of the film should be longer than the period of movement. A shutter is employed with an opening of less than  $180^{\circ}$ , and therefore the period of exposure is not so long as that of nonexposure. It is argued that it was perfectly easy to enlarge the openings beyond  $180^{\circ}$ , and thus afford a longer duration of exposure, and that such change in construction would only have required the ordinary skill of a mechanic familiar with the art. It does not appear from this patent that Mr. Edison regarded the necessity of an exposure longer than the period of motion,—an essential feature of the patent. To prolong the period of exposure evidently did not occur to Mr. Edison. The apparatus was designed to be used for producing and reproducing, and, although it describes an intermittent movement of the film bearing pictures, it nowhere appears that the patentee regarded it as essential that the duration of exposure should exceed the period of rest, and that by such means an unblurred picture effect might be produced. Edison, as well as others who preceded him, practically regarded a projecting apparatus and a camera for producing pictures as reciprocal, and that no blemish of the moving pictures would follow from their use. The position of the patentees was opposed to this view. It was their idea that the poor results attained were due to the use of a machine of practically the same construction as that employed in taking the pictures. Mr. Armat says:

**"In the first place, in taking a picture of an object in motion it is essential to make the exposure of the picture on the sensitive surface as short as possible, for the reason that if this is not done the moving object will have time to displace the image of itself on the sensitive surface, causing a blur and an indistinct picture. In an exhibiting apparatus the reverse is true. You have in the exhibiting apparatus the picture fixed beyond the possibility of any such movement or blur, and the longer this picture is exposed, the stronger the impression, and the better the results. In a picture-taking apparatus, or camera, you are dealing with a moving object and a sensitive surface. In an exhibiting apparatus, you are dealing with a fixed picture and the human eye. No question of flicker or scintillation enters into the problem of taking pictures. This question enters very extensively into the question of exhibiting pictures."**



This view appears to find some corroboration in the Edison patent, No. 593,426, dated March 14, 1893, for exhibiting photographs of moving objects, wherein the specifications state that:

"In the reproduction apparatus, a shutter is used for covering and exposing the pictures successively in much the same manner as the sensitive film is exposed in taking the photograph."

For these reasons, this patent does not anticipate that here considered. Much stress is placed by defendant's counsel upon the Belgian patent granted to Messieurs Lumiere four months prior to the date of application in suit. This patent is for the production and exhibition of animate moving pictures by an intermittent mechanism which acts upon an evenly perforated picture-bearing film, giving it successive displacements, separated by periods of rest. During the interval the picture is taken or exhibited. The sensitive film is the same as that employed by the complainant. A circular disc or shutter is employed, with portions cut away, corresponding to sectors of an angle. It may be changed to modify the period of rest. The specifications say that the period of rest "may be as great as about 170 degrees, which would be too much for obtaining clearly defined impressions, but which is a condition very favorable for the exhibition of the pictures, when the apparatus is used for such purpose." The specifications further say that, by the use of cams of proper configuration, the period of rest of the film may be prolonged to two-thirds of the total time. This, the patent repeats, is a condition more favorable for the exhibition of the pictures, either directly or by projection. According to the testimony of the expert for the complainant, the claims and specifications of the Lumiere patent do not disclose the material features of the claims in suit. The machines were designed for producing and exhibiting pictures with a shutter having no opening sufficient to afford the enlarged period of illumination. The disadvantages in such a machine for producing and exhibiting, insisted on by complainant's expert, are shown by the finding of the court of appeals of the District of Columbia (17 App. D. C. 349) in the interference entitled "Latham v. Armat." The court said, in speaking of the operation of the shutter device in connection with the producing and exhibiting machine:

"In our opinion, proof of the existence of a camera for taking pictures of objects in motion, said camera having, in combination with a sensitized film, mechanism for giving the film an intermittent motion, in which the periods of pause exceed the periods of motion; said mechanism comprising, in addition, the other elements called for by the issue, and a shutter,—is not a reduction to practice of this issue, unless there is proof to show that, when this camera was used for projecting, the shutter was either omitted altogether, or was so adjusted as to provide for such relative periods of pause and illumination and periods of motion as are called for by the issue."

It is quite true that the Lumiere patent provides for a substitution of shutters. A cutaway disc of translucent material is employed for exhibiting pictures, replacing the one for taking pictures. The change is made to diminish scintillation due to periodic suppression of the light. It is not pretended that the shutter described will operate to prolong the interval of illumination and exposure, so as to

cause the period of illumination to predominate. The French certificate of addition, dated March 28, 1896, however, seems to indicate an expansion of the claims so as to include the material feature of the claim in suit. The addition to which a reference is made reads as follows:

"When the apparatus is used for the exhibition of pictures, either by direct view or by projection, the periodic passage of the light and the shutting off of the same causes a scintillation, which may be avoided or reduced, at least partially, by cutting in the shutter, J, narrow openings in the form of radial slots, as is shown in Fig. 4. These openings, which may have varying forms and dimensions, will be regularly spaced, or not, over a whole or a portion of the surface of the shutter."

As this was a feature discovered subsequent to the grant of the patent in suit, it does not anticipate the claims. Moreover, it was an improvement or modification of the original patent, and designed, I think, to accomplish the functions of the patent under consideration. It not having been originally designed or adapted for the performance of such a function, it is not sufficient to constitute anticipation. *Topliff v. Topliff*, 145 U. S. 161, 12 Sup. Ct. 825, 36 L. Ed. 658. Complainant's expert admits that a shutter device structurally like that described by the French certificate of addition, or one which enlarges the period of illumination over that of nonillumination or nonexposure, substantially comprises the essence of the claims in suit. A broad construction of those claims does not limit them to the preferred form of apparatus by which the scintillation and flickering is effaced. The patent in suit describes the character of the shutter by which the light is interrupted at the instant when the tape or film is moved. To render the substitution of pictures imperceptible, shutter action must exceed that of change or period of movement of film. The Lumiere patent, although indicating that a cut-away disc of translucent material employed for the exhibition of pictures has the effect of diminishing the scintillation, does not indicate (except as modified or improved by the subsequent certificates of addition) the form or dimensions of such cutaway disc or shutter. It is therefore assumed that the original patent did not contemplate a shutter of other or different character than that corresponding to the sector of an angle of about  $170^{\circ}$ , or one which obstructs the picture during the interval of motion only. This difference in shutter action, somewhat difficult to comprehend because of its rapidity of function, is nevertheless essentially distinguishable. By the employment of a shutter of the former dimensions, the interval of illumination predominates, and the change of picture is imperceptible. By the use of the latter, the period of light is less, and therefore it does not perform the functions of the patent in suit, nor come within its scope. It is deduced by counsel for complainant that, inasmuch as the triangular cam of the Lumiere patent provides for prolonging the period of rest of the strip or film two-thirds of the total time, it can have no application to the apparatus by which pictures are taken and exhibited. Complainant's proofs tend to show that an enlargement of the period of illumination is not essentially adapted to such an apparatus. The evidence of the expert

witnesses is in conflict on this point. The later certificate of addition of the Belgian patent asserts that the principal advantage to be obtained by the cam in Fig. 4, referred to in the first certificate of addition, consists in giving to the film which receives and exhibits the pictures a period of absolute rest. This period of rest is described as a notable interval occurring between the impressions or the exhibition of two successive pictures. Does this rest embrace the period during which a change of pictures occurs in the manner described by the patent in suit? The argument of counsel for complainant, emphasizing this view of the controversy, may be quoted:

"To increase the period of rest between two impressions, and not during impressions, was to do precisely what Mr. Edison did. He increases his period of rest 8 or 9 times, in order that his film may come to a state of complete rest and be perfectly steady before exposure. But he, like the Lumieres, used a shutter, which absolutely prevented the period of exposure from being longer than the period of nonexposure, or substitution of pictures."

The Lumiere specifications failed to make clear with that definiteness required by the decisions that the result of the employment of the triangular cam would produce an exposure of the picture-bearing film two-thirds of the total time, or that it would be an advantage to cause the period of illumination of the picture to exceed the period of change or of substitution. This feature of the specifications, however, was subsequently amended so as to incorporate a provision which provided that, by "replacing by a cam the eccentric which originally operated the fork which moves the strip, we succeeded in augmenting the time of rest up to a certain limit." The form of this cam results in changes in direction which are to operate, and which are liable to injure the strip. Due weight must be given to these considerations, and I am therefore constrained to hold that the Lumiere patent and certificates of addition are not anticipatory of the claims in suit.

The Johnson British patent, No. 1,443, involves an optical photo-scope or kinoscope. It provides for an intermittent movement of the pictures, operated by means of a button or spring. The pictures are placed upon a glass or slide, and viewed through proper magnifying lenses. The defendant claims that this patent embodies the principle of the intermittent and rapid-moving film of complainant's patent. The Linnett British patent, No. 925, illustrates a moving card machine of the mutoscope class. By the operation of cards towards the vision the period of exposure of each picture is longer than the period occupied in passing out of the line of vision. United States Brown patent, No. 93,594, August 12, 1869, is a device for exposing the picture surface intermittently. The periods for movement and rest are of equal duration. The apparatus belongs in the magic-lantern field.

I do not regard that the mechanical details in the patents mentioned, and in others of a similar nature, in reference to which proof was given, contain the essential features forming the combination in suit. I conclude that the disputed claims of the Jenkins and Armat patent are not anticipated by the prior art. The Lumiere patent and certificates of addition are defendant's best reference, and, whatever doubts have

arisen in my mind by reason thereof, I have resolved in favor of the patent. The proofs for complainant show that the inventors, after several futile attempts, devised an apparatus which, in their judgment, accomplished the desired results. The patent seems to have achieved the object for which it was obtained. The improved facilities of complainant's apparatus over those of the animated picture exhibiting device then extant were recognized by artisans skilled in the art. The machine was publicly exhibited at the Atlanta Exposition in the year 1895. Subsequently, in January, 1896, Armat, who owned and controlled the patent, entered into a contract by which a large number of machines were to be constructed and put upon the market by an association or firm who were then exploiting the Edison kinetoscope, or direct-vision apparatus, so called. Moving picture exhibitions were given at various places in the city of New York,—the factory of Mr. Edison and elsewhere. About 80 machines were constructed and exhibited at Washington, Atlantic City, and other places. The method pointed out by the patent for increasing the period of illumination of the picture over that of change or substitution has been adopted by others engaged in exhibitions of this character. This appears to be strong evidence of the utility and novelty of the patented improvement. *Smith v. Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Magowan v. Packing Co.*, 141 U. S. 343, 12 Sup. Ct. 71, 35 L. Ed. 781; the *Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 450, 36 L. Ed. 161; *Francis v. Kirkpatrick* (C. C.) 52 Fed. 824; *Eastman Co. v. Blair Opera Co.* (C. C.) 62 Fed. 403. I think that the Armat and Jenkins invention, in the then state of the art, was a discovery of a new result, and therefore a patentable achievement, which entitles them to the protection of the patent laws. What they did was more than a mere detail of construction, obvious to a mechanic skilled in the art. The proofs abundantly disclose that there was a flickering and blurring of the canvas or screen upon which the pictures were projected, due to the illumination, which the skilled in the art were seemingly unable to destroy. All knew of the glaring and disagreeable effects produced by the machines then in the field, and by having a continuous or intermittent movement of the film. Undoubtedly many endeavored to find means to efface the very evident imperfection of the machines then in the public eye. None succeeded. It remained for the patentees to experiment upon the prior art, as already stated, and to bring into notice its inefficiencies, and the erroneous conception of the period of illumination and exposure. The defendant earnestly contends that the patentees here lay claim merely to widening the opening in the shutter, thereby allowing more light to pass through. Viewed in that manner, it does not appear to be a very great invention; but, when we give consideration to what the improvement quickly accomplished, it assuredly is entitled to a meritorious place in the field of invention. The defense of improper joinder is based upon a declaration of Armat, one of the inventors of the patent in suit, made at the time he applied for his prior United States patent No. 673,992, that he was the sole inventor of the feature in question. The prior statement of Armat is not entitled to such weight as to overcome the presumption of mutual

inventorship by Jenkins and Armat, as appears to be sufficiently established by the evidence.

The defense of prior use is not sustained. The evidence establishes that, subsequent to the employment of Mr. Dickson by Mr. Edison, an exhibition of the apparatus took place at Mr. Edison's factory. Afterwards contracts were entered into between Mr. Armat and Messrs. Raff and Gamman, agents of the Edison Kinetoscope Company, and the apparatus was extensively used in various cities already referred to. This would seem to be abundant proof of the utility and novelty of the invention. The evidence of Mr. Dickson falls far short of establishing the defense of prior use. The burden of proof in such a case rests upon the defendant. He has failed to show by a preponderance of proof the practicability of the Dickson experimenting apparatus. *Cantrell v. Wallick*, 117 U. S. 695, 6 Sup. Ct. 970, 29 L. Ed. 1017; the Barbed Wire Patent, *supra*.

Does the defendant's apparatus known as the "Biograph," as illustrated and described in Complainant's Exhibit Drawings of Defendant's Apparatus and Complainant's Exhibit Description of Defendant's Apparatus, infringe the patent in suit? As already stated, the object of complainant's invention, the period of exposure of the pictures so enlarged, and the movement of the film or strip upon which the pictures are superimposed, is so rapid that the blurring effects caused by the illumination are almost entirely effaced. The manner of increasing the illumination resulting from the improved apparatus used to exhibit the pictures is due to the intermittent movement of the film. The defendant, in the operation of its apparatus, used a shutter, which it claims is necessarily employed to intercept the light while the film is in motion. The length of the period of illumination and exposure of the film, as compared with the interval of movement or substitution of pictures, is in excess of the period of nonillumination or change, and therefore comes within the scope of the disputed claims. The apparatus of the defendant comprises a transparent picture-carrying surface, having a tape-like film, and means for giving an intermittent movement, so as to enlarge the period of rest and illumination of the picture-bearing film. When so enlarged, the period of exposures exceeds that of nonexposure. By reason thereof each picture on the film resembling objects in motion is given a longer period of exposure than the time required to change one picture in series to the next in sequence. The mechanical combination for accomplishing this method of exhibiting moving pictures is substantially the equivalent of the combination in suit.

Upon the whole case, I am of the opinion that the complainant is entitled to a decree for an injunction and accounting. Decree may be entered accordingly.

## KRUTTSCHNITT v. SIMMONS et al.

## SAME v. GOTTLOB.

(Circuit Court, S. D. New York. October 9, 1902.)

## 1. PATENTS—DESIGNS—EVIDENCE OF INFRINGEMENT.

Where the effect of complainant's patented design was to introduce into the market a new article of manufacture made and sold by him, the fact that purchasers of similar articles subsequently made and sold by defendants supposed they were getting complainant's design does not establish that such articles infringed the design patent, where the mistake resulted from the novelty of the article itself and not from the similarity of the design, but the question of infringement must be determined by a comparison of the designs with that of the patent.

## 2. SAME—INFRINGEMENT.

The Kruttschnitt design patent No. 30,627, for a design for an ornamental border adapted for use on aluminum sign plates, discloses patentable novelty, and is valid; also *held* infringed by certain designs used by defendants, and not infringed by others.

In Equity. Suits for infringement of letters patent No. 30,627, for a sign plate, granted to Gustav A. Kruttschnitt, April 25, 1899. On final hearing.

Adna G. Bowen, for complainant.

Hauff & Hauff, for defendants.

TOWNSEND, Circuit Judge. These suits on two bills for infringement of plaintiff's design patent No. 30,627 were heard together. So far as appears from the record, the particular collocation of a scroll figure with an inner border line shown in the drawings of the patent is novel. The special modified scroll design appears to be differentiated from the similar designs of the prior art to such an extent as to meet the requirement of novelty in a design patent. The design described and shown is an ornamental border adapted for use on aluminum sign plates, comprising a main ornamental scroll figure suggestive of a distorted Greek pattern having a mottled surface and a rectangular inner defining border line. The inner border of complainant's sign plates is cut or stenciled with a tool; the mottled pattern is produced by revolving a brush against the surface of the plate. The defendants have produced a great number of different designs, resembling more or less closely the patented design.

The single question in the case is as to the scope of the order for an injunction. It does not appear that there is anything new in the processes by which the design is produced, and, even if the method of their application to aluminum plates has accomplished new results, no patent has been obtained therefor. The complainant hit upon or conceived the novel idea of so ornamenting plain sheets of aluminum as to adapt them for ornamental and advertising purposes, and thereby secured a large trade in what had hitherto been a comparatively valueless blank. The attention of the public is not primarily or necessarily called to the specific design, but to the bordered aluminum sign plates as a new article of manufacture. Consequently, when the defendants manufactured bordered aluminum

signs having patterns differing so widely from the patented design as not to infringe the same, they were purchased by persons who supposed they were getting plaintiff's design, or who, at least, failed to distinguish the difference between them. Counsel for plaintiff, therefore, invokes the application of the familiar test,—“the eye of the ordinary observer, giving such attention as a purchaser usually gives.”

For the reasons already stated, this test cannot be applied in this case without doing violence to the fundamental law of infringement,—that in order to constitute infringement there must be an appropriation of the novel elements of the patented design. Because such aluminum signs are new, the purchasing public may mistake defendants' design, which every one has a right to make, for the design which only the plaintiff has the right to make. But the defendants cannot be deprived of their common right. The plaintiff, then, must be limited in such test to configurations which appropriate his design.

Of the exhibits produced on the hearing, it must be found that Exhibits 4, 9, 10, 11, 12, 15, 16, and 17 do not infringe, but that Exhibit 5 does infringe. The complainant is therefore entitled to an injunction and an accounting as to Exhibit 5. As to the other exhibits, the bill is dismissed.

**CHICAGO PNEUMATIC TOOL CO. v. PHILADELPHIA PNEUMATIC TOOL CO.**

(Circuit Court, S. D. New York. October 13, 1902.)

**1. PATENTS—INFRINGEMENT—DISTRICT OF BRINGING SUIT.**

The circuit court for the Southern district of New York has jurisdiction of a suit for infringement of a patent against a corporation of another state under Act March 3, 1897 [U. S. Comp. St. 1901, p. 589], where defendant has a regular and established place of business in New York City, where its agent, acting under his general authority, accepted an offer and completed a contract of sale for an infringing article, which was recognized by defendant as valid.

**2. SAME—SALE TO AGENT OF PATENTEE.**

The fact that a sale of an infringing device was made to an agent of the owner of the patent does not change its character as an act of infringement.

**In Equity.** Suit for infringement of patent. On motion for preliminary injunction.

John R. Bennett, for the motion.

E. Hayward Fairbanks, opposed.

**LACOMBE**, Circuit Judge. The defendant with entire propriety refrained from arguing the question of construction of the patent and of infringement. The same questions are now before the court of appeals in this circuit. By so doing, however, it has not waived any of the points presented by the pleadings and papers.

As to the question of jurisdiction, the only controversy is whether or not an infringing device was sold in the city of New York by the

defendant, which concededly has a regular place of business here. This is to be decided, not by the assertions or conclusions which are to be found in the affidavit, but by the facts of the transaction. It seems entirely plain that an offer to buy the infringing device at a named price was made in this city by the purchaser to an agent of the defendant in defendant's regular place of business, and that such agent on behalf of defendant accepted such offer, thus closing a contract of sale, without reference to the headquarters of defendant in Philadelphia. The two telegrams disclose only that the agent asked headquarters if a drill could be shipped on a certain day, and that he was informed that it could, whereupon he himself accepted the purchaser's offer, without receiving or asking for any further authority from headquarters than he apparently already possessed; and that authority was evidently quite sufficient, for, on the strength of the sale the agent had made, the defendant shipped the drill. The facts are not the same as in *Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co.* (C. C.) 116 Fed. 641.

There is no force in the suggestion that the sale was made to a purchaser who bought in the interest of complainants, in order to secure proof of infringement. We are not now dealing with any question of damages, but with the mere fact of sale of a device made in conformity to the patent. The sale of such a device is an act of infringement, although it may be made under such circumstances that complainants cannot recover damages for it.

Motion for preliminary injunction is granted.

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### DURFEE v. BAWO et al.

(Circuit Court, S. D. New York. October 4, 1902.)

#### 1. PATENTS—CONSTRUCTION OF CLAIMS.

An American patent, which describes in its claims but one form of the device claimed, cannot be construed broadly to cover a different form described and claimed in a foreign patent previously granted to the same inventor, notwithstanding broad language used in the specification, but must be considered as an abandonment of the prior form.

#### 2. SAME—INFRINGEMENT—TUBULAR BELLS.

The Harrington patent, No. 485,542, for an improvement in tubular bells, designed to improve the tone, discloses invention, and was not anticipated; but, in view of the state of the prior art, and especially of prior British patents to the same inventor, must be limited to the particular invention described, which consists of placing one or more stiffening devices within the tube "between its point of suspension and its end." As so construed, *held* not infringed.

#### 3. SAME—PRIOR USE—EVIDENCE.

The defense of prior public use, to defeat a patent, must be established beyond a reasonable doubt.

#### 4. SAME.

A patent is not invalidated because a device similar to that described was previously used by another, but for a different purpose.

#### 5. SAME—ANTICIPATION—TUBULAR BELLS.

The Treat patent, No. 568,816, for a tubular bell, is void for anticipation by the Harrington British patent, No. 2,054.



**In Equity.**

Edward C. Davidson (Nathan Heard, of counsel), for complainant.  
Dickerson, Brown & Raegener (Edwin H. Brown, of counsel), for defendants.

HAZEL, District Judge. This suit is brought for alleged infringement of two United States letters patent,—No. 485,542, dated November 1, 1892, granted to John Harrington, and No. 568,816, dated October 6, 1892, granted to James E. Treat. Both patents relate to improvements of cylindrical tubular bells. They are owned by complainant, to whom they were assigned by the patentees. For convenience the patents in suit will be referred to hereinafter as the "Harrington Patent" and "Treat Patent," respectively. Harrington's British patents will be appropriately distinguished.

The Harrington United States patent in suit, for which the complainant claims a liberal construction, will first be considered. The grounds for such basic claims involve an examination of the principles of the laws of vibrating sounds as applied to tubular bells, and of various of the patents cited by defendant in anticipation of the patents in suit. It is clear at the outset that the Harrington patent is for an improvement to remedy and perfect apparent inefficiencies in the sound of a tubular bell. There is no novelty in the bell itself, in the means employed to suspend it, or in the application of external force. The single claim of the patent reads as follows:

"In a musical sounding apparatus of the class described, a suspended tube adapted to be struck by a hammer and caused to vibrate to produce by its vibration a musical sound of a certain pitch, combined with one or more stiffening devices in said tube between its point of suspension and its end to affect the vibrations of the metal of the tube and the quality of the tone produced by such vibrations, substantially as described."

The general nature of the invention is concisely stated in the specifications to be an invention relating—

"To means and apparatus for the production of musical sounds of that class wherein a suspended metallic tube is adapted to be struck by a hammer, the vibration of the metal of the tube caused by the blow producing a musical sound. In apparatus of this class the pitch of the sound produced by the tube when struck by a hammer and set in vibration depends upon the quantity of metal in the tube and is unaffected by the column of air contained within the tube."

The patent illustrates two forms of stiffening the tubular bell: (1) A rigid pin or cross-piece inside the tube at one or both ends; (2) a polygonal form secured by removing segments of the packing or plugging inserted at the end and within the tube. In each instance, the stiffening device is integral with the tube. The defenses interposed are want of patentability, anticipation, noninfringement, prior public use, and abandonment of forms of the invention described by the British patent No. 2,054, granted to Harrington and hereinafter more particularly referred to.

The patent is not void for lack of invention. It is well established by the proofs that tubular bells, without a stiffening or loading device, emit inharmonic sounds technically called "hooplike vibrations,"

which unfit them for the variety of musical purposes to which they may be applied by the adoption of a stiffening device, which consists in the addition of metallic portions to the end or within the tube. The essence of Harrington's contribution to the state of the art is the improvement of the quality of the tone of a tubular bell. By the tone of the bell is meant the quality, pitch, and volume of sound. When a tubular bell is struck a blow by a hammer, the fundamental sound is followed by nascent, undulatory, longitudinal vibrations, extending the entire length of the tube. These vibrations are styled "overtones," or "partials." They are similar to those which emanate from a metallic rod or plate. But, as the tubular bell is hollow, it is proportionately lighter and stiffer than a rod rigid at one end and yielding at the other, and consequently the quality of sound and vibration is perceptibly unlike. It is distinguished from the ordinary bell by narrow transverse dimensions, by the character of metal which composes it, and by the sound produced when struck. Experience has shown that the vibratory sounds are not always in harmony with the pitch or fundamental note. The fundamental note or pitch is regulated and controlled—that is, lowered or raised—by the dimensions of the tube, by the general character of the metal employed in its construction, and by the stiffening device, which suppresses the inharmonic vibrations perceptible in the plain tubular bell. These inharmonic vibrations are described by Professor Main, complainant's expert witness, as "hooplike vibrations." He says that a tube, at the moment of impact of the hammer, becomes slightly oval, due to compression; that the tube vibrates back and forth transversely, precisely as a hoop would do,—hence "hooplike vibrations," which rapidly correspond with the pitch of the note which is produced.

After giving the testimony of the expert witnesses careful consideration, I am clearly satisfied that hooplike vibrations exist in an unstiffened or unweighted tubular bell, and that the quality of tone is thereby impaired. The utility of the tubular bell wholly consists in a melodious progression and modulation of the fundamental tone. Defendant's expert witnesses testify that both patents in suit, by their construction, added increased weight to the tube, with the practical view of varying the sound, and not to suppress inharmonic and discordant vibrations. Their testimony tends to show that such vibrations have no appreciable existence in the tubular bell, and, therefore, no disturbing feature is apparent in its musical tone. Hence nothing has been achieved by the inventions. It was not the object of the invention to vary the sound. The patentee expressly states that the invention designs to improve the quality of the tone. To that end it was desirable to extinguish or suppress the inharmonic component sounds attributable to the plain tubular bell. If, therefore, the tone is pleasingly varied by the patentee's stiffening device, it is an incident following a claim whose essential feature is the improvement of the quality of the tone by the adoption of a certain device. *Tilghman v. Proctor*, 102 U. S. 711, 26 L. Ed. 279. It is quite true that weighting, thickening, or loading a rigid metallic bar, usually at the end or in prongs in tuning forks, will produce vibrating overtones. Such overtones, however, are not always musically melodious.

The defendant contends that the prior art discloses a method of stiffening or loading in various acoustic vibrating musical instruments; that, to obviate inharmonic tones, such instruments were weighted or stiffened in substantially the same manner as described by the Harrington device. The United States patents, Nos. 329,090, of 1885, and 375,654, of 1887, granted to Segrove; the Starr United States patent, No. 8,537, of 1851; Butterworth's United States patent, No. 299,956, of 1884; the United States patent to Fischer, No. 309,138, of 1884; the United States patent, No. 149,585, of 1874, to Hill; and the Hummel German patent, No. 7,405, of 1879,—are cited in anticipation. These patents, however, are for tuning forks,—for improving the purity of sound. They point out a manner of stiffening the prongs, or weighting a ring, or other vibrating segments, to affect the tone. None of them have been applied to a tubular bell. The nearest application would seem to be the Hill patent, which shows a short hollow tube, split diametrically throughout its length, and having superimposed upon its upper end a split lead ring. This ring, being an additional weight to the vibrating ends, affected the tone. The patent was for tuning the device, and not for suppressing component notes. I do not think that any of these patents are anticipations of complainant's device, which indubitably improved the tubular bell in a manner which entitles it to classification as a harmonious musical instrument.

I do not consider the device in suit, or Harrington's original British patent, No. 2,054, to which particular reference will follow, remarkably inventive productions. Weighting or loading a vibrating musical instrument,—merely placing an additional portion of metal on or within a tubular bell,—to affect its melody, especially in view of the means employed in other vibrating musical devices of another class to improve the purity of sound, does not take high rank in the field of invention. It has enough merit, however, to advance the utility of tubular bells and make them useful in new fields. The extent to which the patent in suit deserves protection against infringement will not be considered.

The complainant contends that the invention covered by the claim of the Harrington patent is so far primary that it should be construed unrestrainedly, and to embrace within its scope the defendant's structure, which functionally operates in substantially the same way, producing a suppression of inharmonic overtones in the tubular bells of defendant's manufacture. The scope of the patent in suit must be measured by British improvement patent, No. 2,054, issued to Harrington February 10, 1888. The specifications of that patent state that the object of the patentee is to improve the tone of the apparatus described by his British patent, dated October 2, 1884 (in which tubes were employed, open at both ends, in combination with a clock), and to afford facility for tuning the same with the greatest accuracy. This the patentee proposed to accomplish by employing a plug or cap at either or both ends of the tube, which, when driven or screwed into or around the tube, afforded a satisfactory tuning and increased the volume of sound produced. A set screw or other suitable means were employed to keep the plug or cap in position.

Subsequently, in 1888, Harrington obtained another British patent for curing a defect caused by vibrations of the tubular bell. These vibrations resulted in a confused sound, which a thick felt damping appliance was designed to destroy. April 11, 1892, another British improvement patent, No. 6,922, was granted to Harrington, associated with Thomas Latham. The specifications of the latter patent, which substantially embody the device of the Harrington patent in suit, state that the tubular bells, closed at both ends in the manner described by the British patent, No. 2,054, were sometimes injured by driving the plug into the top, therefore requiring a close-fitting screw cap to prevent loosening, which impaired the sound. The improvement consisted in riveting a sound plug or bolt or pin within and near one or both ends of the tube.

The defendant by its amended answer avers that the British patents, Nos. 2,054 and 6,922, anticipate the patent in suit, and, further, that the patentee omitted to include in his patent in suit that form of his invention described in British patent, No. 2,054, and illustrated in Fig. 4 accompanying the application for that patent; and, having abandoned that form of his invention, the patentee is now estopped from claiming such a construction of the patent in suit as would cover that claim. As already stated, British patent, No. 2,054, employs a plug or cap at either or both ends of the tube. The patent in suit describes a rigid pin or cross-piece inside the tube and a plug having portions removed at various points between the tube and the plug. I think this must be considered as a tacit abandonment of the enlarged claims of the prior patent. Giving to such British patent a broad scope must obviously lead to a narrow construction of the claims of the patent in suit. It is quite true that the patentee in his specifications describes a broad invention. He says:

"The shape of the stiffening devices may be varied without departing from this invention, the gist of which lies in stiffening or solidifying the tube at one or more points, to so affect the vibration of the metal of the tube as to produce the improved quality of tone desired."

In view of the prior British patents granted to Harrington, he was not entitled to a broader interpretation than that allowed by the patent office, nor in any event broader than he, already a holder of a foreign patent, saw fit to cover in his application to the patent office of the United States. The patent in suit has improved the old tubular bell, and therefore must be restricted to the improvement described. Indeed, the file wrapper shows satisfactorily, I think, that it was intended that the complainant's device should be limited to one or more stiffening devices "inside" the tube, or to devices located "between" the point of suspension of the tube and its end. The original specifications filed by the patentee include a stiffening device "suitably located" with relation to the length of the tube to affect the quality of the tone. This claim was amended so as to conform to the narrower scope. The claim cannot be enlarged beyond the scope of its intention.

The correspondence of the commissioner of patents shows that in his opinion the patent was anticipated by Harrington's United States patent, No. 389,841, granted September 18, 1888. He made no

reference to the British patent, but seemed to think that it was not new to stiffen tubes at various points of their length for the purpose of obtaining harmonious sounds. He cited an organ pipe as one that was stiffened to qualify the tone, but subsequently, after an extended correspondence, allowed claim 2. The commissioner held claim 1 was superfluous, and substantially similar to claim 2. In this, I think, he erred. Notwithstanding the broad language employed in the specifications, the claim allowed all that the patentee could be allowed. The court is not informed whether the patent office carefully examined the state of the prior art or the British patents referred to. It is presumed, from the exhibits in evidence, that they did, and therefore limited his claim. If the applicant felt aggrieved because of that limitation, his remedy was to appeal from the decision of the patent office. As no ambiguity is discovered in the terms of the claim of the patent in suit, it certainly should not be enlarged beyond the scope of its claim as allowed by the patent office. Complainant cannot show that his invention is broader than the terms of his claim, "or, if broader, he must be held to have surrendered the surplus to the public." *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Machine Co. v. Lancaster*, 129 U. S. 273, 9 Sup. Ct. 299, 32 L. Ed. 715; *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235. In coming to this conclusion I am influenced not wholly by the action of the patent office, but by the Harrington claims as specified in British patent No. 2,054. The patent in suit can, therefore, be given no wider scope than such a betterment over the prior patent as may be specifically pointed out. Harrington elected to take for his American patent the forms of his device as illustrated by Figs. 1 and 2 of the patent. The character of the improvement pointed out by him in his specifications and covered by his claims is not such as entitles it to a broader construction. The prior art limited the field of his invention. The functions performed by the tubular bell as a result of the patent in suit were not new. No reason exists, therefore, for making the defendant's device sufficiently broad to come within the scope of complainant's patent. *Manufacturing Co. v. Randall*, 43 C. C. A. 578, 104 Fed. 355. I do not think that the views expressed in the case of *Extraction Co. v. Brown*, 43 C. C. A. 568, 104 Fed. 345, by the circuit court of appeals for the Eighth circuit, cited by counsel for complainant, are at variance with this view. In that case the court held that the circumstances were not such as to require or justify a literal interpretation of the patentee's claim. It was there held that the invention was not anticipated and was a meritorious one, and that the device illustrated in the drawings, as applied to a double-deck furnace, should be construed to apply to either a single or double-deck furnace. Manifestly the state of the art, as ascertained by the British patents claimed to anticipate, and the use of stiffening devices for controlling vibrating sounds in the different classes of musical instruments, amply justify restricting the actual claim allowed, irrespective of the broad description and statements contained in the specifications.

The defendant's device practically secures the results achieved by the Harrington device. Harmonious quality of tone is produced by

striking the tube at or near a solid ring or cap affixed to its end. In tuning defendant's device to secure the required pitch, the metal is cut off at the bottom; the ring being integral with the upper end of the tube. Defendant's structure seems to be more nearly the equivalent of Fig. 4 of the Harrington patent, No. 2,054. The manner of attaching the ring integrally would not escape the charge of infringement. *Bundy Mfg. Co. v. Detroit Time Register Co.*, 36 C. C. A. 375, 94 Fed. 534. By the device in suit the metal tube is shortened or reduced to obtain a required pitch proportionately to the additional metal supplied by the stiffening device. There is such a wide departure in the defendant's structure from the literal statements of the claim in suit that it cannot be held to infringe complainant's tubular bell, which consists of a metallic addition to the tubular bell firmly affixed within the tube. Both perform the same function, but in a substantially different way, giving effect to the narrow construction of the claim of the patents.

Upon the question of prior public use, I have read the testimony upon which this defense is based. The testimony of Seymour, witness for defendant, showing that during 1884, and August 11, 1886, he completed a chime of bells for a clock, the tubular bells of which were stiffened, does not seem to be of such a reliable nature, in view of the circumstances, as to justify its acceptance in anticipation of the Harrington patent. It is of the same class of testimony which requires the nonpresence of a reasonable doubt before it can be given controlling credence. Corroboration of Seymour's testimony is attempted by convenient diaries and memorandum books kept at the time by his wife and other witnesses, from his relations, who remember having seen the clock at the time or times mentioned. The testimony is not so clear as to remove a reasonable doubt which exists as to its accuracy. *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Barbed Wire Patent*, 143 U. S. 284, 12 Sup. Ct. 443, 36 L. Ed. 154; *Brown v. Zaubitz* (C. C.) 105 Fed. 242; *Dodge v. Post* (C. C.) 76 Fed. 807. Furthermore, I think that the cross-pins used in the Seymour bells were employed simply as a means for suspending the tubes. It was not used for the purpose of improving the quality of the tone, and, therefore, it does not anticipate the Harrington patent in suit. This conclusion finds support in *Clough v. Manufacturing Co.*, 106 U. S. 175, 1 Sup. Ct. 188, 27 L. Ed. 134, *Nelson v. Type-Founding Co.* (C. C.) 91 Fed. 418, and *Chisholm v. Johnson* (C. C.) 106 Fed. 191.

#### The Treat Patent.

By this patent the end of the tube is firmly held by a ring, which increases the thickness of the end of the tube. The ring may be applied to either or both sides of the tube. The specifications say that when the tube is suspended by a suitable cord, and the ring is struck at its end by a hammer or in any other usual manner, the tone of the bell is greatly improved. The first claim of the specifications originally filed with the commissioner of patents was for tubular bell having its end reinforced by metallic rings, substantially described. The application was rejected on the ground that the rein-

forcement rings specified were old, in view of Fig. 3 of the Harrington patent in suit. This claim was waived, and the claims in suit allowed. Defendant's device is practically similar to the invention described in the Treat patent. Structurally, the ring or cap arrangement around the end of the tube is integral to it, and in effect undoubtedly contains the essential elements of the Harrington British patent, No. 2,054, and the Treat patent in suit. The claims allowed are as follows:

"(1) A tubular bell having a metallic ring secured thereto at its end, said metallic ring fitted in intimate, solid contact throughout its length against said tube, whereby the sonorous vibrations of the latter are amplified, substantially as described.

"(2) A tubular bell having its end fitted very firmly to the exterior of a metallic ring, substantially as described.

"(3) A tubular bell having its end embraced and held firmly both externally and internally between metallic rings, substantially as described."

The exterior ring is very much like the plug or cap device of the earlier British patent. All that Treat seems to have done has been to substitute a ring around the end of the tube in place of the cap screwed to the tube, as described in Fig. 4, and to substitute or affix a ring within the tube in place of the plug or disc in the later Harrington patent. Each of these forms constitute devices tending to stiffen the tube in the manner pointed out. They do not perform any new function. I am therefore of the opinion that the scope of the claims of the Treat patent is fully embraced in the claims of the Harrington British patent here considered. It is merely change of form without being an improvement,—a detail of construction which a skilled artisan by the employment of ordinary mechanical knowledge has made superior to the old tubular bell. When a defect in the Harrington patent in suit, consisting of liability to loosen the diametrical pin by the frequency of the hammer blow, thereby injuring the tone of the bell, became apparent, it was not difficult to obviate such defect in the light of the prior art. An exterior ring integral with the end of the tube appears to have taken the place of the screw cap arrangement of the Harrington British patent, while an interior ring has taken the place of the plug or disc. The Treat patent, therefore, cannot be distinguished by structural changes or superior workmanship from the earlier British patent and the improvement patent in suit. The right of the public to use what has been disclosed by the prior British patent, the monopoly having expired, should not be curtailed.

It follows that for the reasons stated the Treat patent is anticipated by British patent No. 2,054. The Harrington patent must be restricted in its claims to a stiffening device within the interior of the tube, as therein more specifically referred to. The defendant does not employ a device covered by those claims or secured by that patent. It therefore cannot be held to infringe. A decree may be entered dismissing the bill.

## BARRETT v. TWIN CITY POWER CO. et al.

(Circuit Court, D. South Carolina. November 22, 1902.)

## 1. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—FEDERAL COURTS.

A remedy at law created by the statutes of a state cannot oust the jurisdiction of a federal court of equity.

## 2. SAME.

Complainant undertook to develop the water power of a river, and for that purpose secured options on adjoining lands, which were necessary to the project. Learning that other persons were also securing lands for the same purpose, negotiations were entered into, which resulted in his transferring his options to such persons, the purchasers to organize a corporation, and to deliver to complainant a certain amount in its bonds by a certain date in payment for such options, in default of which they were to be paid for in cash or returned. Differences arose between the parties respecting the payment, and the bonds were not delivered within the time specified. A demand for the return of the options, which were about to expire, was refused, and, the company having failed to complete the purchases thereunder, complainant filed his bill in equity, asking the appointment of a receiver to complete the purchases for the protection of his rights thereunder. *Held*, that such bill presented a case within the jurisdiction of a court of equity, and, having obtained jurisdiction for one purpose, the court would retain it to grant full relief.

## 3. CONTRACT—PERFORMANCE.

Complainant transferred property and rights to certain of the defendants under a contract that they should organize a corporation, and deliver a certain amount in its bonds to complainant in payment by a date named, otherwise to pay him the amount in cash on that date; time being made of the essence of the contract. The bonds were to be secured by mortgage on the corporation's property, and the issue was not to exceed 80 per cent. of the amount of its investment in such property. At the expiration of the time named, the corporation had been organized, but had not issued any bonds, nor executed any mortgage, and the amount it had invested up to that time was small. *Held*, that a delivery or tender to complainant of an accepted order on its treasurer for the delivery of the bonds when they should be issued was not a fulfillment of the contract, but that complainant was entitled to demand the cash payment.

## 4. SAME—ESTOPPEL TO DENY PERFORMANCE.

The failure of complainant to return the order, or to state his refusal to accept it, for some weeks after it was sent him by mail, did not work an estoppel against him, where he had distinctly refused to accept it when offered a few days previously, and notified defendants that he insisted on the bonds or the cash payment, and defendants had no reason to be misled as to his position.

## 5. SAME—WAIVER OF TIME FOR PERFORMANCE—AGENCY OF MORTGAGE TRUSTEE.

There having been no bonds nor mortgage in existence when the time for performance of the contract expired, the person who was afterward made trustee in the mortgage had no power, as agent or representative of complainant, to waive the limit of time in his behalf, by giving the order on the treasurer for delivery of the bonds when issued.

## 6. SAME—DEFENSES TO SUIT FOR ENFORCEMENT.

The assignees of certain options for the purchase of property, who retained the same, and transferred them to a corporation after they had made default in paying therefor and their return had been demanded by the assignor, cannot set up in defense to a suit for the enforcement of the contract that the price they agreed to pay was exorbitant, and the bargain unconscionable.



In Equity. On final hearing.

See III Fed. 45.

F. H. Miller, Wm. K. Miller, and D. S. Henderson, for complainant.

B. L. Abney and J. S. Muller, for defendants.

SIMONTON, Circuit Judge. Thomas Barrett, Jr., a citizen of the state of Georgia, resident in Augusta, desired to develop the water power of the Savannah river above the city of Augusta. To that end he secured the necessary capital, and proceeded to obtain options from owners of land on both sides of the river adjacent to the proposed site of his operations. Whilst he was engaged in securing these options, and after he had succeeded in obtaining some 15 of them, he found that there was another person engaged in the same purpose,—W. H. Chew, acting as trustee for C. E. Fisher, of New York. As these efforts were in conflict with each other, after some negotiation Chew determined to buy out Mr. Barrett, and finally a contract was entered into between them in the words and figures following; that is to say:

“Augusta, Ga., June 1, 1900.

“In consideration of five thousand dollars in cash, represented by draft of W. H. Chew of G. E. Fisher, of 37 Wall street, New York, for \$5,000.00, and the agreement of said trustee to have delivered to me fifteen thousand dollars of bonds as hereinafter stated,—total consideration, twenty thousand dollars,—I, Thomas Barrett, Jr., hereby agree to sell to said trustee all options owned by me and expiring May 1st, 1901, for the purchase of land fronting on the Savannah river, which stand in my name, and which are of record in Edgefield county, S. C., and Lincoln county, Ga., to which reference is made. This sale is upon the condition that said trustee and said G. E. Fisher and his associates shall proceed to organize an incorporation to develop a water power of not less than 15,000 horse power at or near Ring Jaw Shoals, on the Savannah river, within the space of eight (8) months from this date, and upon the completion of said incorporation to deliver me first mortgage bonds of the corporation for fifteen thousand dollars (\$15,000), said corporation not to issue bonds in excess of 80 per cent. of the amount paid, laid out, and expended in the purchase of the various tracts of land and the land covered by these options and in the development of said water power, or that said trustee and said G. E. Fisher and his associates shall have the privilege of paying to me \$15,000.00 in cash instead of bonds. It is distinctly understood that, if said draft for five thousand dollars is not paid on presentation, then this instrument is absolutely null and void, and, that if said money is paid, and the corporation is not organized, and the bonds hereinbefore specified issued and delivered to me by January 1st, 1901, or fifteen thousand dollars cash paid in lieu thereof,—time being of the essence of the contract,—then this sale shall be null and void, and the sum of five thousand dollars, paid to me at this time, shall not be accounted for by me, but shall be retained by me as the amount of liquidated damages agreed upon between the parties hereto for a violation of the said contract, and all options to be returned to me the same as if this sale had not been made.

W. H. Chew, Trustee.

“Thomas Barrett, Jr.”

It has been made to appear clearly that the date January 1, 1901, in this contract, is a clerical error, and should be February 1, 1901. Complying with this contract, Thomas Barrett, Jr., forthwith transferred and assigned all the options held by him, some 15 in all, to W. H. Chew, trustee. On August 7, 1900, a charter was issued by

the secretary of state of South Carolina to a corporation, the Twin City Power Company, which thenceforward took the place of Fisher, trustee, and Chew, his agent. At the time of the issuing of this charter the board of directors certified that 20 per cent. of the capital stock had been paid in. The liability of the stockholders was "only to the extent of the amount remaining due to the corporation on the stock owned by them." On December 8, 1900, D. M. McKaye, treasurer of the Twin City Power Company, wrote to Mr. Barrett, calling his attention to the error in the contract above referred to, and ends thus: "We shall now make more rapid progress, and will be ready to make delivery to you of the securities under the contract within the eight months designated, namely, January 31, 1901." On December 8, 1900, complainant wrote a letter to Wm. H. Chew, calling his attention to the terms of the contract and the stipulation therein. The bonds were to be delivered by January 1, 1901 (should be February 1), or \$15,000 paid in cash in lieu thereof; that he will, of course, expect either bonds or cash. The receipt of this letter was acknowledged by Chew in his letter of December 14, 1900. He called attention to the clerical error in the date of the contract. On December 17, 1900, the complainant wrote to Chew, acknowledging receipt of this last letter, recognizing the clerical error in the contract, and stating that, if bonds were delivered by January 31, 1901, it would be all right; otherwise he would expect the \$15,000 in cash at that time. On December 17, 1900, complainant replied to McKaye's letter of December 8th, recognizing the error in the contract as to January 1, 1901. On December 19, 1900, Chew, signing himself vice president and general manager, wrote to complainant, acknowledging his letter of December 17th, saying: "In reply would say that we will comply with our contract to the letter. Should we fail in getting our bonds ready, you will be paid as per agreement." In December, 1900, McKaye had an interview with complainant in Augusta, and suggested to him to take stock instead of bonds. This suggestion was not approved by complainant. After some discussion as to the value of the bonds, complainant stated to Mr. McKaye that he would expect the bonds if issued with the terms of the contract, otherwise he would expect the cash. On January 25, 1901, McKaye, as treasurer, wrote to complainant, saying that, owing to delay in securing important legislation and acquiring property, the company would be obliged to give an order for delivery of the bonds at the earliest day the bonds and mortgage were ready for delivery of the trustees; that he did not think the delay in the actual delivery of the bonds would make any difference to complainant if in place of them he held an order for their delivery at the first moment they are ready, which they expect will be within a very few weeks; ending with these words: "Kindly let us know if you have any suggestion to make regarding the wording of the delivery order." To this letter complainant replied on January 28, 1901, expressing great surprise at the proposal to give an order for bonds, instead of the bonds themselves; calling attention to the correspondence with Chew and himself; concluding: "I therefore beg to insist that you comply with the terms of the contract, and that, if the bonds are not ready for delivery on January 31, I shall expect

you to remit me fifteen thousand dollars in cash." On January 30, 1901, Chew wrote to complainant, acknowledging the receipt of this letter to McKaye, and inclosing an order signed by Chew, trustee, to McKaye, as treasurer of the Twin City Power Company, to deliver to Barrett \$15,000 first mortgage 6 per cent. gold bonds as soon as said bonds are certified to by the trustees of the mortgage, and ready for delivery, claiming in this way the fulfillment of the contract of June 1, 1900. The acceptance of this order by McKaye is written on its face. This letter, sent by registered mail, reached Augusta and was receipted for February 1, 1901. At this time Barrett was sick at home, but could attend to his correspondence. He did not reply to it, but on March 23d thereafter he went to New York, and demanded from Chew, as an individual, as trustee for Fisher, and as vice president of the Twin City Power Company, the delivery of his options. He made the same demand on Fisher and on McKaye, treasurer. All these demands were refused. They admitted that the options had been transferred to the Twin City Power Company, that the expenditures then did not exceed between \$40,000 and \$50,000, that the stock of the company was \$1,000,000, and that a mortgage was in the course of preparation. On that day formal assignment was made by Chew of all lands conveyed in South Carolina, or carried by the Barrett options, to the Twin City Power Company, and this was duly recorded in South Carolina. So the matter stood. The options of Barrett would expire on May 1, 1901. On March 30, 1901, he filed his bill in this court, amended April 16, 1901, against Chew, Fisher, the Twin City Power Company, and the parties giving the options, in which he sought to protect his rights under these options, demanding the fulfillment of the contract, praying that, inasmuch as the time was short, and the options in danger of loss, a receiver be appointed, authorized to make good the options or to protect them; at the same time offering to furnish all the money needed for this purpose, this advance to be secured to him. A temporary receiver was appointed. On hearing the rule to show cause issued on appointment of the temporary receiver, the following order was entered:

"It is therefore ordered that the defendant the Twin City Power Company secure to the complainant the performance of the agreement of the 1st of June, and to this end that it enter into bond with surety, to be approved by the judge of this court, in the penal sum of \$15,000, with the condition that it preserve and keep in full force and effect each and every of the options delivered to Chew, trustee, by the complainant, under the agreement of June 1, 1900, and that it shall in every respect keep and perform the provisions of said agreement as construed by the order and decree of this court upon the final hearing of the case; that upon the execution and approval of the said bond the temporary restraining order heretofore issued be rescinded, and the receivership be dissolved."

Thereafter bond was filed by the defendant in conformity to the provisions of this order, and the temporary receiver discharged. Defendant Twin City Power Company, Fisher, and McKaye filed their answer. The cause came to an issue, testimony was taken, and it is now before the court on pleadings and testimony for final decree. On July 23, 1901, the solicitors of defendant tendered in writing to

complainant, as in compliance of the order of Chew, trustee, on Mc Kaye, treasurer, fifteen 6 per cent. first mortgage bonds of \$1,000 each. This tender was declined on various grounds. The bonds were then deposited by the defendant with the clerk of this court.

The first question which arises, and the one demanding our first consideration, is as to the jurisdiction of this court. The defendant insists that the complainant has a plain, adequate, and complete remedy at law. When the bill was filed the complainant was in this position: He had been induced to abandon the enterprise in which he had entered of developing the water power of the Savannah river above Augusta, and had surrendered that to Chew and his associates, his competitors in that enterprise. He had transferred to them the options he had secured from landowners on each side of the river, which options were of essential necessity to the enterprise. When the time for the fulfillment of the contract between them arrived, a grave difference was found to exist. The defendant had agreed to deliver bonds of the amount of \$15,000, secured by a first mortgage on the property, the entire issue being not greater than 80 per cent. of the value of the property, with the privilege of paying in lieu of such delivery \$15,000 in cash. Efforts were made to adjust this difference until March 28, 1901, which failed. The options all expired on May 1st thereafter. Complainant desired the fulfillment of the contract according to its terms, or the return to him of his options. It was a matter of impossibility to obtain any adjudication upon the differences of the parties in this contract at any time before May 1st; and in the meantime, if these options were allowed to expire, the injury to complainant would be irreparable. It was of the last importance, therefore, to him, that the status quo be preserved; and this could not possibly be effected except by the use of the powers of a court of equity in the issue of an injunction and the appointment of a receiver, who could protect and conserve the interest of both parties. The statutory remedies provided by the Code of South Carolina could not oust the jurisdiction of a court of equity. The remedy at law which would prevent the exercise of equitable jurisdiction was one which was in existence when the judiciary act of 1789 was passed. *McConihay v. Wright*, 121 U. S. 206, 7 Sup. Ct. 940, 30 L. Ed. 932. Even if this statutory remedy could give relief, it does not oust the jurisdiction of the federal court. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Besides this, the remedy at law to which the judiciary act refers must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce v. Grundy*, 3 Pet. 210, 7 L. Ed. 655; *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Tyler v. Savage*, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. Ed. 82; *Gormley v. Clark*, 134 U. S. 339, 10 Sup. Ct. 554, 33 L. Ed. 909; *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82. The court of equity, having jurisdiction for one purpose, will retain the cause, and grant full relief. *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829; *Tayloe v. Insurance Co.*, 9 How. 390, 13 L. Ed. 187.

The next question in the case is, was there a breach of the contract

on the part of the defendant? The contract provided for the organization of a corporation to develop the water power within eight months from the date of the contract (June 1, 1900), and upon the completion of said incorporation to deliver to Barrett first mortgage bonds of the corporation for \$15,000; and subsequently the date for such delivery is fixed at January (February) 1, 1901, time being of the essence of the contract. On February 1, 1901, the bonds were not ready for delivery. They in fact were not ready for delivery until July 23, 1901. But in lieu thereof Chew, trustee, sent to complainant an order on McKaye, treasurer of the corporation, to deliver to complainant \$15,000 in first mortgage gold bonds of the company as soon as the same were certified to by the trustee of the mortgage and ready for delivery. Was this a compliance with the terms of the contract? The bonds were not in existence. It was uncertain when they would be executed. The mortgage was not executed. The cost of the work was not ascertained. When McKaye accepted the order he had no means of immediate compliance. The delivery of the accepted order was, in effect, a change of the contract from a promise of delivery on a day certain to a promise of delivery on some unascertained—perhaps unascertainable—day in the future. If it were accepted as a release of the contract of June, 1900, it would be, in effect, the substitution of the contract of McKaye for that of Chew, trustee. Clearly, this was no compliance with the contract. It is a substitution of a promise to do a certain thing on a day certain by another promise to do it at some day in the future, as circumstances will allow. But it is said that the accepted order was sent to Barrett on February 1, 1901, was not returned, was not repudiated, and nothing was heard from him until some time in March following; and so complainant is estopped from denying the acceptance of the order. From the detailed statement of the correspondence on this subject in the former part of this opinion it appears that as late as December 19, 1900, Chew, as vice president and manager, assured complainant, "We will comply with our contract to the letter. Should we fail in getting our bonds ready, you will be paid as per agreement." This was in reply to a letter from complainant saying, if the bonds were delivered in accordance with the contract January 31, 1901, the matter would be all right; otherwise he would expect payment of \$15,000 in cash. In the latter part of December Mr. McKaye had an interview with complainant; tried to get him to take stock for the bonds. This was refused, and McKaye was notified distinctly that the bonds would be required. Up to that date no intimation was given on one side that the bonds could not be delivered, or that an order would be substituted for them; and certainly not any intimation whatever on the other side of a willingness to take an order in lieu of the bonds. On January 25, 1901, for the first time, it is proposed to give the order for the unexecuted bonds in lieu of the bonds themselves, and this is at once rejected by complainant in his reply dated January 28, 1901. On January 30, 1901, in the face of this rejection, the order is inclosed to complainant, and the letter inclosing it received on February 1st. Barrett was not called upon to answer this at all. He

had never given any reason for an impression that he would accept such an order as the fulfillment of the contract. On the contrary, he had distinctly and repeatedly declared his determination to insist on the delivery of the bonds on the day fixed, or the payment of the money in lieu thereof. And when Chew wrote his letter of January 30, 1901, he knew that his order would not be accepted. How could he expect otherwise? The bonds which he had contracted to deliver were to be secured by a mortgage of all the property of the Twin City Power Company. The bonds secured by this mortgage were not to exceed 80 per cent. of the entire cost of the property and the development of the water power. This mortgage, at the date of this order, was not executed. Its terms were not known—could not be known—to complainant. The amount secured by the mortgage was unknown,—could not then be known. What man of ordinary prudence would accept an indefinite order for an unknown quantity as satisfaction and fulfillment of a contract definite in time, definite in amount, definite in all its terms, secured by a money equivalent?

It is said, however, that the complainant has estopped himself from denying that he accepted the order as a substitute for the bonds by the delay in repudiating it. The doctrine of estoppel is well stated in *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462:

"When a party by his acts or words, causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous condition, he will be concluded from averring anything to the contrary against the party so altering his condition."

In *Brant v. Iron Co.*, 93 U. S. 335, 23 L. Ed. 927, the supreme court says:

"For the application of the doctrine of equitable estoppel there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury."

In all this class of cases, says Story, "the doctrine proceeds on the ground of fraud, or of gross negligence, which, in effect, implies fraud. And therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief." 1 Story, Eq. Jur. 391. To the same effect are the adjudged cases. If we examine the circumstances of this case, it must appear that no element of estoppel exists. The complainant had repeatedly insisted in writing on his right to the bonds or the money on the day fixed by the contract, of which it is distinctly stated time is of the essence. He had, in an interview with McKaye, promptly refused to take stock for his bonds, and in words insisted on the bonds. When McKaye afterward wrote to him, for the first time suggesting that an order for bonds, and not the bonds themselves, would be given him, he at once declined to accept it. And in reply to that letter came an order for the bonds, deliverable some time in the future. Could the delay in replying to this cause the defendants to believe that complainant had changed his mind, and had departed from his oft-expressed determination? Would any reasonable man have acted on such an impression, derived in this way? Do not all the circumstances repel such an infer-

ence? "The mere retention of a report by an agent of an unauthorized purchase on account of his principal, and the mere silence of the latter, are not, in law, an adoption of the act." *Hansen v. Boyd*, 161 U. S. 410, 16 Sup. Ct. 571, 40 L. Ed. 746. In what way was the defendant affected by the delay in returning the order for the bonds. In March, when the complainant visited New York to insist on his rights, not a bond had been issued; none had been prepared. The mortgage was not drafted nor executed. No progress whatever was made in the work. No money had been expended, except for the ordinary expenses of the company, and not more than \$41,000; nearly all of which was for lands. The estimate put upon the enterprise by the Twin City Power Company called for an expenditure of one million to one and a quarter million of dollars. How could the dispute over the payment of \$15,000 in money or in bonds affect such an enterprise? At all events, the position of complainant was known in March, and was emphasized by his bill filed March 30th. I see no ground of estoppel.

It is said, however, that, even if the order for bonds was not equivalent to the delivery of the bonds themselves, the limit of time in the contract was waived by the complainant through the trustee of the mortgage as his agent and representative. It is perfectly true that, when a mortgage has been executed to a trustee, and persons accept or purchase bonds secured by the mortgage, the trustee of the mortgage, for many purposes, is the representative and agent of the bondholders. But in the case at bar, when the time limit in the contract was about to expire, there was no mortgage, no trustee of the mortgage; indeed, no bonds. So there could not, by any possibility, be any connection between the complainant and any trustee. When the bonds were issued, some months afterward, this suit was in progress, and the complainant had disclaimed any intention to receive bonds.

The defendant has called the attention of the court to the difference between the cost to complainant of the options sold by him to the defendants and the amount he now demands for them. It is suggested that this is an unconscionable bargain, one which this court should not enforce. The complainant had determined to embark in the enterprise of utilizing the water power of Savannah river. To this end he began to obtain options from the riparian landowners on both sides of the river. Chew, trustee and agent, conceived the same enterprise for the defendants. Both the complainant and the defendants saw, or supposed that they saw, valuable results from this enterprise. Complainant was induced to forego all these results to himself, to abandon the enterprise, and to sell out to the defendants. He estimated his loss at \$20,000. In this estimate Chew agreed, and promised to pay it to him. And on Chew's estimate Fisher and the Twin City Power Company must have agreed, for they adopted and assumed his contract; and all the options of Barrett, purchased at this price, were assigned to the Twin City Power Company, and the assignments recorded by that company, after full notice of complainant's demands. It is too late now to speak of this bargain as unconscionable.

I am of the opinion that under this contract the defendants were bound to make an actual delivery of bonds to the amount of \$15,000, secured by a first mortgage on all the property of the Twin City Power Company; that they had an alternative of paying in cash \$15,000, if said bonds were not delivered; that, failing to deliver the bonds, they were bound to pay the \$15,000 in cash. 22 Am. & Eng. Enc. Law (2d Ed.) 543. *Choice v. Moseley*, 1 Bailey, 136, 19 Am. Dec. 661; *Marlor v. Railroad Co. (C. C.)* 21 Fed. 383; *McGillin v. Bennett*, 132 U. S. 445, 10 Sup. Ct. 122, 33 L. Ed. 422.

Let a decree be prepared in accordance with this opinion.

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AMERICAN FISHERIES CO. v. LENNEN et al.

(Circuit Court, D. Connecticut. November 18, 1902.)

No. 1,077.

**1. JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY—SUIT FOR INJUNCTION.**

In a suit to enjoin defendants from continuing a business in which they have engaged in violation of a contract with complainant, the amount or value in dispute for jurisdictional purposes is the value of the object to be gained by the suit, and not the amount of complainant's damages, and a federal court has jurisdiction where the value of the plant owned and operated by defendants and the amount of the business done by them annually largely exceeds the jurisdictional amount.

**2. CONTRACTS—CONSTRUCTION—AGREEMENT NOT TO ENGAGE IN CERTAIN BUSINESS.**

Complainant's assignor purchased a number of fishing plants situated along the Atlantic coast from Maine to Delaware, two of such plants having been purchased from defendants, who were joint owners. It paid a considerable sum, in addition to the actual value of the plants, for their good will, under a contract which bound defendants not to engage in the fishing business or the manufacture of certain fish products for the term of 20 years, "upon, along, or off the Atlantic seaboard." *Held*, that such prohibition included all the waters adjacent to the Eastern coast of the United States, and was not limited to so much of the coast as lies north of Delaware, nor did it exclude the bays or other indentations along the coast; and that defendants violated the contract by subsequently going into the Chesapeake Bay, and there purchasing and operating a fishing plant from which they conducted fishing operations both within and outside of the bay.

**3. SAME—VIOLATION.**

The fact that complainant, being a nonresident corporation, was precluded by the laws of the states adjoining the bay from fishing in their waters, did not relieve defendants from the effect of the restriction imposed upon them by the contract as to such waters.

**4. SAME—SPECIFIC ENFORCEMENT BY INJUNCTION.**

A court of equity will enforce specific performance of a restrictive contract by injunction, where it is apparent from a view of all the circumstances of the case that it will subserve the ends of justice, as where the damages caused by its violation are not susceptible of proof.

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¶ 1. Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 18 C. C. A. 75; *Shoe Co. v. Roper*, 36 C. C. A. 459.

See Courts, vol. 13, Cent. Dig. § 890.



In Equity. Suit for injunction. Heard on the merits on pleadings and proofs.

For former opinion on demurrer, see (C. C.) 116 Fed. 217.

Goodwin Stoddard, for complainant.

H. A. Hull, Wm. F. M. Rogers, and Perkins & Perkins, for defendants.

PLATT, District Judge. The complainant filed this bill some time since, asking for an injunction restraining the defendants, and each of them, for the period of 20 years from the 26th day of November, 1897, from becoming interested in or connected with any business other than that conducted by the complainant, its successors or assigns, in catching menhaden, herring, or other fish used in the manufacture of oil or scrap, and from either directly or indirectly becoming interested in the business of manufacturing such fish, or any fish, into oil or guano, upon, along, or off the Atlantic seaboard. The complainant is the assignee of the American Fisheries Company, and there is no question as to diverse citizenship or the regularity and validity of the assignments. Whatever dispute did arise has been cured by proper amendment. The bill was demurred to mainly on the ground that the covenant was in restraint of trade, and therefore illegal and void, and the demurrer was overruled. Answers were then filed by each defendant, and, as they are substantially alike, a brief statement of the points made by one will cover the general line of defense.

The substantive averments of the bill are admitted. Various defenses are then set forth: (1) No knowledge that Church assigned the contract made with him to the American Fisheries Company. This defense, and all other objections based upon invalidity or irregularity of the transfers, had been fully met by proofs and amendment by the complainant and admissions by the defendants. (2) That the assignment was illegal, because the restrictive covenant therein was in restraint of trade. This defense was disposed of in the opinion overruling the demurrer. (C. C.) 116 Fed. 217. (3) That the defendants had a parol agreement, contemporaneous with the contract in suit, that the American Fisheries Company, its successors and assigns, would furnish them employment in catching and manufacturing menhaden and other fish, and that agreement has not been carried out. (4) That at or about the time the respondents sold their plants, the American Fisheries Company bought out "all or nearly all" the plants of a like character, from Maine to Delaware, and entered into similar restrictive covenants with the vendors; that nothing was purchased south of Delaware; that a large fleet of vessels with many owners occupied the Atlantic seaboard of the state of Virginia, and the waters of the Chesapeake Bay, and that, therefore, the expression "upon, along, or off the Atlantic seaboard" in the contract in suit "was intended to mean, and did mean, the Atlantic seaboard in the locality from and including the state of Delaware to and including the state of Maine, but not the Atlantic seaboard south of said state of Delaware." (5) That complainant was

forbidden by the laws of Maryland and Delaware from fishing in the waters of the Chesapeake Bay or of the state of Virginia. (6) Complainant has not been damaged, or its rights injured, by the business conducted by the Menhaden Oil & Guano Company, although one defendant is the business manager, and the other is the secretary, of that corporation. The complainant then asked for an injunction pendente lite, and the matter was submitted on affidavits, and argued on July 17, 1902. It seemed wiser that the entire matter should be closed at an early day; and for that reason no action was then taken, and the final hearing was fixed for September 23, 1902. It was then fully investigated on affidavits and oral testimony, and counsel were permitted to present their opposing views at full length in writing.

The following is a condensed statement of the facts which seem material to the issue presented: James Lennen and Louis P. Allyn had, prior to this action, been for many years engaged in the fishery business. In 1896 they became jointly interested therein. They owned plants situated on leased grounds at Lewes, Del., and Sag Harbor, Long Island. These plants, including the equipment, were worth about \$40,000, exclusive of good will, when the contract was made over which this controversy arises. Through the efforts of one N. B. Church, some 17 plants were bought from 14 owners, the plants at Lewes and Sag Harbor being included therein. This happened in the year 1897. The different agreements to sell were given to said Church, and ran to himself and his assigns, and contained the restrictive covenant, which raises one of the contentions upon which this dispute hinges. Thereafter, about February 21, 1898, the respondents signed, executed, and delivered the contract in suit, reciting therein the contract with Church, and the assignment thereof by him to the American Fisheries Company. They covenanted with that company:

"That we will not, nor will either of us, be or become interested in or connected with any business other than that to be conducted by said the American Fisheries Company, its successors or assigns, in catching menhaden, herring, or other fish used in the manufacture of oil or scrap, nor will we, or either of us, either directly or indirectly, become interested in the business of manufacturing such or any fish into oil or guano upon, along, or off the Atlantic seaboard, for the period of twenty years from the 26th day of November, 1897; it being the intention of this agreement to bind ourselves, and each of us, firmly by these presents, not to enter into or become, directly or indirectly, interested in the business of catching or manufacturing any fish when caught into oil or guano during the period of twenty years above mentioned."

This contract was made with a corporation organized in January, 1898. The option to Church was executed November 26, 1897. The respondents did not attempt to get a guaranty of employment from Church in connection with the option which they gave him. They made efforts in that direction at or about the time of making the contract of February 21, 1898, but signed, executed, and delivered the same just as it reads to-day. They sold thereunder their two plants for \$60,000, less 5 per cent. and Church's expenses. The American Fisheries Company consolidated the 17 plants so pur-

chased into 5 working establishments. In March, 1900, the American Fisheries Company went into the hands of receivers, under the chancery laws of New Jersey. A reorganization was effected, and by various proper steps, unnecessary to relate here, the present complainant came into existence, and was invested with all the property, rights, and franchises of the insolvent corporation, including therein a specific assignment of the contract in suit, dated July 11, 1900. After the American Fisheries Company became embarrassed, the respondents took part in the purchase of a fishing plant at Harburton, Va., and on April 11, 1900, assisted in the organization and management of the Menhaden Oil & Guano Company, which acquired, re-furnished, equipped, managed, and carried on the plant and business of menhaden fishing and manufacturing at Harburton. The stock in that corporation is largely owned by the families of the respondents, and the respondents themselves are in the active management of the plant, Lennen as treasurer and general manager, and Allyn as secretary. Both receive salaries from the corporation.

In their brief, counsel for the defendants raise at the outset and for the first time the objection that upon the face of the papers the only reason for being here grows out of diverse citizenship, and that in such case the matter in dispute must exceed \$2,000; that in bills in equity the object to be gained by the bill is the criterion; and that the actual damage in this case is little or nothing. This contention may well be disposed of at the threshold, since, if it were valid, the discussion would end at the beginning. It is plain that in such a case as this the subject-matter in dispute is the essential factor which confers or prevents jurisdictional authority. In bills asking that the use of a name be enjoined, the court does not look to the actual damages which might be recovered, but to the importance of the right to the complainant. *Symonds v. Green* (C. C.) 28 Fed. 834. When an injunction is asked against the erection and maintenance of a nuisance, it is not important to discuss what amount of damage would result if the nuisance were operated, but rather what the cost of the alleged nuisance will be (*Rainey v. Herbert*, 5 C. C. A. 183, 55 Fed. 443), the general principle being enunciated in *Railroad Co. v. Ward*, 2 Black, 485-492, 17 L. Ed. 311. The fact that an actual injury resulting from the violation of a right is small, and the interest to be effected by an injunction is large, is not to weigh against the interposition of preventive power in equity when it is clear that on one hand a right is violated and on the other a wrong committed. *Railroad Co. v. McConnell* (C. C.) 82 Fed. 65. The value of the object to be gained by the bill is the criterion in each case. In the present inquiry the object to be gained is to prevent the defendants from continuing their connection, directly or indirectly, with the plant, equipment, and business of the Menhaden Oil & Guano Company. The evidence shows beyond peradventure that their actual cash interest therein, direct and indirect, through themselves or their families, is largely in excess of the jurisdictional amount. The salaries alone which they receive as the managing and controlling spirits are sufficient to furnish jurisdiction. The annual catch of fish, together with the oil and guano and scrap into which the fish are trans-

muted, are excessively ample. It would be idle and superfluous to state in concrete form that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000.

The next point of interest is this: What is meant by the words "upon, along, or off the Atlantic seaboard," when construed in the light of the circumstances surrounding the contract in which they appear? In the opinion filed in connection with my decision against the demurrer I used this language:

"In reaching this conclusion I assume that the 'Atlantic Seaboard' must refer to all the waters adjacent to the Eastern coast of the United States. Any narrower construction than that would leave the defendants at liberty to enter into a like business under such conditions as would necessarily bring about direct and immediate competition with that of the vendee."

In the full light of the completed case nothing has transpired which argues ambiguity, abstruseness, uncertainty, doubt, or mystery in any way touching those words. They are as plain and simple to-day as they seemed to be when I first studied them. "Seaboard" means the country bordering on the sea; and the sea, if we can depend upon the makers of the Century Dictionary for authority, is "a more or less distinctly limited or landlocked part of the ocean, having considerable dimensions"; and they also thought that "sea, bay, and gulf are more or less synonymous terms." The language seems peculiarly fitted to the Chesapeake Bay, and to many another indentation of the coast, all the way from Maine to Florida.

What were the parties trying to come at when they made their bargain? The complainant's assignor paid \$20,000 for the good will of two plants and the removal of two experienced competitors from its path. It can hardly be seriously claimed that the purpose was that they should refrain from deep-sea fishing alone, or from fishing, deep or shallow, north of Cape Charles, but should have absolute, unrestrained leave and license to go down around the corner of the cape and take up the same old business at a new stand on the bay. I might say incidentally, right here, that the very fact that a large business in the bay was left untouched by Church and those for whom he acted would seem to relieve the complainant and its assignors from any taint of monopolistic greed in this enterprise; and also, incidentally, that the defendants admit that they did fish, to some extent, upon the very locality which, by their construction of the covenant, was forbidden water, and to that extent they ought to be enjoined; so that the real contention is as to the terms of the injunction. Such a prohibition, however, would be practically nugatory from the very circumstances of the case; at best, it could not strike at anything except deep-sea fishing. The facts warrant, in my opinion, a remedy much more searching and drastic than that. It was a business transaction. The words used were apt, to bring about exactly what the parties wished to accomplish. A seafaring man, with a plain education (and both defendants answer that description), could understand and appreciate the purpose sought for and the end to be gained, and each word used contributed to the result. "Upon" and "along" clearly refer to the waters adjacent to and easily reached from the coast line; "upon" relating to any given

spot or place, and "along" extending the suggestion from the very northern to the very southernmost point of that coast line. "Off" adds to and enlarges the meaning of the other words, and was intentionally placed there. It carries the prohibition out into the deeper water more distant from the coast. The coast line cannot be found by drawing straight lines from the outermost projections, leaving all the balance of the sea which creeps into the indentations free for fishing. If so, the prohibition is frivolous, nugatory, and nonsensical. In one breath the defendants contend that the prohibition is confined to deep-sea fishing, in the next breath they endeavor to draw the line of prohibition east and west at Cape Charles. In the one instance they must keep out in deep water from Maine to Florida, and never fish within indentations; in the other instance they can sail out into the ocean at will, and fish within indentations ad libitum, but must confine their excursions to the waters south of a line through the Cape Charles headland. An interpretation of the restrictive covenant, based upon either contention, would not bring about the result which the parties had in mind, and, looking at the matter from one of the points of view, competition could be continued with composure. The menhaden is a migratory fish, and it is only a question of days whether he is caught above or below an imaginary east and west line, whatever style of fishing is adopted. The plant at Lewes was just inside the Delaware Breakwater. It was quite convenient to both deep-sea and protected fishing. Defendants sold the plant at an extra price with that convenience attached. It is almost incredible that they expected to retain the right to go down the coast a few miles to a plant which was also confessedly so situated as to offer free and convenient access to both kinds of fishing. They would not have thought of starting up a business at Harburton if the complainant's assignor had not fallen into difficulties in the New Jersey courts. This is evident from the admissions found in the letters of one of the defendants. The negotiations for that plant were begun with fear and trembling, and with expressed doubts. There was hope that the American Fisheries Company might die the death, and the restrictive covenant die with the corporation. They acted covertly and stepped with gingerly tread, and, when brought to book, threw aside all disguise, openly avowed their acts, and said, We are not violators, we remain in Chesapeake Bay. True, we may have gone outside for a few miles toward the old plant which we sold you, but we did not catch many fish. At any rate, we propose to fight it out, and contracts are queer things, hard to enforce, and "there is many a slip 'twixt the cup and the lip." They employed able counsel, and have made a stubborn and vigorous fight, but equity is imperturbably calm, clear-sighted, and far-reaching, and she will easily brush aside the defenses so ingeniously contrived to entangle her path and obscure her vision. The arguments bearing upon this point are not persuasive.

We come next to the contention that there was a parol agreement, contemporaneous with the contract in suit, by which employment was guaranteed to the defendants, and that the promise has been broken, and that equity should cast out the violator of one part

of the bargain when he seeks to enforce the other, even if it was in words and not in the writing. Testimony on this phase of the case was received to show extrinsic circumstances, which, if true, would cause a court of equity to hesitate in ordering the restrictive covenant of the contract carried into operation. Scrutinizing the evidence with microscopic pains, and with a disposition to help the defendants, if the chance to help them exists, the court is forced to find that Church did not at any time, either for himself or for his assignee, in connection with, or apart from, the contract upon which this bill is based, promise to employ the defendants, or either of them; and there is certainly no evidence that the American Fisheries Company made or was asked to make any such bargain, if Church is to be eliminated from the proceedings. Nor was there any attempt on the part of any one to hoodwink the defendants into their bargain under a misunderstanding; on the contrary, the transaction was open and aboveboard, and the defendants undertook what they did in the full light of day.

It is contended further that there was no serious and irreparable damage. The damage certainly seems serious enough, and damages are always understood to be irreparable when they cannot be measured by any certain pecuniary standard. When damages caused by the injury are not susceptible of proof or estimation, an injunction will lie. When one, having agreed not to do so, does engage in a particular business, it is no answer to a demand that he should stop, to say, "I do not hurt you very much; please be patient and endure with philosophy the pain which I am inflicting; it may smart a trifle, but the disability will not be permanent."

Defendants further argue that they ought not to be restrained, because they have only two steamers and four sail vessels, and form a meager part of the great fleet, both steam and sail, which venture out upon the waters of the Chesapeake Bay, and, I presume, beyond. The answer is obvious. Defendants were paid to refrain from competition, and the others were not. Whether the others were wiser in their day and generation, or more foolish, or if they lacked an equally good chance, is not known, but the simple fact remains that none of them are under restrictive covenants, and, so far as the complainant is concerned, are at liberty to sail as they will and fish where they may. These privileges, however, do not extend by analogy to the defendants. They made their own bed, and ought to occupy it gracefully. It is not good logic, good morals, or equity, for them to claim the right to eat their cake and enjoy it indefinitely after it has been eaten. And, they say, the market remains normal. What they have caught, or may catch, will not affect the market price; but the former managers of the other purchased plants may also have been experienced fishermen, and if defendants can continue their marauding expeditions under judicial authority, so may the other mariners, and when the entire batch of vendors from the 17 or more plants have followed suit, moved their stakes, and taken up new fields south of Cape Charles, incomprehensible harm might follow, especially since the fish starts from the south and travels northward.

The injured party only asks that the defendants live up to the bar-

gain which they made, and under which they obtained a bonus greater than the amount which they have invested, directly or indirectly, in the Harburton plant. The cases cited by counsel on this question all cluster about the discussion as to whether a court of equity will decree a specific performance of a contract of sale, or will leave the parties to their remedy at law. A decree is usually entered, but whether it shall be or not is a matter of sound discretion, and that discretion can be invoked if the sale will work hardship or injustice to either party. Even in such cases, the supreme court says, in *Willard v. Tayloe*, 8 Wall. 567, 19 L. Ed. 501, "In general it may be said that the specific relief will be granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice."

A word ought to dispose of the claim that because the defendants have become connected with a corporation which can fish in Virginia and Maryland waters, which privilege is denied to the complainant because it is a nonresident, therefore equity should not enforce the restrictive covenant of the contract in suit. The mere statement of the proposition ought to exhibit the non sequitur of its alleged logic.

It was promised that in this opinion a definite ruling would be made upon the admissibility of certain testimony, set forth in the depositions, to which a general objection was entered at the time of taking the proofs. The opinion in itself, if carefully read, will make clear my position; but, to be explicit, the testimony is received and used so far as it bears upon the character, nature, extent, or explanation of the connection which existed between the defendants and the Menhaden Oil & Guano Company, and the letters written by Lennen are used so far as they contain admissions describing the kind of connection, or his views of the right or wrong of that connection.

The restrictive covenant, which was incorporated in the option given to Church and his assigns, and appears in the contract in suit, is lawful, and was paid for as incidental to the contract of sale, and, with the interpretation herein given, the relief demanded is no more than is reasonably necessary to afford a fair protection to the complainant.

Let a decree be prepared which will provide such relief, with the costs of this suit.

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#### DALTON v. MILWAUKEE MECHANICS' INS. CO.

(Circuit Court, N. D. Iowa, W. D. November 24, 1902.)

##### 1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—SUFFICIENCY OF PETITION BY CORPORATION.

An averment in a petition for removal that defendant is a corporation and a "citizen and resident" of a state named is not the equivalent of one that it is organized under the laws of that state, and such petition is insufficient to effect a removal on the ground of diversity of citizenship, unless such fact otherwise appears on the record, under the settled rule that the record in the state court, when the petition has been filed therein, must show, by clear and positive averment, that the cause is

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¶1. Averments of citizenship to show jurisdiction in federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261.

removable, and that the jurisdiction of the state court has terminated, and that of the federal court has attached.

2. SAME—AMENDMENT OF PETITION IN FEDERAL COURT.

Where the record in a state court, after the filing of a petition for removal therein, fails to show facts which are necessary to devert that court of jurisdiction, the federal court into which the record is removed is without jurisdiction to permit the amendment of the petition for removal to supply such facts.

On Motion to Remand to State Court and on Application by Defendant for Leave to File Amendment to Petition for Removal.

Martin & Martin and Wright, Call & Hubbard, for plaintiff.  
Wright & Stout, for defendant.

SHIRAS, District Judge. This suit was brought in the district court of Plymouth county, Iowa, and in due season the defendant filed a petition for removal of the suit into this court, it being averred in the said petition "that in the above-entitled cause there is a controversy which is wholly between persons of different states, to wit, a controversy between your petitioner, the Milwaukee Mechanics' Insurance Company, a corporation which your petitioner avers was at the commencement of this suit, ever since has been, and still is, a citizen and resident of the state of Wisconsin, and said plaintiff, P. F. Dalton, who, your petitioner avers, was at the commencement of this suit, ever since has been, and still is, a citizen and resident of the state of Iowa, and that your petitioner was not at the commencement of this suit, nor has it ever been, and is not now, a resident or citizen of the state of Iowa." The transcript having been filed in this court, the plaintiff moves for an order remanding the case on the ground that this court is without jurisdiction over the suit, for the reason that the jurisdictional facts authorizing a removal are not made to appear upon the record; and thereupon the defendant asks leave to amend the petition for removal by adding thereto the averments "that the amount in controversy between said plaintiff and defendant exceeds in value the sum of \$2,000, exclusive of interest and costs," and that "the defendant is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin."

The first question to be considered is whether the record upon its face was sufficient to inform the state court that its jurisdiction over the case was at an end. Thus in *Insurance Co. v. Pechner*, 95 U. S. 183, 24 L. Ed. 427, it is said:

"This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot proceed further with the cause. Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended."

In *Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656, it was ruled that:

"It is well settled that in the courts of the United States the special facts necessary for jurisdiction must in some form appear in the record of every



suit, and that the right of removal from the state courts to the United States courts is statutory. A suit commenced in a state court must remain there until cause is shown under some act of congress for its transfer. The record in the state court, which includes the petition for removal, should be in such condition when the removal takes place as to show jurisdiction in the court to which it goes."

In *Brown v. Keene*, 8 Pet. 115, 8 L. Ed. 886, Mr. Chief Justice Marshall, speaking for the court, said:

"The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

In *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057, it is declared that:

"As the jurisdiction of the circuit court is limited in the sense that it has none except that conferred by the constitution and laws of the United States, the presumption now, as well as before the adoption of the fourteenth amendment, is that a cause is without its jurisdiction unless the contrary affirmatively appears. In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intentment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record."

In the case now before the court the defendant sought to remove the suit on the ground of the diversity of citizenship, and the question is whether such diversity was clearly and affirmatively made to appear in the state court when the petition for removal was filed therein.

It is sufficiently averred that the plaintiff, Dalton, was, when the suit was begun and when the petition for removal was filed, a citizen of the state of Iowa. With respect to the defendant, it is averred, in substance, that when the suit was begun and when the petition for removal was filed the Milwaukee Mechanics' Insurance Company was a corporation, and was a citizen and resident of the state of Wisconsin. Neither in the petition for removal, nor in any other part of the record, is it averred that the insurance company is a corporation created or organized under the laws of the state of Wisconsin. On behalf of the defendant it is contended that from the averment that the corporate insurance company is a citizen of the state of Wisconsin the inference should be drawn that the corporation was created under the laws of that state.

In *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451, it was said:

"In the declaration the plaintiffs are averred to be citizens of Ohio, and they complain of the Lafayette Insurance Company, a citizen of the state of Indiana. This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation, or, if it be such, by the law of what state it was created. The averments that the company is a citizen of the state of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state, within the meaning of the constitution."

In *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207, it was said:

"The two original defendants, the Chicago & South Western Railway Company and the Chicago, Rock Island & Pacific Railroad Company, are averred to be citizens of the state of Iowa. Were this all that the pleadings

exhibit of the citizenship of the parties, it would not be enough to give the circuit court jurisdiction of the case. In *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451, a similar averment was held to be insufficient, because it did not appear from it that the Lafayette Insurance Company was a corporation, or, if it was, that it did not appear by the law of what state it was made a corporation. A corporation itself can be a citizen of no state in the sense in which the word 'citizen' is used in the constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which by its laws created the corporation. It is therefore necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adverse party is a citizen."

These decisions conclusively show that the averment that a named corporation is a citizen of a given state is not the equivalent of the averment that the corporation was created and exists under the laws of the named state. It is not the averment of a fact, but of a conclusion of law, which, as is said by the supreme court in *Drawbridge Co. v. Shepherd*, 20 How. 227, 233, 15 L. Ed. 896, is an averment that is simply impossible, and which the court is bound to know cannot be true.

Certainly, therefore, the court cannot assume that the defendant insurance company was created a corporation under the laws of the state of Wisconsin, because it is averred that the corporation is a citizen of that state,—a status or condition which cannot be rightfully predicated of a corporation.

It is further contended that as the petition filed by complainant in the state court names the defendant as the Milwaukee Mechanics' Insurance Company of Milwaukee, Wis., it should be inferred therefrom that it is a corporation created under the laws of that state. As already shown, the supreme court holds that the facts upon which jurisdiction rests must be affirmatively pleaded, and not be left to mere inference. Thus, in *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932, there are cited approvingly the statement made in *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057, that, "where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intentment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record," and the ruling in *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885, that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings that the averments should be positive. In the cited case of *Grace v. Insurance Co.* reliance was placed, in support of the jurisdiction, upon the fact that it was stated in the petition for removal, after reciting the residence of the parties, that there is and was at the time this action was brought a controversy therein between citizens of different states, but the court held that the averment "is to be deemed the unauthorized conclusion of law which the petitioner draws from the facts previously stated." It was also held in this case that the averment that the plaintiffs "are of the county of Kings and state of New York" was insufficient to show citizenship.

In support of the contention that the jurisdictional facts are sufficiently shown on the face of the record in this case, counsel for the defendant company cite the cases of *Johnson v. Manufacturing Co.* (C. C.) 76 Fed. 618; *Stadlemann v. Towing Co.* (C. C.) 92 Fed. 209; and *Lumber Co. v. Comstock*, 71 Fed. 477, 18 C. C. A. 207. The last case, as I read the report thereof, was not a removal case, but was brought originally in the United States circuit court, it being averred in the petition that "Daniel F. Comstock, who is a citizen of the state of Michigan, complains of the Chicago Lumber Company, who is a citizen of the state of Illinois," etc. The objection to the jurisdiction was not made until after the case had reached the appellate court, and the court of appeals held that when raised it was technical and without merit. The case did not present the question whether the averments therein found would have been sufficient to have terminated the jurisdiction of a state court had the action been brought therein. In the other cases cited by counsel the objection taken was to the lack of the proper citizenship of the plaintiffs, Foster in the one case and Stadlemann in the other. In both cases it was held that the averments made were insufficient to sustain the jurisdiction, but that sufficient jurisdictional facts were averred to justify the allowance of the amendments asked. These cases, therefore, do not tend to support the first contention of defendant's counsel that the averments appearing on the record in this case are sufficient to show that the case was a removable one, and that the jurisdiction of the state court was terminated, and that of this court attached, when the petition for removal was filed in the state court.

The question whether the averment that a corporation is a citizen of a named state can be relied on as a sufficient allegation of the jurisdictional facts is fully considered in the cases of *Loneragan v. Railroad Co.* (C. C.) 55 Fed. 550; *Frisbie v. Railway Co.* (C. C.) 57 Fed. 1; and *De Loy v. Insurance Co.* (C. C.) 59 Fed. 319; and in these cases, following the decisions of the supreme court already cited, it was held that the averment of citizenship in case of a corporation was insufficient, and did not confer jurisdiction upon the federal court in removal cases.

But it is further strongly urged on behalf of the defendant company that, if it be true that the necessary jurisdictional facts are imperfectly stated on the face of the record, then leave should be granted by this court to file an amendment curing the imperfections in question. Counsel for defendant adroitly make use of the phrase "imperfectly stated" in speaking of the averments of the record, whereas in fact the real question is whether an amendment can be allowed in this court when the averments are insufficient to show that the case is a removable one under the statutory provisions. It is claimed by counsel that the petition for removal is in effect a pleading, and that defects therein are curable by amendment. Granted; but in which court should the leave to amend be sought, and, if allowed, in which court should the amendment be filed? In this case the right of removal is sought upon the ground of the diversity of citizenship between the adversary parties. If the record on its face showed the requisite diversity of citizenship when the petition for removal was filed in the state court, so that the

jurisdiction of this court attached to the case, wherein lies the necessity of filing an amendment to show more perfectly the fact that the jurisdiction has attached?

If the case has been rightfully brought within the jurisdiction of this court, so that it can rightfully exercise its discretion over the matter of allowing amendments to the pleadings, then it must be true that, as the record was made in the state court, sufficient was shown on the face thereof to terminate the jurisdiction in that court, and to cause the jurisdiction of this court to attach to the suit. If sufficient appeared on the face of the record, as it was made to appear in the state court, to transfer the jurisdiction to this court, what necessity exists for filing an amendment? The only purpose of the amendment is to show that this court has rightfully obtained jurisdiction; but, if that fact already appears on the face of the record, why should the court grant leave to file an amendment to show that which already appears? If, however, the purpose of the amendment is to cause the face of the record to show what it does not now show, to wit, a requisite diversity of citizenship between the adversary parties, then is it not clear that leave to file the proposed amendment must be sought from the state court and not from this court? It is well settled by the decisions of the supreme court that the state court does not part with its jurisdiction, nor does the jurisdiction of this court attach, in cases of this character, until the record in the state court is such as to show that court that it has lost its jurisdiction, and can no longer proceed with the case.

Thus, in *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962, it is said:

"A state court is not bound to surrender its jurisdiction of a suit on removal until a case has been made which on its face shows that the petitioner has a right to the transfer. As was said in *Insurance Co. v. Pechner*, 95 U. S. 183, 185, 24 L. Ed. 427: 'His petition when filed becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot proceed further with the suit. Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended.' The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that may be removable, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends and that of the circuit court begins."

It certainly cannot be the fact that in cases wherein a removal is sought on the ground of diverse citizenship the jurisdiction of the state court can be terminated by petitions for removal or by amendments thereto filed in the federal court. In such cases the jurisdiction of the state court can only be ended by making a proper showing of the facts justifying the removal on the face of the record in that court. Thus, in *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144, it is said:

"It thus appears that a case is not, in law, removed from the state court upon the ground that it involves a controversy between citizens of different states unless, at the time the application for removal is made, the record,

upon its face, shows it to be one that is removable. \* \* \* If the case be not removed, the jurisdiction of the state court remains unaffected, and, under the act of congress, the jurisdiction of the federal court could not attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal. \* \* \* If a suit entered upon the docket of a circuit court as removed upon the ground of diverse citizenship of the parties was never, in law, removed from the state court, no amendment of the record in the former could affect the jurisdiction of the latter or put the case rightfully on the docket of the circuit court as of the date when it was there docketed; for the only mode provided in the act of congress by which the jurisdiction of the state court of a controversy between citizens of different states can be divested is by presenting a petition and bond in that court, showing, in connection with the record, a case that is removable. The present motion, in effect, is that such amendment of the record may be made in the circuit court as will show that this case might have been removed from the state court, not that in law it has ever been so removed."

If in order to show upon the face of the record that the case now before the court is in fact a removable one, it is necessary that the proposed amendment should be filed, then it must be true that the record, as it now exists in the state court, and as it was when the petition for removal was filed in that court, does not and did not show the existence of the facts necessary to be shown of record in order to terminate the jurisdiction of the state court and to cause the jurisdiction of this court to attach to the case, and, therefore, under the ruling of the supreme court in the case last cited, the existing jurisdiction of the state court cannot be affected by any pleadings, original or amendatory, filed in this court.

But it is contended by counsel for defendant that the rulings of the supreme court in the cases of *Ayers v. Watson*, 113 U. S. 598, 5 Sup. Ct. 641, 28 L. Ed. 1093; *Carson v. Dunham*, 121 U. S. 427, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Martin v. Railroad Co.*, 151 U. S. 690, 14 Sup. Ct. 533; 38 L. Ed. 311; and *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673,—justify the conclusion that that court has receded from the rule announced in the earlier cases, and that it is now permissible to amend the record in the federal court in cases of this character.

The case of *Ayers v. Watson* did not present the question of the right to amend in the federal court, the point decided being that the mere question of the time of filing an application for removal under the act of 1875 was not jurisdictional, but modal and formal, and therefore that it was not open to the party who had petitioned for the removal to afterwards assert that his application had not been made in due time.

The case of *Carson v. Dunham* also arose under the act of 1875, and two grounds for removal were set forth in the record in the state court, the one being diversity of citizenship, which was properly averred, and the other that the controversy arose under the laws of the United States. The supreme court held that, as the petition for removal showed on its face that the controversy was between citizens of different states, the case was properly removed into the federal court. In that court issue was taken upon the averment regarding the citizenship of Dunham, and it was shown that he was a citizen of the same

state with Mrs. Carson, and therefore the averment in the petition for removal was false, and the jurisdiction could not be maintained on the ground of diversity of citizenship between the adversary parties. On the point whether the case was one arising under the constitution or laws of the United States, the supreme court held that the answer filed in the federal court might be considered, in connection with the other showing of record, as an amendment to the petition for removal, it being said:

"As an amendment the answer was germane to the petition, and did no more than set forth in proper form what had before been imperfectly stated. To that extent, we think, it was proper to amend a petition which, on its face, showed a right to the transfer. Whether this could have been done if the petition, as presented to the state court, had not shown on its face sufficient ground of removal, we do not now decide."

In this case the court held that, as the petition for removal showed on its face the requisite diversity of citizenship to authorize a removal of the suit into the federal court, an amendment might be made in that court because the case was then really pending therein, but the court expressly stated that it did not decide whether this could be done in cases wherein the record in the state court did not show the facts authorizing the removal.

In the next case cited, to wit, *Martin v. Railroad Co.*, the question of the right of amendment in the federal court was not involved nor decided, the jurisdictional questions considered in that case being the status of the railway company; that is, whether it had become a corporation of West Virginia, and whether the petition for removal had been filed within the time limited by the statute.

The last case cited is that of *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, in which the point decided was that a petition for removal, filed as soon as the plaintiff, by dismissing his action against all the original defendants who were citizens of the same state with himself, left the case pending between a citizen of the one state and a corporation created under the laws of another state, was filed in due time. In the course of the opinion the following statement of the law is made:

"A petition for removal, when presented to the state court, becomes part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends, because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and if it does the circuit court of the United States cannot allow an amendment of the petition, but must remand the case. *Orehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249. But, if upon the face of the petition and of the whole record of the state court sufficient grounds for removal are shown, the petition may be amended in the circuit court of the United States by leave of that court, by stating more fully and distinctly the facts which support those grounds. *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Martin v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311."

Thus it appears that none of the cases cited by counsel for defendant sustain the contention that an amendment may be made in the circuit court of the United States to sustain its jurisdiction in a removal case,

where the record, as it exists in the state court, fails to show the facts necessary to terminate the jurisdiction of that court. On the contrary, the supreme court has uniformly held that, unless the record in the state court showed on its face that its jurisdiction and right to proceed were at an end, the right of amendment did not exist in the federal court, in cases wherein the right of removal was claimed on the ground of diverse citizenship between the adversary parties.

Thus, in *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249, it is stated that:

"It appears from the record that the citizenship of the parties at the commencement of the actions as well as at the time the petitions for removal were filed was not sufficiently shown, and that, therefore, the jurisdiction of the state court was never divested. This being so, the defect cannot be cured by amendment."

When, however, upon the face of the record in the state court, it is made to appear, in support of the application for a transfer to the federal court, that the case is a removable one, then the right of that court to proceed further in the case is at an end, and the jurisdiction of the federal court attaches.

The jurisdiction being thus transferred into the federal court, issue may be therein taken upon the facts averred in the petition for removal. Thus, issue may be taken on the averment that the plaintiff or defendant is a citizen of a named state, or upon an averment that a named defendant is a nominal party, or was made a party wrongfully with intent to defeat the otherwise existing right of removal. In such cases an amendment may be allowed in the federal court to set forth more fully and perfectly the facts relied on to sustain the averments of the petition for removal. The right to allow the amendment to be filed exists because, on the face of the record, the jurisdiction is in the federal court, which will remain in full force unless facts are proven which overthrow or defeat it; but, if on the face of the record the jurisdiction of the state court remains unaffected, the federal court is not invested with the control of the case or of the record, and cannot, therefore, allow an amendment of the pleadings therein. In this case, therefore, this court has no power to grant the leave asked to file an amendment to the petition for removal, unless upon the face of the record, as the same exists in the state court, it appears that the case is a removable one, and that by the filing of the petition for removal the right of that court to proceed with the case was ended. The right of removal was claimed to exist on the ground of the diversity of citizenship between the adversary parties, and as the defendant is a corporation it could not be averred of it, in its corporate capacity, that it was a citizen of a state; and, therefore, to establish the requisite diversity of citizenship, it was incumbent on the defendant to aver that it was a corporation created under the laws of a named state, in order that the court might be authorized to draw from this averment of fact the legal conclusion that the stockholders composing the corporation were all citizens of the state creating the corporate body. There is not to be found in the petition for removal, nor in any other portion of the record, an averment that the defendant corporation was created under the laws of the state of Wisconsin or of any other state, and

therefore the court cannot assume that the stockholders therein, who are the only parties of whom citizenship can be predicated, are in fact citizens of the state of Wisconsin, or that they may not be citizens of the same state with the plaintiff. The record, therefore, fails to show the facts necessary, under the statutory provisions, to sustain the right of removal,—a defect which cannot be cured by an amendment in this court,—and the motion to remand must therefore be granted.

The court has been led into this lengthy consideration of the questions presented and of the authorities cited, not because any doubt was entertained of the views presented by this court in *Loneragan v. Railroad Co.* (C. C.) 55 Fed. 550, but for the reason that counsel in their argument were so earnest in their contention that if the court should again carefully consider the authorities cited by them it would appear that the conclusion reached in that case was not well founded; but the reconsideration given to the question has failed to show any reason why the court should change its view as expressed in the case named. The orders to be entered, therefore, are that the application for leave to amend the petition for removal is denied, and the motion to remand the case to the state court is granted.

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POTTS v. ALEXANDER.

(Circuit Court, W. D. New York. November 1, 1902.)

No. 133.

**1. EQUITY—PLEADING—DEFENSES—LACHES.**

The defense of laches may be interposed by plea, answer, or demurrer, or it may be raised on the hearing or preliminary thereto.

**2. SAME.**

Defendant's husband sold to plaintiff's assignor in 1881 all his standing pine timber land on a certain stream in the state of Michigan, together with a certain lumbering outfit, and agreed that, if any land had not been deeded under the contract, deeds to such land would be executed on application. This contract was not recorded until 1887, when it was recorded in one county, and 10 years later a certified copy was recorded in another county. In 1886, 1888, and 1900 defendant, her husband having died in 1885, conveyed certain of the lands to other parties, which plaintiff claimed under the contract, but no action was begun to enforce the same until 1900, though plaintiff's assignor had full knowledge of the transfer at least eight years earlier. The action brought was dismissed, and at different times between 1890 and 1893 letters were addressed to defendant at the place where she was supposed to reside, but no answers were received, and an attorney employed to locate her was unable to do so; but no other efforts were made to prosecute the claim until the suit in question was instituted in August, 1901. *Held*, that an application by the plaintiff for leave to file a replication nunc pro tunc after an order dismissing the cause for failure to file the same should be denied on the ground that plaintiff's claim was barred by laches.

**3. SAME—LIMITATIONS.**

State statutes of limitations, while relevant in federal courts of equity on an issue of laches, are not binding on such courts.

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¶ 3. State laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

See Courts, vol. 13, Cent. Dig. § 983; Equity, vol. 19, Cent. Dig. § 242.



In Equity.

Harvey L. Brown (Elliott & Elliott, of counsel), for complainant.  
Morey & Bosley, for defendant.

HAZEL, District Judge. This is a motion by the complainant for leave to file his replication nunc pro tunc. The complaint was filed August 7, 1901. The answer was filed December 9, 1901, after several extensions by stipulation. On March 24, 1902, no replication having been filed, an order was entered as of course dismissing the complaint pursuant to equity rule 66. It appears by the moving papers that complainant's counsel who prepared the bill resides at Marion, Ind. His solicitor is a resident within the jurisdiction of this court. Each seems to have relied upon the other to file the replication. None was filed within the period fixed by rule; hence this application to the grace and favor of the court. Motions of this character are ordinarily treated with indulgence, and relief is generally granted where the application is made in good faith, and when the default is fully excused. *Peirce v. West*, Fed. Cas. No. 10,909, Pet. C. C. 351; *Fischer v. Hayes* (C. C.) 6 Fed. 63-76, 19 Blatchf. 13; *Robinson v. Satterlee*, Fed. Cas. No. 11,967, 3 Sawy. 134; 1 Fost. Fed. Prac. p. 277; *Robinson v. Randolph*, Fed. Cas. No. 11,963, 4 Ban. & A. 317. There is no general or positive rule on the subject of allowing a party in default to come into court to interpose his defense, or when the application, as here, is made by complainant to prosecute his alleged cause of action. The application is vigorously opposed on the ground of manifest laches of complainant, which appears upon the face of the bill. This opposition to allowing the relief ordinarily granted in equity requires an extended examination of the facts alleged in the bill. Is the claim set forth in the bill stale, or has there been such failure to seek equitable relief as to justify this court in a refusal to consider complainant's case upon his own showing? The defense of laches may be interposed by plea, answer, or demurrer, and may also be raised on the hearing, or preliminary thereto. *Manufacturing Co. v. Williams*, 15 C. C. A. 520, 68 Fed. 494; *Lansdale v. Smith*, 106 U. S. 391, 27 L. Ed. 219; 1 Bates, Fed. Eq. Proc. 336. The theory of counsel for defense is that great inconvenience or hardship would result to defendant by allowing the relief sought; that she will be put to great expense in preparing her defense, which involves the examination of records and abstracts of lands situated in four counties in the state of Michigan; and will necessarily be put to great expense in procuring witnesses who are acquainted with market values of timber lands at a period from 10 to 20 years prior to the institution of this suit. She claims that the damages, if any, which have accrued to complainant, depend upon timber values from 1881 to 1892, inclusive, and upon the particular value of white pine, Norway pine, and other timber land. Defendant therefore contends that, if the bill shows on its face apparent laches and staleness of claim, the court, in the exercise of its inherent power, should decline to vacate the order dismissing the bill, and by so doing refuse all equitable relief in the premises. It is uniformly held that a court of equity has the power to refuse

relief when injustice would apparently be done, and where it appears by the bill under consideration that undue and unexplained delay existed in the enforcement of an equitable remedy. The rule, as stated in *Badger v. Badger*, 2 Wall. 95, 17 L. Ed. 836, is as follows: One who appeals to the conscience of the chancellor in support of a claim where there has been laches in prosecuting it, or long acquiescence in the assertion of rights, "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." The doctrine enunciated has often been recognized and reaffirmed in the courts of the United States, and the maxim that "equity aids the vigilant" has been uniformly upheld. *Godden v. Kimmell*, 99 U. S. 201, 25 L. Ed. 431; *Lansdale v. Smith*, *supra*; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; *Foster v. Railroad Co.*, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899; *Wetzel v. Transfer Co.*, 12 C. C. A. 490, 65 Fed. 23; *Gallagher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738. The rule imports a strict compliance with its provisions in tenor and spirit. The position, therefore, of the defendant on this motion is well grounded if the facts alleged by the bill clearly disclose that complainant has unduly slept upon his rights. In such case the court sitting in equity will take cognizance of and determine the question of laches, irrespective of the manner in which the inequity of the claim is called to the court's attention, provided complainant has had notice thereof. It is presumed that the bill fully and completely gives the facts which complainant may be able to prove upon the hearing. An early disposition of the controversy when the admitted facts show laches and staleness of claim finds encouragement in a court of equity, and its power is inherent to discourage such litigation at any point, unless good reason appears for the delay. *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036, and cases cited. This is especially the rule where no statute of limitation distinctly governs the case. In the case of *Wagner v. Baird*, 7 How. 258, 12 L. Ed. 692, it was held that:

"Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions. It operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor."

The question of laches, therefore, without straining any technical rule, may be properly considered upon this motion as if the subject-matter came before the court on demurrer, plea, or answer. Counsel for complainant has been fully heard upon this motion, and has filed a painstaking brief discussing the facts alleged in the bill of com-

plaint and the authorities bearing upon the question involved. He does not claim that the hearing will develop any facts different from those alleged in the lengthy bill. Its unusual allegations must be admitted for the purposes of this motion. It substantially avers that the complainant acquired from his father, John E. Potts, by an assignment dated July 3, 1890, all rights under a contract set out in the bill. This suit was commenced in August, 1901. The complainant seeks an accounting of all moneys realized from the sale of certain timber lands claimed to be covered by the contract hereinafter specifically referred to, and prays that the defendant be declared trustee of such funds for the benefit of complainant. Defendant was formerly the wife of one Bliss, who died in the year 1885. The basis of the claim in suit is a contract in writing, entered into between complainant's assignor and said Bliss on October 26, 1881, as follows:

"Au Sable, Mich., Oct. 26th, 1881.

"This is to certify that I have sold John E. Potts all my standing pine timber land on this stream or Au Sable for \$66,500, which also includes river front and farm in 24—9 east; and it is further understood, if I have omitted to deed any timber land on this stream I now have or own, I will at any time make deed for same; and I also in the sale sell all my horses and camp outfit on this stream now in S. Vaughn's care.  
S. P. Bliss."

This instrument was recorded six years later, on December 23, 1887, in Oscoda county, Mich., where some of the property is situated, and nearly 10 years later—September 4, 1891—a certified copy was recorded in Alcona county, Mich., where also are situated some of the lands which are the subject of the suit. The contract was contemporaneous with the execution and delivery by Bliss of the deeds to other lands. The consideration,—\$66,500,—which included the purchase price for certain personal property, was paid at different times within two years next succeeding the making of the contract. When the parties met for the purpose of concluding their arrangements of sale, it was discovered that divers lists and memorandums, descriptions of land to be incorporated in the instrument of conveyance, were missing; hence the making of the additional contract. The property in question is inaccessible timber lands, valuable for the timber standing and growing thereon, and available only when through railroad facilities for marketing and conveying it to convenient shipping points were established. The bill alleges on information and belief that subsequent to the sale to Potts Bliss removed from the state of Michigan to the state of New York; that the defendant, now Mrs. Alexander, took an active part on several occasions with her husband in concluding the negotiations; that she shared with her husband the management and responsibility of his business affairs, and was acquainted with the character of the lands and properties owned by him. The bill then alleges generally that the defendant had full knowledge of all the facts which led to the making of the conveyances to complainant's assignor and the contract above set out. It specifically states that, after the transaction was concluded, defendant promised complainant's assignor to join with her husband in all future conveyances that might be deemed necessary to carry out the agreement, and that the defendant succeeded by testamentary disposition to her husband's estate on

his death. Complainant's assignor first heard of the death of Mr. Bliss in 1886. Prior thereto he wrote several letters to him at Buffalo, N. Y., wherein he referred to the contract which they had made, but to which letters no replies were received. It is alleged that an attorney living in Buffalo, N. Y. was consulted for the purpose of ascertaining the residence of Mr. Bliss, but that no information was received from that source. At different times from the year 1890 to 1893 he addressed letters to Mrs. Bliss at Buffalo, N. Y., to which no replies were received. It does not appear that any of them were returned to him. Would it not be a fair inference, therefore, that they were received? Such an inference would have required an earlier commencement of the suit. On March 7, 1892, complainant filed a bill in chancery in Oscoda county, Mich., against the defendant and certain grantees asserting title to 1,840 acres of pine timber lands claimed to be covered by the contract. He alleges that he was then ignorant of the ownership by Bliss of other lands on the Au Sable river. The bill substantially averred the facts of the conveyances and contract as here, and prayed for specific relief against the defendant. The defendant was not served with process, and the suit was abandoned. It is alleged as a further reason for abandoning the suit that the timber had then been removed by the grantees, and an injunction to restrain them from despoiling the property would have been unavailing. The bill further states that complainant and his assignor have frequently endeavored, since making the contract, to discover the defendant's whereabouts, but they were unable to do so until the year 1900, when he learned that the defendant had remarried, and that she resided in Buffalo, N. Y. This information appears to have been obtained owing to inquiries made of a relative of the defendant named Curtiss. At this time complainant also learned that the defendant, prior to her remarriage, had lived in Tonawanda, N. Y. except for a short period of time. Efforts to sooner ascertain defendant's place of residence appear to have consisted merely in addressing letters to Mr. Bliss prior to his death; subsequently to the defendant, his widow; and in a fruitless attempt to ascertain where she resided through the medium of an attorney, who reported by correspondence that he was unable to find her. Lands sold by Bliss to complainant were chiefly valuable for the timber standing and growing thereon. It is also charged by the bill that the lands intended to be conveyed and included in the terms of the contract were held by Mr. Bliss as trustee for complainant's assignor, and that upon his death the defendant succeeded to the trust by operation of law. It is also charged that the lands described in the complaint as sold by Mrs. Bliss were included in the contract. Their aggregate value with the timber standing thereon at the time of making the contract and at the time of sale by defendant was \$50,000. Without the timber their value is but nominal, while, if the timber had not been cut therefrom, they would now be worth \$75,000. Defendant sold the land for \$15,000, which is alleged to have been less than its real value. The bill discloses such a staleness of claim as to fully satisfy me that the defendant ought not to be required at this late day to meet its averments. No such impediments to an earlier enforcement of his claim are stated as reasonably justify the belief that com-

plaintiff has acted with required diligence, or in good faith. The laches of his assignor have the same effect as his own subsequent neglect. He has slumbered upon his rights, or at least has been so passive without cause that he cannot now invoke the aid of a court of equity.

The answer challenges complainant's right to sue because of laches, and pleads, among other things, the statute of limitations as a bar. The statute of limitations does not necessarily apply. The courts of equity at times have held that such statutes by analogy were applicable to equitable causes. The statutes in terms, however, are not applicable to the equity side of the court. The inherent principles of its own peculiar system of jurisprudence, however, are invariably applied by a court of equity. *Abram v. Ordway*, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036; *Sullivan v. Railroad Co.*, 94 U. S. 811, 24 L. Ed. 324. On this point Chief Justice Fuller, writing for the court, in the case of *Hammond v. Hopkins*, *supra*, quotes the following, at page 273, 143 U. S., and page 435, 12 Sup. Ct., 36 L. Ed. 134, from the opinion of Justice Merrick, who rendered the opinion in the court below:

"Where there has been no change of circumstances between the parties, and no change with reference to the condition and value of the property, a court of chancery will run very nearly, if not quite, up to the measure of the statute of limitations as applied in analogous cases in a court of law. But where there has been a change of circumstances with reference to the parties and the property, and still more where death has intervened, so that the mouth of one party is closed, and those who represent his interests are not in a predicament to avail of the explanations which he might have made, out of the charities of the law and in consideration of the fact that fraud is never to be presumed, but must always be proved, and proved clearly, the courts limit very much, in such cases, the measure of time within which they will grant relief, because the presumption comes in aid of the dead man that he has gone to his account with a clear conscience."

Every case of this nature must stand or fall on the particular circumstances presented. Such is the uniform holding of the decisions. The delay in an earlier enforcement of the claim is not sufficiently excused in the case at bar. I am not satisfied that merely writing letters, to which no replies were received, was exercising such diligence to find the defendant as the exigencies of a meritorious claim required. Nothing appears to have been done to discover defendant from the year 1893 to the year 1900, a period of eight years. About nine years had elapsed when the suit was commenced after complainant had actual knowledge of the transfer by the defendant of timber lands to which he claimed equitable ownership. The complainant, however, must be presumed to have had earlier knowledge. The cause of action must be deemed to have accrued at that period of time when the conveyances were respectively recorded. The first conveyance was made on March 22, 1886, and related to lands situate in Alcona county. Other sales were made on January 20, 1888, February 14, 1890, and September 4, 1890. The bill does not state when these various conveyances were recorded. It avers the record, but the date and time are left blank. It will be assumed that the conveyances were recorded soon after their date. Public notice of such sales to

the world was given in the manner prescribed by law. It has been held that the statute of limitations begins to run from the accrual of the cause of action, and, when applied to the covenants in a deed, begins to run when the covenants are broken. *Am. & Eng. Enc. Law* (2d Ed.) 224. Applying that principle to the case at bar, it does not seem to me to be inequitable to hold that the implied covenants to make further conveyances to complainant's assignor contained in the contract were broken at the time of the respective sales; and, inasmuch as the deed of conveyance in each sale was recorded, it will be assumed that slight diligence on complainant's part would have made him acquainted with the transfers by Mrs. Bliss of property included in the contract, and above specifically referred to. Moreover, no reason appears why complainant could not have ascertained the nature and extent of any property owned by Bliss at any time subsequent to the making of the contract. An examination of the records would have apprised him of all lands of which Mr. Bliss was the owner in his lifetime. Indeed, an examination of records made subsequent to the first conveyance by Mrs. Bliss in 1886 doubtless would have apprised him of her place of residence. It was undoubtedly recited in the conveyance made by her. Even the tax gatherer might have been able to furnish useful information on that subject. Other avenues of information by which her residence would have become known were not followed. The bill discloses no specific element of fraud or concealment on the part of Mr. Bliss or the defendant. As already stated, the conveyances to various parties of the lands in question were made openly, and public notice thereof by recording was given to complainant and others as early as 1886. The record of these various deeds negatives the allegation of concealment. No attempt was made by complainant at the time of this conveyance, nor indeed, at the time he commenced the suit in chancery, to ascertain from the grantees the place of residence of defendant. This, it would seem, could easily have been done, as such grantees at that time lived in Iasco county, where it is alleged some of the land is situated. The bill does not disclose the existence of an express trust, in which no length of time could be a bar to an accounting, and in which laches could not be imputed to the cestui que trust in the enforcement of his rights. In *Re Jones' Estate*, 51 App. Div. 420, 64 N. Y. Supp. 667. The conveyances, in the circumstances must be considered as a denial of any trust relationship, and such denial is presumed to have come to the knowledge of the complainant when the transfers were recorded. *Lemoine v. Dunklin Co.*, 2 C. C. A. 343, 51 Fed. 489. The fact that Potts frequently wrote Bliss, and after his death to his widow, on the subject of the contract, shows that he had reason for believing that all the timber lands had not been included in the deeds delivered to him in 1881. Tested by the rules many times announced, I think the bill must be held deficient in that it does not specifically and satisfactorily set out the existence of any reasonable impediments to the commencement of the suit at an earlier time. It is a pertinent assumption that, if the complainant had a meritorious grievance, he would long since have taken steps to protect his rights. Instead of proceeding zealously to recover damages to which he may have deemed himself

entitled, or holding the defendant to account or to discovery, he has stood idle, and by silence and apparent acquiescence has tacitly assented to the transfers made by the defendant. Complainant now asserts that the timber lands had a greater value than defendant received for them, and that he is the equitable owner thereof by virtue of a contract made with his father more than 20 years ago. No impediments appearing to an earlier commencement of the suit, his present position does not satisfy me of the justice of his cause. The subsequent commencement of actions against grantees, which were abandoned cannot relieve him from the imputation of sleeping on his rights. The contract was not recorded until a number of years after the death of Mr. Bliss, and after a sale of timber lands by Mrs. Bliss in Alcona county. Undoubtedly, material evidence is not now as available to the defendant as if the suit had been seasonably commenced. In the case of *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383, it was held that the death of one of the parties to an agreement and the loss of her testimony does not necessarily operate as an obstacle to the maintenance of the bill, but that it is a circumstance to be considered by the court in weighing the evidence. Here there are other circumstances which satisfy me that the defendant ought not to be called on to make proof of transactions long past, and as to the value of timber lands which may have gone beyond the memory of witnesses. I think that the objections raised by the defendant on this motion are tenable, and that by reason of laches in failing to duly assert his claim the complainant has placed himself in a position where a court of equity will not lend its power to his relief.

An order may be entered denying the motion for leave to file a replication and dismissing the bill. Costs having already been taxed in the order dismissing the suit, no further costs will be granted.

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In re GOLDVILLE MFG. CO. OF GOLDVILLE, S. C.

Ex parte SOUTH CAROLINA LOAN & TRUST CO. et al

(District Court, D. South Carolina. November 22, 1902.)

1. MORTGAGES—VALIDITY—DELIVERY.

A mortgage by a corporation to secure bonds, after being duly signed and proved in the presence of two witnesses, was taken by the attorney of the company and delivered to the trustee therein, by whom it was returned to the attorney to be recorded, and was so recorded, but was subsequently mislaid, and was not returned to the trustee. *Held*, that there was a sufficient delivery, under the law of South Carolina, to render the mortgage valid.

2. SAME—EXECUTION BY CORPORATION—ERROR IN NAME.

The fact that, in signing bonds and a mortgage on behalf of a corporation, a part of the corporate name was omitted, does not render them invalid, where the proof is clear that they were in fact intended to be the obligations of such corporation, and duly authorized.

3. CORPORATIONS—POWER TO PLEDGE BONDS.

A corporation having power to issue bonds may, in the absence of express restriction, pledge the same for money borrowed for legitimate purposes.

**4. SAME—VALIDITY OF BONDS.**

Bonds issued by a corporation for the purpose of raising money to pay for machinery contracted for by its predecessor in the ownership of a cotton mill, which the corporation agreed to receive and pay for, and which were pledged for such purpose, are not invalid under the provision of the South Carolina constitution prohibiting the issuing of bonds by corporations except for money or property actually received.

**5. FIXTURES—AS BETWEEN MORTGAGOR AND MORTGAGEE—COTTON-MILL MACHINERY.**

Under the statute of South Carolina requiring separate records to be kept of chattel mortgages and mortgages of real property, a mortgage covering a cotton mill and the machinery therein is valid as to such machinery, although recorded only in the record for real estate mortgages. The machinery being necessary to the use of the building for the purpose to which it was devoted, both together constitute the mill; and it must be presumed to have been the intention and understanding of both parties that the machinery should be a fixture, and a part of the realty, regardless of the manner of attachment.

Petition for Foreclosure of a Mortgage against a Bankrupt Corporation.

Miller & Whaley, for petitioners.

N. B. Dial, for creditors.

Geo. Johnstone, for bankrupt.

**BRAWLEY**, District Judge. This is a petition of the South Carolina Loan & Trust Company, trustee, and of the parties above named, bondholders, praying the foreclosure of a mortgage given by the Goldville Manufacturing Company of Goldville, S. C., to secure certain bonds. The mortgage conveys two tracts of land, one containing 1,365 acres, the other containing 119 acres, together with all the buildings and improvements situate on said premises, consisting in part of one cotton mill building, 28x75 feet, boiler room, 33x35 feet, and engine room, 38x35 feet, attached; one 20-ton oil mill building; one ginnery building; 20 operatives' houses, and other buildings; also all machinery, shafting, engines, boilers, tools, and appliances belonging to said mortgagor, and used in its cotton mill business, its cotton oil business, and its ginnery business, consisting in part of A. T. Atheton & Co.'s pickers and intermediates, with a particular description of certain other machinery in the mill, in the cotton oil mill outfit, and in the ginnery outfit. This company was incorporated under the general laws of the state of South Carolina in October, 1900. Previous to that time J. S. Blalock and his son L. W. C. Blalock and his daughter M. E. Browning, who were the owners of the land described, and other large tracts of land adjacent, had been conducting large farming operations thereon, and a small mercantile business for the supply of their tenants and laborers, and had erected the cotton gins and the cotton oil machinery, and were erecting the cotton spinning mill. The mercantile business had been conducted under the name of the Goldville Manufacturing Company, also; but, requiring additional capital to complete the mill, they were advised to form a corporation, and such corporation was organized, with a capital of \$100,000, divided into 1,000 shares, of \$100 each; L. W. C. Blalock subscribing to 549 shares, M. E.



Browning to 449 shares, and J. S. Blalock to two shares; and the parties named were elected directors of the company; the capital stock being paid in lands, buildings, etc., estimated as of the value of \$100,000. On December 3, 1900, in pursuance of a notice published in the Clinton Gazette, a newspaper published in the county of Laurens, a special meeting of the stockholders was held, and the board of directors of the corporation was authorized and directed to issue 75 bonds of the corporation, of the denomination of \$1,000 each, bearing interest at the rate of 6 per cent. per annum, and to execute a deed of mortgage of all the property, rights, and franchises of the corporation to the South Carolina Loan & Trust Company of Charleston, S. C., as trustee, to secure the payment of said bonds. On the same day the directors met, and the draft of the deed of mortgage was approved, and the president and the treasurer were authorized to sell the bonds, and until sold they were authorized to pledge the same as collateral for notes and other evidences of indebtedness of the company. It appears from the testimony that the Blalocks had negotiated for machinery to be put into the cotton mill to the value of about \$75,000, and, after vainly endeavoring to sell the bonds at par, they borrowed money from the People's National Bank and others of the petitioners upon a pledge of the bonds as collateral; the money thus obtained being used to pay for the machinery. Bonds to the amount of \$5,000 were pledged to the Carolina, Newberry & Laurens Railroad Company to secure an indebtedness of about \$4,000 for freight due on the machinery transported. All of the bonds, except \$1,000, were thus disposed of. The Goldville Manufacturing Company has been adjudicated a bankrupt, and, upon this petition for foreclosure, certain of the unsecured creditors have appeared in opposition thereto, and various objections to the bonds are made.

The first to be considered is that the meeting at which the bonds were authorized was not advertised according to law. The statute requires that:

"The board of directors, trustees or managers shall call a stockholders' meeting, giving at least thirty days' notice of the time, the place and purpose of said meeting, either by the mailing of written notice to each stockholder, or else by publication in some newspaper published in the county where the corporation has its principal place of business; or if no paper be published in the county, by written or printed notice pasted up on the court house door." 22 St. at Large, S. C. p. 770.

The testimony is that the notice was duly published in the Clinton Gazette, a newspaper published in Laurens county, 30 days prior to the meeting, and printed copies of the advertisement were cut from the newspaper and pasted on the minutes of the company. L. W. C. Blalock testified that he cut the clipping each week after receiving the paper. To offset this positive testimony, there is the vague and uncertain testimony of the publisher of the newspaper that his recollection is that it was not published more than two or three successive weeks; but no files of his paper were preserved, and his testimony as to his mere recollection cannot outweigh Blalock's testimony, supported as it is by the production of the printed

notices. Inasmuch as the notice required by law was intended for the benefit of stockholders, to prevent action to their prejudice being taken at meetings of which they had no notice, they could waive it if they had actual notice of the meeting; and the minutes of the meeting show that all of the stockholders were present when the bonds and mortgage were authorized. It is clear that there is nothing in this objection, for the statutory notice was published, and all the stockholders were present at the meeting.

The second objection is that there is no proof that the mortgage was delivered in the presence of two witnesses. It is admitted that the mortgage was signed and sealed and proved in the presence of two witnesses, and that it has been recorded in the Real Estate Mortgage Book of Laurens County; but the trustee was not present when the mortgage was executed, and the objection is made that it was not delivered. After the execution of the mortgage the same was turned over to Mr. Lyles' clerk, who was one of the witnesses, and sent by him to Mr. Lyles, who, as the attorney for the company, carried the same to Charleston and delivered it to the trustee. The trustee gave it to Mr. Lyles to be recorded, and it was sent to the registrar in Laurens county, and returned to him, but the original mortgage has been mislaid. By a stipulation of counsel the copy of the mortgage in evidence is admitted as a true copy of the original and of its record. Delivery is indispensable to the completion of a deed, but this may be done either formally, or delivery may be inferred from circumstances which indicate that the grantor intended to part with the dominion of the instrument and put it into the possession of the trustee. In *Withers v. Jenkins*, 6 S. C. 122, the court says:

"It is not necessary to the valid execution of a deed that there should be actual delivery either to the grantee in person, or to some one expressly authorized to accept it on his behalf. Much less is such a requisition essential where the instrument gives a trust conferring on the trustee a mere naked title, coupled with no interest, that he holds for the mere purpose of protecting and preserving the trust for the beneficiaries who may be entitled to these enjoyments. If the grantor, in the absence of the grantee, and without his knowledge, has actually consummated the delivery in accordance with the purpose declared on the face of the instrument, the object to be effected by it is as fully accomplished as if there had been an actual transfer of the paper from the hands of the grantor to those of the grantee."

I have no hesitation, therefore, in holding that the mortgage was duly executed and delivered.

The third objection is that the bonds and mortgage are in the name of the Goldville Manufacturing Company, whereas the corporate name of the company is the Goldville Manufacturing Company of Goldville, S. C. The mortgage recites that it is the mortgage of the Goldville Manufacturing Company, a corporation duly organized under the laws of the state of South Carolina on the 23d day of October, 1900, having its principal place of business at Goldville, Laurens county, S. C. There is no other corporation at Goldville, and the Blalocks were never officers of any other company; and the proof is clear that the notes, bonds and mortgage, while signed, "Goldville Manufacturing Company," were in fact the notes, bonds,

and mortgage of the Goldville Manufacturing Company of Goldville, S. C. It is a mere misnomer, of which neither the company itself nor its creditors can take advantage. "The identity of a corporation is no more affected by a change of name than the identity of an individual. The agents of a corporation have no implied authority to use any name except that indicated by the company's charter in contracting on the company's behalf, but the use of a wrong name is ordinarily not material if the corporation is really intended by the parties. The misnomer of a corporation has the same legal effect as the misnomer of an individual. A contract entered into by a corporation under an assumed name may be enforced by either of the parties. If the contract is expressed in writing and the identity of the corporation can be ascertained from the instrument itself, the misnomer is wholly unimportant; but, if necessary, other evidence may be introduced in order to establish what company was intended." Mor. Priv. Corp. § 354. Any variation from the precise name of a corporation, when the true name may be collected from the instrument itself, and when it appears from the proofs that the obligations sued upon were intended to be the obligation of the corporation sued, is unimportant.

The fourth objection is that the corporation had no right to pledge the bonds. It appears from the minute books of the corporation that, at a meeting of the three directors who were the three stockholders of the company, the officers of the company were expressly authorized to pledge the bonds; and, as a general rule, "a corporation having authority to issue bonds may, in the absence of express restriction, pledge them for money borrowed for legitimate purposes." *Nelson v. Hubbard* (Ala.) 11 South. 428, 17 L. R. A. 375; 42 Am. & Eng. Corp. Cas. 210.

The fifth objection is that these bonds are invalid under section 10, art. 9, of the constitution of South Carolina, which provides that "stock or bonds shall not be issued by any corporation save for labor done, or money or property actually received or subscribed; and all fictitious increase of stock and indebtedness shall be void." This constitutional prohibition was evidently intended to provide against any issue of stock or bonds without consideration, to protect stockholders against spoliation, and to guard the public against worthless securities, and can have no application here, where the bonds were issued for the purpose of paying for machinery already contracted for, and which actually went into the building. The machinery had been contracted for by the Blalocks, but formed no part of the payment of their subscription to the capital stock of the company, and upon the organization of the company there was an agreement that the company should take the machinery and assume the payment of the debts. It is not a case of pledging bonds for an antecedent debt of the company, for the company did not owe for the machinery until it assumed the Blalock contracts, borrowed the money for the payment thereof, and pledged the bonds as collateral. It was a present consideration, and the company would not have secured the machinery except upon the assumption of the obligation to pay for the same.

The sixth objection is that the mortgage does not cover the personal property, because it was recorded only in the Real Estate Mortgage Book of the County of Laurens. The statutes of South Carolina provide "that the registrars of mesne conveyance of the several counties shall provide different sets of books for the recording of chattel mortgages and mortgages on real estate, in one of which sets all chattel mortgages shall be recorded, and in the other set all mortgages on real estate shall be recorded." There is no provision in the statutes which specifically provides in what book a mortgage covering both real estate and personal property shall be recorded, and there is no decision in South Carolina on the precise point. I am of opinion that in a case of this kind, where the mortgage is of the mill building and its machinery, all purposes for which recording is necessary are served by its being recorded in the Real Estate Book, and that there was no necessity for a double record. The case of *Anthony v. Butler*, 13 Pet. 434, 10 L. Ed. 229, seems to sustain this view; and there is a Missouri case (*Jennings v. Sparkman*, 39 Mo. App. 669) to the same effect. All of the machinery described in the mortgage was designed to become a part of the mill building,—was adapted to and designed to promote the object for which the mill was erected; such real estate and such machinery constituted the mill, and were, *ex vi termini*, a unit; and I am of opinion that it was the intention of the parties, and the understanding of mortgagor and mortgagee, that the same should become a fixture and a part of the freehold, and constitute the cotton mill which was mortgaged. One of the earliest cases in South Carolina wherein the principle is discussed is *Faris v. Walker*, 1 Bailey, 541, where Justice O'Neill says:

"What is such a fixture as passes with the freehold? has been a question of great difficulty. The rule on the subject, as between the heir and the executor, or between vendor and vendee, is more rigorous than between landlord and tenant, or the executor of a tenant for life and the remainderman. In relation to the former, all things which are necessary to the full and free enjoyment of the freehold, and which are in any way attached to it, are held to be fixtures, and pass with it. With regard to the other class, articles used for a trade or manufacture, or for the temporary convenience of the occupant, and which may be detached from the freehold without injuring it, are held not to be fixtures. What ought to be a fixture depends, I think, materially upon the nature of the freehold sold. If a plantation, then all such things attached to the land, which are usually necessary or are used in the management of the farm, would pass. If a freehold, fitted up for trading of a particular kind or for manufactures, is sold to a person intending to follow the same business, then all the machinery necessary to the manufacture or trade so intended to be carried on would pass. I therefore instructed the jury that, if they thought the cotton gin necessary to the full and free enjoyment of the freehold sold for agricultural purposes, it passed to the defendant under the sale by plaintiff. *Vide Nimmons v. Moyer*, decided at Columbia in December, 1829, and 2 Kent, Comm. 378-80."

One of the latest cases on the subject is *Padgett v. Cleveland*, 33 S. C. 347, 11 S. E. 1069, where a portable engine which had been placed on the mortgaged property was thereafter removed to another town. The court says:

"When the mode and extent of the annexation of the chattels to the realty do not determine their character as fixtures, the intention with which they

were placed upon the land should be considered, which intention may be gathered not merely or chiefly from the manner in which the chattels were annexed, but from the character of the improvement,—whether it is essential to the proper and ordinary use of the realty.”

In that case the man who put the engine on the property testified that he intended it to remain so long as he could make it profitable; and the court held that there was no satisfactory proof of the solemn dedication of the machinery as a part of the lot, so that it could not be detached at any time. The conduct of the parties was inconsistent with the alleged intention of dedication, and the machinery, having been detached from the mortgaged premises without objection, and removed to another place, was held to be personal property.

In *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235, the issue was whether certain machinery in a cotton mill was, as between mortgagor and mortgagee, a part of the realty; the fact being that the machinery was procured for the use of manufacturing cotton cloth, and had been attached to the building and connected with a motive power with a view to permanence. The court held that the machines were fixtures, and says:

“Except in cases where a contract determines the character, a machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it to promote the object for which it was erected or to which it has been adapted and devoted,—an article intended not to be taken out and used elsewhere unless by reason of some unexpected change in the use of the building itself.”

The tendency of the modern cases is to make this a question of what was the intention with which the machinery was put in place; and, after quoting numerous cases in that state and in others, says:

“These cases seem to recognize the true principle on which the decision should rest, only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles not merely his own rights, but the rights of others who have or who may acquire interests in the property. In this commonwealth it has been said that whatever is placed in a building subject to a mortgage, by a mortgagor or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes a part of the realty.”

And to the same effect are the decisions in the great manufacturing states of Pennsylvania, New Jersey, and New York. And the conclusion of them all is that if there is an intent to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and the chattels are annexed to the freehold, and are fitted for and applied to the use to which the real estate is appropriated, all being designed for and necessary to the prosecution of a common purpose, then machinery and land become unified, and are subject to the lien of the real estate mortgage. *Hill v. Bank*, 97 U. S. 453, 24 L. Ed. 1051, is in harmony with these views.

I have considered the cases cited by the creditors in opposition to these views (*Evans v. McLucas*, 15 S. C. 67; *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. 1069; and *Hughes v. Shingle Co.*, 51 S. C. 1, 28 S. E. 2), and they do not alter the conclusion reached, which is that the intention of the parties is the governing principle in South Carolina, as elsewhere, in determining what constitutes a fixture.

Upon the whole case, I am of opinion that the bonds are valid obligations of the bankrupt corporation; that they were lawfully pledged for money borrowed to pay for the machinery and the expenses of transportation thereof, and that the said machinery is covered by the mortgage, which was duly executed, delivered, and recorded; and that the petitioners are entitled to a decree for foreclosure.

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UNITED STATES v. MELFI et al.

(District Court, D. Delaware. June Term, 1902.)

No. 20.

1. CONSPIRACY TO DEFRAUD UNITED STATES—INDICTMENT—SUFFICIENCY.

The indictment in substance charged that the defendants unlawfully conspired with one Petolicchio to commit an offence against the United States "by causing the violation" of section 5425 of the revised statutes [U. S. Comp. St. 1901, p. 3669], and that such offence "consisted in this, that by their conspiring and inducement" twenty one persons named in the indictment "should obtain, accept and receive certain certificates of citizenship" for themselves "by means of certain false statements, made with intent to procure the issuance of said certificates of citizenship to them"; and that Petolicchio "to effect the object of the said conspiracy" entered into between him and the defendants "did appear before the District Court of the United States for the District of Delaware, and the Superior Court of the State of Delaware, in and for New Castle County, sitting at Wilmington, and did then and there make certain false statements to said courts, with intent to procure, from said courts, the issuance" to the twenty one persons above referred to "of certain certificates of citizenship under the laws of the United States relating to the naturalization of aliens, which said false statements were then and there well known" by the defendants and Petolicchio "to be false, and which said false statements consisted in this, that said Giovanni Petolicchio then and there made certain statements to the said courts on a matter material to the proceedings then and there depending before the said courts and concerning which the said courts had jurisdiction," that the twenty one persons above referred to "had resided within the State of Delaware one year at least; whereas in truth and in fact the said" twenty one persons "had not resided within the State of Delaware one year at least, but heretofore lived and now continue to live in the State of Pennsylvania." *Held*, on demurrer, that the indictment was fatally defective, in that the object of the conspiracy as set forth did not involve a violation of section 5425 of the revised statutes [U. S. Comp. St. 1901, p. 3669], or any other offence against the United States.

(Syllabus by the Court.)

Wm. Michael Byrne, U. S. Atty.

Harry Emmons and Henry C. Conrad, for defendants.

BRADFORD, District Judge. A general demurrer has been filed to the indictment in this case which charges the defendants with a

violation of section 5440 United States revised statutes, as amended by the act of May 17, 1879 [U. S. Comp. St. 1901, p. 3676]. Section 5440 as amended is as follows:

**"If two or more persons conspire either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."**

The indictment in substance charges that the defendants Carmin Melfi, Giovanni D. Fellipo and Saverio Posten, alias Vito Spera, unlawfully conspired with Giovanni Petolicchio to commit an offence against the United States "by causing the violation of section 5425" [U. S. Comp. St. 1901, p. 3669], and that such offence "consisted in this, that by their conspiring and inducement" twenty one persons named in the indictment "should obtain, accept and receive certain certificates of citizenship" for themselves "by means of certain false statements, made with intent to procure the issuance of said certificates of citizenship to them"; and that "the said Giovanni Petolicchio to effect the object of the said conspiracy" entered into between him and the defendants, "did appear before the District Court of the United States for the District of Delaware, and the Superior Court, of the State of Delaware, in and for New Castle County, sitting at Wilmington, and did then and there make certain false statements to said courts, with intent to procure, from said courts, the issuance" to the twenty one persons above referred to "of certain certificates of citizenship under the laws of the United States relating to the naturalization of aliens, which said false statements were then and there well known" by the defendants and Petolicchio "to be false, and which said false statements consisted in this, that the said Giovanni Petolicchio then and there, made certain statements to the said courts on a matter material to the proceedings then and there depending before the said courts and concerning which the said courts had jurisdiction," that the twenty one persons above referred to "had resided within the State of Delaware one year at least; whereas, in truth and in fact the said" twenty one persons "had not resided within the State of Delaware one year at least, but heretofore lived and now continue to live in the State of Pennsylvania."

Under the demurrer the counsel for the defendants contend in substance, first, that "the offence charged in the said indictment is a felony under the statutes of the United States, and such being the case the said indictment is fatally defective in not charging that the offence was committed 'feloniously'"; and, secondly, that the indictment does not sufficiently or in substance charge any offence against the federal statutes. The first contention clearly cannot be sustained. It is well settled that a conspiracy, having for its object the commission of a misdemeanor or felony, is only a misdemeanor, unless it be declared by statute a felony, and further, that a conspiracy to commit a misdemeanor only is not merged in the misdemeanor when committed. The decisions are not harmonious on the question whether, in the ab-

sence of a statute, a conspiracy to commit a felony is in all cases merged in the consummated felony. Nor is it necessary for the purposes of this case to decide or discuss this point. Even if it be assumed that the indictment properly charges a conspiracy to commit an offence under section 5425 [U. S. Comp. St. 1901, p. 3669], and that the offences enumerated in that section are all felonies, the fact remains that the indictment does not charge the consummation of any felony thereunder; for it does not allege that any certificates of citizenship were obtained, accepted or received by the defendants or any of them, or by the twenty one persons, or any of them. The demurrer, therefore, cannot be sustained on the ground that the indictment does not contain the word "felonious" or "feloniously" in connection with the allegation of the commission by the defendants of acts alleged to be unlawful.

The further question is presented, whether the indictment charges against the defendants any offence against the United States. It is true that the defendants are charged with conspiring to commit or cause to be committed what is termed in the indictment an offence against the United States under section 5425 [U. S. Comp. St. 1901, p. 3669]. It is essential to the validity of the indictment that it should disclose upon its face the offence which is the object of the conspiracy. Section 5425 so far as it is pertinent to this case, provides that "every person who \* \* \* obtains, accepts, or receives any certificate of citizenship known to such person to have been procured \* \* \* by means of any false statement made with intent to procure, or aid in procuring, the issue of such certificate \* \* \* shall be imprisoned," &c. The penalties of the statute are directed against any person who obtains, accepts or receives any certificate of citizenship with the scienter therein specified. The indictment does not allege that the object of the conspiracy was that the defendants, or any of them, should obtain, accept or receive any certificate or certificates of citizenship for themselves. It charges that the object of the conspiracy was that, by the conspiring and inducement of the defendants and Peto-licchio, the twenty one persons should obtain, accept and receive for themselves certificates of citizenship "by means of certain false statements, made with intent to procure the issuance of said certificates of citizenship." Neither the twenty one persons or any of them are defendants to this indictment, nor is any criminality under section 5425, actual or meditated, charged against them. That section, in providing that criminality thereunder shall attach to any person who obtains, accepts or receives a certificate of citizenship "known to such person to have been procured \* \* \* by means of any false statement made with intent to procure, or aid in procuring, the issue of such certificate" requires for the commission of the crime that the person who obtains, accepts or receives the certificate shall be the person who has knowledge of the falsity of the statement or statements made for the purpose and as the means of procuring or aiding in the procurement of the certificate. Therefore, an indictment charging a conspiracy to commit an offence against the United States by a violation of the provisions of section 5425 in question must allege, as one of the essential ingredients of the intended offence constituting the object of



the conspiracy, that the persons, who should obtain, accept or receive certificates of citizenship, should do so with knowledge on their part that they had been procured by means of false statements made with intent to procure or to aid in procuring the issue of such certificates. There is, however, no such averment in the indictment. It is true that it is alleged that by the "conspiring and inducement" of the defendants and Petolicchio, the twenty one persons "should obtain, accept and receive" certificates of citizenship for themselves "by means of certain false statements made with intent to procure the issuance of said certificates of citizenship to them." But in the connection in which this allegation is made it does not appear what such false statements were to be, nor by whom they were to be made. On an examination of the indictment as a whole it is fairly to be inferred that such false statements were those made by Petolicchio. It is the false statements of Petolicchio alone which are alleged to have been made "to effect the object of the said conspiracy" and "which said false statements were then and there well known by" the defendants and Petolicchio "to be false."

But, further, the indictment not only omits to state the nationality of the twenty one persons, but fails to aver that they were aliens. Section 5425 [U. S. Comp. St. 1901, p. 3669] must be considered in connection with title XXX of the revised statutes of the United States [U. S. Comp. St. 1901, pp. 1329-1334] dealing with the naturalization of aliens. No court in this country has any authority or jurisdiction to naturalize persons other than aliens; and the provisions of section 5425 in question have reference solely to offences committed with respect to proceedings for the naturalization of aliens. The omission of a proper averment on this subject renders the indictment fatally defective.

In view of the foregoing considerations the indictment cannot be sustained as charging a conspiracy to commit or cause to be committed an offence against the United States under section 5425.

In *Williams v. U. S.*, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509, the court had under consideration the sufficiency of an indictment on the margin of which was endorsed a reference to certain statutes which, however, were not mentioned in the body of the indictment. The court held that the indictment could not be sustained under the statutes referred to in its margin; but that the indictment properly charged an offence against the United States covered by a statute not referred to in the indictment. Mr. Justice Harlan delivering the opinion of the court said:

"It is said that these indictments were not returned under that statute, and that the above indorsement on the margin of each indictment shows that the District Attorney of the United States proceeded under other statutes that did not cover the case of extortion committed by a Chinese inspector under color of his office. It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offence under the laws of the United States, that is sufficient to sustain it, although the representative of

the United States may have supposed that the offence charged was covered by a different statute."

A distinction between the present case and that of *Williams v. U. S.* is that the statute, the violation of which is alleged as the object of the conspiracy, is expressly referred to not only in the indorsement on the indictment, but in the body of the indictment; while in *Williams v. U. S.* the only reference made to the statutes under which it was claimed the indictment could be supported was merely by way of indorsement on its margin. If it be assumed,—a point not intended now to be decided,—that the above distinction between the two cases is without substance, the question arises whether the indictment before this court properly or sufficiently charges any offence against the United States. It certainly does not charge a conspiracy to commit an offence under section 5392 [U. S. Comp. St. 1901, p. 3653], relating to perjury, for there is no allegation in the indictment that the false statements were sworn or affirmed to. Nor does it charge a conspiracy to commit an offence under section 5395 [U. S. Comp. St. 1901, p. 3654], which provides that "in all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit who knowingly swears falsely, shall be punished," &c. For, as before stated, the indictment does not aver that the false statements were under oath or by affidavit, nor that the twenty one persons were aliens. Much stress was laid by the District Attorney on section 5427 [U. S. Comp. St. 1901, p. 3670], which is as follows:

"Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made felony, or counsels, advises or procures, or attempts to procure, the commission thereof, shall be punished in the same manner and to the same extent as the principal party."

But the indictment does not charge that the defendants knowingly and intentionally aided or abetted the twenty one persons, or any of them, in the commission of the offence of obtaining, accepting or receiving certificates of citizenship with the scienter specified in section 5425 [U. S. Comp. St. 1901, p. 3669]. Nor does it allege the commission of that offence. Nor does the indictment allege that the defendants, or any of them, knowingly and intentionally attempted to do any act denounced in section 5425 or that they, or any of them, counseled, advised or procured, or attempted to procure the commission of such offence. Nor does the indictment charge a conspiracy to violate section 5427 [U. S. Comp. St. 1901, p. 3670]. It charges the defendants with conspiracy to commit what is termed an offence under section 5425 and not with the violation of section 5427. The defendants are charged with conspiracy under section 5440 [U. S. Comp. St. 1901, p. 3676], as amended, the punishment for which is substantially different from that provided for a violation of section 5427. The authorities cited by the District Attorney, and which have been carefully examined by the court, doubtless enunciate sound principles of law, but are wholly inapplicable to the decision of the present case. I am

not aware of any statute of the United States which can support the indictment as it has been framed.

It may further be added that the defendants have a constitutional right "to be informed of the nature and cause of the accusation." In *Evans v. U. S.*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830, Mr. Justice Brown, in delivering the opinion of the court, said:

"While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove."

But in the same case Mr. Justice Brown further said:

"The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. \* \* \* Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offence intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offence to which the plea relates."

The indictment here, if it can be supposed to charge any offence, wholly fails to meet the requirements recognized as essential by the Supreme Court of the United States. It does not impart to the defendants the information which they have a constitutional right to receive from the government before being placed on their trial.

The demurrer is, therefore, sustained on the ground that the indictment does not sufficiently or in substance charge any offence against the laws of the United States.

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#### In re WATERLOO ORGAN CO.

(District Court, W. D. New York. November 6, 1902.)

No. 1,073.

#### 1. BANKRUPTCY COURTS — PROPERTY SUBJECT TO JURISDICTION — ADVERSE CLAIMS.

A mortgage on property owned and thereafter acquired by a corporation provided that the mortgagee might enter into possession in case of default in the payments of principal or interest for 60 days. Thereafter the mortgagor was adjudged a bankrupt, and on the same day, but prior in time thereto, the mortgagor surrendered to the mortgagee possession of the property, including that acquired after the execution of the mortgage, though there had been no 60-days default in the payments of principal or interest. *Held*, that the mortgagee was not such an adverse claimant to the property as would bar jurisdiction of the federal court to determine the validity of its claim.

#### 2. SAME—SALE OF MORTGAGED PROPERTY—TRANSFER OF LIENS.

A referee in bankruptcy may direct the manner of sale of property of a bankrupt estate free from liens and incumbrances, preserving and transferring bona fide liens thereon to the proceeds of the sale.

#### 3. SAME—BID BY LIENHOLDER—PAYMENT.

A responsible bank held a mortgage on certain property as trustee of the bondholders of the mortgagor. The mortgage covered not only prop-

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¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 365.

erty owned at the time of its execution, but also subsequently acquired property. On the bankruptcy of the mortgagor, the amount of the property in existence at the date of the mortgage, and conceded to be subject to its lien, was determined by the referee, who, without determining the validity of the lien of the mortgage on the after-acquired property, directed that the whole of it should be sold free of incumbrances, and the liens transferred to the proceeds of the sale. *Held* that, in case the mortgagee purchased the property at the sale, it should be permitted to pay therefor by presenting receipts from the bondholders to the extent of the conceded lien, and by giving an approved undertaking in the amount of the undetermined lien, whereby it should agree to pay to the trustee such amount as should be determined to be value of the property subsequently found not to be subject to the lien, or, on the mortgagee's qualifying as a depository of bankruptcy funds, it might pay such amount in cash to the trustee in bankruptcy, who should thereupon make a deposit of the same with the mortgagee.

Hammond & Hammond, for petitioner.

Frederick L. Manning (James L. Quackenbush, of counsel), for trustee.

George E. Zartman, in pro. per.

HAZEL, District Judge. This is a review of an order of Charles A. Hawley, referee, directing a sale of certain property of the bankrupt, free from the liens of two mortgages upon the same given to the First National Bank of Waterloo as trustee for the bondholders of the bankrupt. The mortgages were executed December 1, 1894, and January 21, 1899, respectively. The bank, as mortgagee, after the petition in bankruptcy was filed, and before adjudication, took possession of certain personal property acquired subsequent to the execution of the second mortgage. Has the bank such an adverse claim of title as will preclude this court from asserting jurisdiction and making the order under review? I have examined the cases to which my attention has been called, and conclude that the national bank has no such possession of the property as vested it with the title thereto, and need not be considered an adverse claimant. The case of *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, is authority for the power of the bankruptcy court to ascertain whether any basis for an adverse claim actually existed at the time of filing creditor's petition. The referee proceeded on the assumption that the asserted adverse claim of the bank was not well founded. In this conclusion I fully concur. The bank cannot be considered to have a higher interest in the property than that of a lienor. *Sexton v. Breese*, 135 N. Y. 390, 32 N. E. 133. The proper construction to be given to the instruments executed and delivered by the bankrupt to the national bank in trust for the bondholders must be found in state authority. In *New York Security & Trust Co. v. Saratoga Gas & Electric Light Co.*, 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132, the court of appeals construed a mortgage like that under consideration as follows:

"The right of the mortgagor to deal with the products and earnings is entirely inconsistent with the existence of any lien upon future products or earnings. That the true construction of the instrument is that although, in terms, it purports to include future earnings and products, it does not, as against general creditors, operate as a lien upon such earnings until actual entry and possession under the mortgage by the mortgagee, and cannot have

any retroactive operation, since it would then deprive the unsecured creditor of the fund upon the faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with it as his own."

It follows that under the instrument in question the mortgagee acquired no higher interest than a lien. In the case at bar the possession of the property covered by both mortgages and the after-acquired property was surrendered by the bankrupt on the day of adjudication, and prior thereto in time. The surrender is deemed to be justified by a clause in the mortgages which allows the mortgagee to enter into possession in case of default in the payments of principal or interest for a period of 60 days. That period had not then expired. Doubtless other questions regarding the validity and invalidity of the provision allowing the mortgagee to enter, contained in the latter mortgage (which includes subsequently acquired personal property), will be raised when the matter finally comes before the referee for determination. It suffices to determine now that the exercise of such right of possession under the mortgage does not constitute the national bank, mortgagee, such an adverse claimant as to bar the jurisdiction of this court to determine the validity of its claims.

It is in the province of the referee to direct the manner of sale free and clear of incumbrances, and he may preserve and transfer bona fide liens to the fund arising from the same. *Trust Co. v. Benbow*, 3 Am. Bankr. R. 9, 96 Fed. 514; *In re Cobb*, 3 Am. Bankr. R. 129, 96 Fed. 821; *In re Pittelkow*, 1 Am. Bankr. R. 472, 92 Fed. 901; *In re Matthews*, 6 Am. Bankr. R. 96, 109 Fed. 603; *In re Kellogg*, 7 Am. Bankr. R. 623, 113 Fed. 120.

The referee directs that the liens of the two mortgages or deeds of trust shall attach to the proceeds to the extent of their respective liens. He has adjudged the value of the property concededly subject to this lien of the mortgages, and acquired prior to their execution, to be two-fifths of the value of the entire property described therein. The value of the property purported to be embraced in the second mortgage, which was acquired after delivery of the mortgage to the bank, is adjudged to be three-fifths of the entire value of the properties described in both mortgages, and therefore it is directed by the referee that three-fifths of the proceeds shall stand in its place. The proportion of values as found by the referee is assented to by the bank. It is further directed by the order of sale that two-fifths of the proceeds of sale of the entire properties shall be distributed pro rata to the bondholders who are secured by the mortgages, which shall be established as valid liens. The referee then directs that the remaining three-fifths of the proceeds shall be specially deposited and kept until the extent of the lien created by the later mortgage, and the rights of the trustee in bankruptcy to such proceeds, shall be legally determined. The order finally provides that, if the national bank shall purchase the property as trustee for bondholders, it shall pay in cash three-fifths of the entire proceeds of the sale; as to the balance, the bank shall deliver to the trustee receipts, signed by the owners of bonds, for their pro rata share of two-fifths of the purchase price. In other words, the bank, in case it elects to purchase the bankrupt's property to protect its liens, is not permitted to apply on the purchase price the value of the subsequently acquired personal property upon which it claims a lien,

on the theory that the pretended lien thereon is void as against general creditors. As to such proportionate value the bank is required to pay in cash; the proceeds, however, to stand in place of that portion of the property sold. The mortgagee contends that the manner of sale directed by the referee is prejudicial to its lien, and tends to sacrifice the rights of the bondholders in the bankruptcy estate. The appraised value of the property is in the neighborhood of \$40,000, and on the argument of this review the trustee intimated that an intending purchaser would bid on the sale approximately the appraised value. The trustee is required to diligently discharge his trust, and to energetically conserve the assets of the bankrupt for the benefit of the creditors. Accordingly I deem it best that the sale of the bankrupt property described in the petition shall be made under the direction of the bankruptcy court. The proportionate value of the after-acquired property, as adjudged by the referee, is not controverted. In fact, as has been already said, it is assented to by the bank. Undoubtedly the interest of the bank as trustee requires that it shall bid at the sale to protect its claim. Shall the bank, in the event of its being the highest bidder at the sale, pay in cash the proportionate value of the personal property acquired by the bankrupt after delivery of the second mortgage? The financial responsibility of the bank is not questioned. The validity of the lien of the bondholders is in dispute. Nevertheless the funds were loaned in good faith. Compliance with the order of sale as made by the referee would deprive the bank, if it bid in the property, of the use of the moneys paid to protect its apparent lien during the pendency of any litigation over the proceeds concerning the validity of the lien of the second mortgage. The funds would remain on deposit in another bank until the controversy was ended. Then, if the lien of the bank was established, it would be paid back by order. On the other hand, if the bondholder's liens under the second mortgage were held to be invalid, the referee would not apply the fund to the payment of such liens or bonds, but the fund would be paid to the general creditors. It is undoubtedly the duty of the court to consider the interests of lienors as well as creditors of the bankrupt. I am unable to perceive that the interests of the creditors will be endangered or become in any manner jeopardized by requiring the national bank to give an undertaking in the amount of three-fifths of the bonded indebtedness if it buys the property, and which shall be accepted by the trustee upon the sale for that amount, instead of requiring a cash payment of that amount, as provided by the order of sale. The undertaking shall be approved by the referee. It shall provide for payment to the trustee of such amount as shall be determined to be the value of the property which is not subject to the lien of the bank. Should, however, the bank qualify as depository of bankruptcy funds, under section 61 of the act [U. S. Comp. St. 1901, p. 3446], it may pay the amount of its bid in the manner required by the order of sale here reviewed, and the trustee in that event is directed to make special deposit of the same with the First National Bank of Waterloo.

The order of sale is accordingly modified to conform hereto. Counsel for the trustee may prepare an order, submitting it for approval to counsel for the national bank. If no agreement as to its form is reached, the court will settle the same.

In re MORTON.

(District Court, D. Massachusetts. December 9, 1902.)

No. 1,559.

**1. BANKRUPTCY—TRUSTEE—DEATH—APPOINTMENT OF SUCCESSOR.**

Where all of a bankrupt's creditors who proved their claims and were unpreferred had received 100 per cent., the appointment of a new trustee by them after the death of the former trustee will not be set aside on the ground that the bankrupt had solicited their votes for the appointment.

**2. SAME—SURPLUS—PREFERRED CREDITORS.**

Where a bankrupt's estate was sufficient to pay the claims of all unpreferred creditors in full, and leave a surplus, creditors who had received an innocent preference, and, on failure to surrender the same, had been refused participation in the bankrupt's assets, were entitled, as against the bankrupt, to share in such surplus.

In Bankruptcy.

Charles H. Wardwell, for trustee.

Harry J. Jaquith, for creditors.

LOWELL, District Judge. The trustee appointed in this case died, and a meeting of the creditors was called to elect a new trustee. All the bankrupt's former creditors who had proved their claims and were unpreferred had received 100 per cent. This must be taken to have been a payment in full, as no question was made regarding allowance of interest. There were assets remaining to be administered. The bankrupt had solicited some of these creditors to vote for one Lovett as trustee, and Lovett was chosen by the statutory majority. Objection was made to the confirmation of the trustee by Warren, a creditor whose claim had been expunged because he had received an innocent preference, and by Parker, a creditor who had been paid in full. Parker no longer objects to the confirmation. The referee has found, in substance, that the bankrupt's solicitation was not by way of improper inducement; and, after conference with him, I find that he was satisfied that Lovett will make a suitable trustee. Though the solicitation of votes by the bankrupt often leads the court to refuse to confirm an election obtained by such votes, yet, in the case at bar, where no creditor whose claim had been allowed could have any real interest in the election, and where, in the absence of a choice by creditors, the referee might have appointed, I am of opinion that the appointment of Mr. Lovett should not be disturbed. As to him, the order of the referee is affirmed.

A further question concerns the petition of certain creditors of the bankrupt whose claims had been proved and filed, and had been disallowed because of innocent preferences received by them. This court has to decide which is entitled to the surplus of the bankrupt's assets after paying his unpreferred creditors in full,—the bankrupt himself, or his preferred creditors; at least, those innocently preferred. The purpose of the bankrupt act is the equal and equitable distribution of the bankrupt's property among his creditors, and the consequent

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 498.

discharge of the bankrupt from his obligations. The discharge follows only upon the distribution, or upon a complete surrender for purposes of distribution. Where the creditor has procured an unequal distribution,—one unduly favorable to himself,—he is in some cases debarred from further distribution. This is because he has injured other creditors by obtaining a preference, not because he has injured the bankrupt himself. From the bankrupt he has obtained no more than the payment of his just debt. "It is only against assignee in bankruptcy that [preference] is possible." Low. Bankr. § 63. Especially is this true where the creditor has received that peculiar kind of preference under the act of 1898 known as "an innocent preference." In that case the preferred creditor intended no unequal distribution of his debtor's property. He learned that the distribution was unequal only after the payment was made. Under these circumstances, the act of 1898 provides that his claim shall not be allowed unless he will surrender his preference. As was stated in *Pirie v. Trust Co.*, 182 U. S. 438, 447, 21 Sup. Ct. 906, 909, 45 L. Ed. 1171:

"His election is between keeping the preference and surrendering it. That is the favor of the law to his innocence, but, aiming to secure equality between him and other creditors, can the law indulge farther? He may have been paid something,—maybe a greater percentage than other creditors can be. That is his advantage, and he may keep it. If paid a less percentage, he can obtain as much as other creditors by surrendering the payment, and an equality of distribution of the assets of the bankrupt is assured. The effect is equitable."

From this it appears plainly that the limitations upon the right of the preferred creditor are established solely to "secure equality between him and other creditors," not to secure to the bankrupt the right to retain any part of his property while obtaining a discharge from his obligations. It is not equitable that a creditor preferred to the extent of 25 per cent. should lose the 75 per cent. due him, while the bankrupt retains a part of his unexempt estate. In *Ex parte Cooper*, 10 Ch. App. 510, 511, Lord Justice James said, "The doctrine of fraudulent preference is entirely for the purpose of distribution among the creditors generally, not for the benefit of any single creditor." See *Willmott v. Celluloid Co.*, 34 Ch. Div. 147, 150. If this be true of a fraudulent preference, it cannot be held that the doctrine of innocent preference is for the benefit of the bankrupt, and for the purpose of preventing a distribution of his property among all his remaining creditors.

It may be urged that the preferred creditor has elected not to share in the distribution in bankruptcy, and that, having made his choice, he must abide by it. He must do so, indeed, as against the unpreferred creditors. He must not, by retaining his preference, speculate upon the chance that the unpreferred creditors may obtain from the estate in bankruptcy as great a percentage as he has obtained from his preference, and, if this happens, share with them in the surplus. Having elected to keep his preference, and not to compete with them, he cannot change his mind to their prejudice. There is no reason why he should not change his mind at any time so as to compete with the bankrupt. The bankrupt's property belongs to his creditors, not to himself. Again, the election of the preferred creditor to retain his



preference need not be deemed a waiver of his right to share in the bankrupt's estate, but only a waiver of his right to share therein with the unpreferred creditors.

The petitioners in this case are creditors of the bankrupt. They seek to have their claims allowed to share in his estate. Who objects to the allowance? Not any creditor, but only the bankrupt. The bankrupt, however, cannot raise the objection that the creditor, like those here, has been preferred. The objection is for the creditors, or for the trustee, their representative. A creditor who has been paid is no longer a creditor for the purpose of objecting to the claims of others. Let us suppose that an insolvent pays 10 per cent. on all his debts but one, goes into bankruptcy, and that the remaining creditor is paid out of the estate. Can any one—the bankrupt, the trustee, or the creditor who has been paid in full—object to proofs thereafter offered by the creditors originally preferred? If the claims here in question were originally offered for allowance within the year, after payment in full of all unpreferred claims, their allowance could not be successfully resisted, for there would be no one entitled to object. That a claim like this was duly offered and allowed, and afterwards expunged, cannot affect the result; otherwise the rights of preferred creditors would depend upon the time taken in winding up the estate,—a distinction without a material difference. The act does not provide that claims must be allowed within a year after adjudication, but that within a year they shall be proved. These claims have been so proved, within the letter of the law. It is a better answer to the argument, however, to treat the expunging, not as a disallowance, but, in the improbable event of the payment of unpreferred claims in full, as a mere postponement of the rights of preferred creditors. That the petitioners are justly entitled to this money is plain. Perhaps they could obtain it by proceedings in a court of equity, but I believe the equitable powers of a court of bankruptcy are large enough to give them their remedy.

No case directly in point has been cited by counsel or found by the court. A surplus, after payment in full of all unpreferred creditors, is so rare in bankruptcy that we cannot expect much authority concerning its proper disposition. No case has been found in which there was controversy between the preferred creditors and the bankrupt. The language of several decided cases, however, illustrates the principles heretofore stated. Thus, in *Re Ft. Wayne Electric Corp.*, 39 C. C. A. 582, 99 Fed. 403, the circuit court of appeals for the Seventh circuit said the preference—

"Was received, to be sure, innocently, and without knowledge of that intent, but the payment none the less worked a preference. It gave to the appellant an undue advantage over other creditors, and while the act will not permit a recovery by the trustee of the payment, because it was received innocently, it none the less remains that the meaning of the act is that, if the appellant seek further payment out of the estate of the bankrupt, he shall share equally with other creditors with respect to his claim."

In the case at bar, all unpreferred creditors have been fully paid, and there is no question of the petitioners sharing anything with them. In *Re Fixen*, 42 C. C. A. 354, 102 Fed. 295, 297, 50 L. R. A. 605, the circuit court of appeals for the Ninth circuit said:

"In this view of the scope and purposes of the act, it certainly cannot be considered inequitable to require one who has received an undue portion of the estate, no matter if innocent, to surrender that advantage before participating in further distributions of the estate with those who have not received any such preference."

Here the petitioners do not seek to participate in a distribution of the estate with unpreferred creditors, but only to obtain payment of their just claims as against the bankrupt.

In the case at bar, it has been suggested that the property in question is claimed, not by the bankrupt himself, but by his trustee under a later bankruptcy. The second trustee, however, has not appeared to claim the fund, and may not be able to hold it against other preferences. At any rate, he can have no right to take property included in the first bankruptcy until the debts due under the first bankruptcy, and released by it, are paid in full.

The order of the referee is modified. Creditors who proved their claims within a year after adjudication, and whose claims were expunged by reason of their having received an innocent preference, may present their claims again for allowance, and, if no other objection to the claims is sustained, they may be allowed and paid after the payment in full of all unpreferred creditors. All questions of the rights of such preferred creditors inter sese are left to the referee for his farther consideration. What would be the rights of creditors not "innocent" need not now be discussed.

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BERRY v. ST. LOUIS & S. F. R. CO. et al.

(Circuit Court, D. Kansas, First Division. December 10, 1902.)

1. FEDERAL COURTS—REMOVAL OF CAUSES—JOINDER OF DEFENDANTS—SEVERANCE.

Plaintiff sued two defendants on a joint and several liability, one residing in the same state, and the other a nonresident. No process was served on the resident defendant, and, the cause being called for trial, the nonresident defendant appeared, and moved that plaintiff be required to elect whether she would dismiss as to the resident defendant or continue the cause for service. She declined to do either, but requested that the cause proceed to trial as to the nonresident defendant; whereupon such defendant presented its petition and bond for removal to the federal court. *Held*, that plaintiff's election to proceed to trial against the nonresident defendant alone operated as a severance of the controversy, and entitled the nonresident defendant to remove the cause.

On Motion to Remand.

Whitelaw & Taggart, for plaintiff.

Pratt, Dana & Black, for defendant railroad company.

HOOK, District Judge. This action was instituted by the plaintiff in the court of common pleas of Wyandotte county, Kan., to recover damages for the death of her husband, alleged to have been caused by

¶ 1. Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Mineral Co.*, 35 C. C. A. 155.

the negligence of the St. Louis & San Francisco Railroad Company and the Kansas City, Ft. Scott & Memphis Railway Company. The plaintiff is a citizen of Kansas, the San Francisco Company is a citizen of Missouri, and the Memphis Company is a citizen of the same state as the plaintiff. The last-mentioned company has never been served with summons, nor has it voluntarily submitted itself to the jurisdiction of the court. In April of the present year the San Francisco Company, claiming that there existed a separable controversy between it and the plaintiff, removed the cause to this court; but its contention in that respect was not upheld, and a motion to remand was sustained. The issues between the plaintiff and the San Francisco Company having been joined, the case was reached on the trial docket of the state court on October 2, 1902. When the case was called the plaintiff announced herself ready for trial. The defendant San Francisco Company requested the court to require her to make some announcement as to its codefendant, over whom no jurisdiction had been acquired; but she refused to indicate her purpose, and declined to say whether she intended to dismiss or continue the cause as to the absent defendant, and she again demanded that the cause proceed to trial against the company which was before the court. Thereupon that company tendered its second petition and bond for removal. On the following day the plaintiff, having obtained leave of the state court, reduced the amount of damages claimed to \$2,000, and the court thereupon denied a removal, and ruled that the trial should proceed. In its petition for removal the railroad company claims that the plaintiff's action, which was theretofore joint, became several by reason of her conduct when it was called for trial, in that she thereby elected to pursue the defendants separately; also that its absent codefendant was fraudulently and improperly made a party defendant for the sole purpose of preventing a removal of the cause from the state court. The reduction of the amount in controversy below the jurisdictional requirement after the filing of the petition and bond for removal may be dismissed from consideration. If the cause was subject to removal the jurisdiction of the state court ceased upon the presentation of the petition and a sufficient bond, and the subsequent amendment of the pleadings could not serve to restore it. No criticism of the bond is offered here, and the journal of the state court recites that it is sufficient. The duty to consider and determine the sufficiency of the petition for removal and the grounds set forth therein in connection with the other parts of the record is cast upon this court, and cannot be evaded.

The plaintiff's cause of action against the two railroad companies is in its nature joint or several, according to her election. She could sue them separately or she could sue them jointly, and the defendants have no voice in the exercise of her option. The particular form of plaintiff's proceedings, whether joint or several, is not controlled by the character of her cause of action, but it rests wholly in her election. And having once made her choice of one form of action she is not precluded from abandoning it and resorting to the other at any appropriate stage of her case. The plaintiff, having a cause of action against the two railroad companies that was joint and several, elected to sue them jointly, and it may be conceded, so far as concerns the question under

consideration, that her course in that respect marked the character of her suit down to the time it was called for trial in the state court. The Memphis Company had never been brought into court, though the suit had been pending for months. No jurisdiction over it had been acquired. While plaintiff at first endeavored to maintain an action against the defendants jointly, such effort was insufficient to suspend the running of the statute of limitations in favor of the Memphis Company, and futile for the accomplishment of a *lis pendens*. Gen. St. Kan. 1901, §§ 4448, 4515. While in this condition the cause was regularly called from the trial docket, and instead of preserving the joint character of her action by continuing it for service upon the absent party the plaintiff elected to proceed against the defendant in court and demanded an immediate trial. All of the features of such a trial and of its resulting judgment would be those pertaining to a separate and several liability of the San Francisco Company. At common law, where two or more defendants were jointly charged, the rule required a disposition of the action as to all of them at the same time. *Barbour v. White*, 37 Ill. 165. And it has been suggested that proceeding to trial against one defendant without attempting to summon the others virtually operated as a nonsuit. *Flinn v. Barlow*, 16 Ill. 39. Following the early New York Code, this rule has been changed by the civil practice acts of many of the states. In Kansas the provision which is typical of the modern practice which has supplanted the common-law rule is that "in an action against several defendants the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper." Gen. St. Kan. 1901, § 4845. It will be observed from the language of this excerpt that a judgment rendered in conformity with its terms is, in substance and effect, a several one; and the test whether such a judgment is proper is whether a separate action could have been maintained by the plaintiff. *Van Ness v. Corkins*, 12 Wis. 186; *Parker v. Jackson*, 16 Barb. 33.

In the case in hand the plaintiff abandoned her right to a joint judgment by demanding a trial as to one defendant in the absence of service upon the other. The course of trial and the character of the verdict and judgment in a joint action render any other conclusion impossible. In *Mitchell v. Milbank*, 6 Term R. 199, the three defendants who were sued jointly in trespass suffered default, and the plaintiff prosecuted three separate writs of inquiry for the ascertainment of his damages, resulting in the assessment of different amounts. Concerning this Lord Kenyon, C. J., said: "The plaintiff's proceedings are certainly irregular; he has executed three writs of inquiry where one would have been sufficient. And if he had entered up final judgment for the several damages in these interlocutory judgments it would have been erroneous." And the rule which has generally obtained since that time is that in an action of tort against several defendants jointly the jury cannot assess damages severally against them. If they are to be held jointly in a joint action there must be a single verdict against all who are responsible, followed by a judgment for a single sum. Sedg. Dam. (8th Ed.) § 431; Cooley, Torts (2d Ed.) 157; *Berry v. Fletcher*, 1 Dill. 67, Fed. Cas. No. 1,357;

Railroad Co. v. South, 43 Ill. 176, 92 Am. Dec. 103; Smith v. Wunderlich, 70 Ill. 437; Bohun v. Taylor, 6 Cow. 313; Holley v. Mix, 3 Wend. 350, 20 Am. Dec. 702.

Even if the plaintiff subsequently persisted in her pursuit of the Memphis Company, and the court finally succeeded in acquiring jurisdiction, the ultimate result would be separate trials before separate juries under diverse conditions; separate verdicts, resulting in separate judgments; and, though the defendants may be alleged to be in equal wrong, that the verdicts and judgments should happen to be for equal amounts would certainly be an unexpected and fortuitous result.

I am aware that the supreme court has held in many cases that for all the purposes of a suit the cause of action is "whatever the plaintiff declares it to be in his pleadings"; but the words so employed should be read in the light of the facts which were then presented for consideration. In those cases no subsequent condition arose outside of the pleadings which might fairly be said to operate as a voluntary abandonment by the plaintiff of the character of his action as first formally declared. There are also cases in which it is held that, where the defendant whose presence prevents a removal from a state court to a circuit court of the United States suffers a default, such condition does not give rise to a right of removal in the remaining defendant. And there are also cases in which the right to remove is denied when at the trial the court renders a judgment of dismissal against the defendant whose presence is incompatible with federal jurisdiction. But in neither of these classes of cases is the result due to the voluntary action of the plaintiff whose election controls the course and nature of the suit. The action of a court in dismissing a defendant at the trial is in invitum, and is not the voluntary act of the complaining party. Nor is he responsible for a default suffered by a defendant whom he has sued jointly with others upon a joint cause of action. But it is clear that, should such a defendant be dropped out of the suit by the voluntary action of the plaintiff, the question of the right of removal is then determinable by the status of the parties who remain. *Powers v. Railroad Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. It is but a step further, and it seems a logical one, that if a plaintiff voluntarily abandons the joint character of his proceedings, and elects to pursue the only defendant who has been drawn within the jurisdiction of the court upon a liability which is either joint or several, at his election, there arises at the moment of the election such a change in the structure of the controversy as confines the inquiry to the citizenship of the parties then before the court. The case of *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 80 Fed. 766, 26 C. C. A. 146, is instructive in this connection. In that case the representative of the trust company brought a suit against the administrator of a deceased teller and the guarantee company as surety upon the official bond of such teller, alleging certain defaults of the latter constituting a breach of the bond. The teller's bond was joint and several in its form and legal effect. As originally brought, the suit was against the administrator and the guarantee company jointly. The defendant guarantee company, which was an alien corporation, filed its petition and bond for removal to the circuit court

of the United States, but its codefendant, the administrator of the deceased teller, did not join therein. After the filing of the transcript in the federal court, the cause was there tried so far as concerned the plaintiff and the guarantee company, a decree was rendered against the guarantee company (68 Fed. 459), and an appeal was taken therefrom to the circuit court of appeals. The first question for consideration which arose on the appeal was one of jurisdiction, and it was whether there was a separable controversy between the plaintiff, a citizen of Tennessee, and the guarantee company, an alien corporation, so as to justify a removal at the sole instance of the latter. The court, after reciting that the obligation of the teller and his surety was joint and several, that the suit was for a joint liability, and the defendants could not control the form of the action in that respect, said:

"Therefore it could not be removed as a separable controversy by the guarantee company, when Schardt (the teller) was its codefendant, against the objection of the plaintiff. Of course, the plaintiff could, if it chose, at any time dismiss Schardt's representative from the suit, and make it a several suit against the company. By making no objection to the removal, by making no motion to remand, and by proceeding to trial without protest, and taking a separate judgment against the guarantee company, we must hold that it consented to a severance of the joint action into two several actions,—one against Schardt, which seems to have remained in the state court or to have been dismissed, and the other against the guarantee company, of which the court below might properly take jurisdiction on the ground of diverse citizenship. Of course, consent cannot give jurisdiction to the federal court over an action not cognizable therein; but when it is cognizable, as its form is joint or several, and a party has the option to treat it as either, we think, in order to maintain the jurisdiction when it has been exercised without objection from him, that he should be held to have elected to treat the action as several as of the time when the removal was effected."

The conclusions which have been stated render it unnecessary to decide the other ground stated in the petition for removal; that is to say, that the Memphis Company was fraudulently and improperly made a party defendant for the sole purpose of preventing a removal of the cause to this court. It may be said, however, that there are some grounds for the contention that the San Francisco Company is too late in the assertion of this cause for removal, for the reason that, if it is well founded, it existed when the first attempt at removal was made, and should have been urged at that time.

The motion to remand is overruled.

## UNITED STATES v. ASSIA.

(Circuit Court, E. D. New York. October 30, 1902.)

### 1. CUBA—MILITARY OCCUPATION—SOVEREIGNTY—CRIMES—JURISDICTION.

The joint resolution by congress of April 20, 1898 [U. S. Comp. St. 1901, p. 2790], after declaring that "the people of the island of Cuba are, and of right ought to be, free and independent," further states "that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." After the Treaty of Paris, a military governor of the island was appointed by the secretary of war, and the military governor after-

wards provided for a civil government, with the various departments and courts. The act of June 6, 1900, amending Rev. St. § 5270 [U. S. Comp. St. 1901, p. 3591], provides for honoring requisitions from the chief executive officer in "control" of a "foreign country or territory" under the "control" of the United States. *Held*, that Cuba, under the military governor, was a foreign country, so that one committing a crime on a vessel registered at a Cuban port was not subject to trial therefor in the courts of the United States.

### Indictment for Manslaughter.

The defendant was delivered to the United States consul at Hayti, who sent him to the United States court in Brooklyn for trial. At the close of the trial the defendant's counsel moved to dismiss the indictment on the ground that the court had no jurisdiction of the offense disclosed by the evidence, which was committed on a vessel sailing under a registry issued by the military government established by the United States in Cuba. The motion was opposed on the ground that the registry issued by the military government in Cuba did not make the vessel a foreign vessel, but that such registry was really an American registry; that, although Cuba was foreign territory when reference is made to the territory of the United States as it existed previous to the war with Spain, still it was not a foreign country while in possession of the United States; and that, when Spain relinquished Cuba, the sovereignty passed to the United States, and remained in them until it passed to the existing government of Cuba pursuant to the act of congress known as the "Platt Amendment," which fixed the terms and conditions on which the island should be released by the United States. And this distinction is indicated in section 5270 of the United States Revised Statutes, as amended by the act of June 6, 1900 [U. S. Comp. St. 1901, p. 3591].

George H. Pettit, U. S. Atty.  
Joseph T. Ryan, for defendant.

THOMAS, District Judge. The force of the language in the Neely Case (21 Sup. Ct. 302, 45 L. Ed. 448) to which attention has been called by the learned district attorney, is recognized, but the general analysis of that case enforces the conclusion reached in this matter. The defendant is charged with manslaughter. The evidence shows that the alleged offense was committed on the steamship *Paloma* while at a port of Hayti. The ship registered at Havana, was operated by persons residing at the port of New York, and had for many years run between such port, Havana, and other ports in the West Indies. At the time of the alleged offense the *Paloma* carried at her stern the American flag, under which, and upon the same staff, was the flag of Cuba. It does not appear at what precise date the registration was had at Havana, but it was during the year next preceding the alleged offense, and succeeded to a former and long-continued registration at the port of New York. The master of the vessel was a citizen of the United States, the defendant is a citizen of Spain, and the deceased was, presumably, a subject of Russia. The question is whether the vessel upon which the alleged crime was committed was an extension of the territory of the United States or of a foreign nation, to wit, Cuba.

The joint resolution passed by congress April 20, 1898 [U. S. Comp. St. 1901, p. 2790], after declaring that "the people of the island of Cuba are, and of right ought to be, free and independent," and that the government of the United States should demand that

the government of Spain relinquish its authority and government in the island, and that the president be directed and empowered to carry the resolution into effect, further states:

"That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people."

The successful issue of the war was followed by the Treaty of Paris in December, 1898. On December 13, 1898, thereafter, an order was issued by the secretary of war, pursuant to the direction of the president, stating that a division to be known as the "Division of Cuba," consisting of the geographical departments and provinces of the island of Cuba, with headquarters at Havana, was created and placed under the command of Maj. Gen. Brooke, who was required, in addition to his command of the troops in the division, to "exercise the authority of military governor of the island." On the 1st of January, 1899, the sovereignty of Spain was formally relinquished, and Gen. Brooke entered upon the exercise of his duties as military governor. On January 11, 1899, "the military governor, 'in pursuance of the authority vested in him by the president of the United States, and in order to secure a better organization of the civil service in the Island of Cuba,' ordered that thereafter 'the civil government shall be administered by four departments, each under the charge of its appropriate secretary,' to be known, respectively, as the departments of state and government, of finance, of justice and public instruction, and of agriculture, commerce, industries, and public works, each under the charge of a secretary. To these secretaries 'were transferred, by the officers in charge of them, the various bureaus of the Spanish civil government.' Subsequently, by order of the military governor, a supreme court for the island was created, with jurisdiction throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employes, with administrative functions, as well as those of a court of justice in civil and criminal matters. By order of a later date, issued by the military governor, the jurisdiction of the ordinary courts of criminal jurisdiction was defined." On the 13th of June, 1900, Gen. Wood, the then military governor of Cuba, made his requisition upon the president for the extradition of Neely under the act of congress passed June 6, 1900. Neely had been in charge of the collections and deposits of money of the department of posts of the city of Havana, and was charged with having embezzled funds that came into his custody as such official. The act of June 6, 1900, was an amendment of section 5270 of the Revised Statutes [U. S. Comp. St. 1901, p. 3591], which relates to the surrender of persons upon requisitions "of any foreign government," and such amendment, among other things, provides "that whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses [naming them]," where



such crimes were "committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory, and not under the flag of the United States, or some other government," and "who shall depart or flee \* \* \* to the United States or to any territory thereof \* \* \*" on "the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed." The supreme court, in its consideration of the case, stated:

"So that the applicability of the above act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a foreign country or territory."

The learned justice writing the opinion, after stating the facts already mentioned, continues:

"The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded in any constitutional, legal, or international sense a part of the territory of the United States. \* \* \* Cuba is none the less foreign territory, within the meaning of the act of congress, because it is under a military governor appointed by and representing the president in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations."

It was urged in behalf of the defendant in the Neely Case that he was entitled to the benefit of the provisions of the federal constitution relating to the writ of habeas corpus, bills of attainder, ex post facto laws, trial by jury for crimes, and generally to the fundamental guaranties of life, liberty, and property embodied in that instrument. Respecting this Mr. Justice Harlan says, "The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." This illustrates that Cuba was not subject to the federal constitution. It was adjudged (*Neely v. Henkel*, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448) that, although the defendant was a citizen of the United States, he had committed a crime in a foreign country, and that he was amenable to the laws of such country.

Thus it appears that the Paloma, the ship upon which the offense in the action at bar was committed, was registered at a port of Cuba, which at the time was a foreign country, and removed from the jurisdiction of the constitution of the United States, and that the defendant was amenable to the laws of Cuba, and the federal courts therefore have no jurisdiction of this offense.

## McKAY v. HUDSON et al.

(Circuit Court, S. D. New York. October 1, 1902.)

## 1. ACCOUNTING—TRUST RELATION.

Complainant supplied money to M. to invest in stock speculation in M.'s name; complainant not to be known in the matter. M. bought and sold on margin through defendant brokers, having several accounts with them, all in his own name, but in some of which complainant was not interested. *Held*, that there was no trust relation between complainant and defendants, authorizing a suit by him against them for an accounting.

## 2. SAME—PARTIES—CUSTODIANS OF JOINT FUNDS.

Nor are defendants custodians of joint funds, so that they may be made defendants as such in a suit against M. for an accounting, though complainant may have an interest in what M. may receive from them when he settles his account with them.

## 3. SUIT—FAILURE AS TO CERTAIN DEFENDANTS—RETENTION AS TO OTHERS.

The whole structure of a bill, as well as its specific prayer, showing that it was directed against the defendants other than M. for substantial relief, and that he was joined merely to cut off his rights, it failing against the other defendants, cannot be retained against him for an accounting.

Davies, Stone & Auerbach, for complainant.

Joseph Fettretch and Ernest E. Baldwin, for defendants.

TOWNSEND, Circuit Judge. In the view which this court takes of this case, it seems unnecessary to state the facts in detail. The complainant supplied money to the defendant Moore to be used in operating in stocks; the operations to be carried on in Moore's name, and the complainant not to be known as interested in them. Moore bought and sold stocks upon margin through the firm of C. I. Hudson & Co., in which the other defendants were partners. The accounts—there were several, in some of which complainant claims no interest—were in Moore's name, and under his control, and the complainant was not known as interested in any of them. The money received from complainant was paid to the brokers as Moore's, and the complainant intended that it should be. The rights and obligations of the brokers with respect to the accounts and the securities held in them was the same, it would seem, whether the complainant was or was not somehow interested in some of them as between himself and Moore. The firm assumed no fiduciary relation to the complainant. No such relation resulted from anything which they did or left undone. No thought of such a relation seems to have arisen until this suit was in contemplation. It appears in the bill, but was abandoned on final hearing. There seems to be no basis for a decree that the defendants C. I. Hudson & Co. account to the complainant.

Treating the suit as one for an accounting against the defendant Moore, the complainant's counsel now suggests that the other defendants are properly joined as "custodians of the joint funds." This makes a striking change of parts, in view of the prayers of the bill. But I do not think these defendants are "custodians of joint funds," although it be assumed that the complainant has an interest in what

the defendant Moore may receive from C. I. Hudson & Co. when he shall have settled his account with them.

My conclusion is that the bill must be dismissed as against the defendants other than Moore, with costs.

It remains to consider whether an accounting should be decreed in favor of complainant against the defendant Moore. It does not seem necessary to determine exactly what was said in the very informal talk in which the relations between these parties originated, nor exactly what the parties intended, nor whether a relation of a fiduciary character resulted. For if it be assumed that the relation was of such a character as to give a basis for a right to an accounting, I do not think an accounting should be decreed under the bill herein. Not only the specific prayer, but the whole structure of the bill, shows that it was drawn upon an entirely different theory. No such relief is asked. Moore seems to have been joined upon the theory—although this is not made clear—that the suit against the other defendants proceeds somehow in his right. Clearly, these other defendants are those against whom the bill is directed. The bill makes Moore only a bystander in the suit, whose presence is desired merely to cut off his rights, while the complainant seeks substantial relief from the other defendants. Under the general prayer, relief not specifically asked may, of course, be granted. But it does not seem proper to grant relief which is wholly outside of the purpose shown by the body of the bill, as well as its specific prayer, and which is asked for upon final hearing against a person other than those whom it is the evident purpose of the bill to reach. For this reason, and without passing upon the several questions involved in determining whether complainant is entitled to an accounting as against the defendant Moore, I hold that the bill should be dismissed as against him, also, with costs, but without prejudice to the right to assert such a claim in a proper suit.

**SPENCER v. CANDELARIA WATERWORKS & MILLING CO.,**  
 Limited, et al.

(Circuit Court, D. Nevada. November 10, 1902.)

No. 721.

**1. ACTIONS—JOINDER—PLEADING.**

Where a complaint alleged a cause of action for the value of certain stocks and bonds sold by plaintiff to one of the defendants, a second cause of action for services rendered by plaintiff to both defendants, and a third for services to the other defendant alone, it was demurrable for misjoinder of causes of action, under Cutting's Comp. Ann. Laws, § 3159, authorizing joinder of actions against several defendants only when each case exists against all of the defendants jointly sued.

On Demurrer.

M. A. Murphy, for plaintiff.

W. E. F. Deal, for defendant Candelaria Waterworks & Milling Co., Limited.

HAWLEY, District Judge (orally). This action was originally brought against the Candelaria Waterworks & Milling Company, Limited. A demurrer was interposed to the complaint on various grounds, and before any action was taken thereon the plaintiff asked leave to file an amended complaint by adding the White Mountain Water Company, a corporation, as a defendant therein.

There are four causes of action separately stated in said complaint, to wit: (1) A cause of action for the value of certain shares of stock and mortgage bonds of the White Mountain Water Company of Nevada, sold by plaintiff to the Candelaria Water Company; (2) for legal services rendered by plaintiff to the defendants at their special instance and request; (3) for services rendered by plaintiff as secretary of the White Mountain Water Company of Nevada; (4) for services as a clerk in making out the annual report of the White Mountain Water Company for the year 1889.

No service has been had on the White Mountain Water Company. The defendant the Candelaria Water Company has interposed a demurrer to the separate causes of action, on the ground, among others, that the complaint does not state facts sufficient to constitute a cause of action, and, generally, upon the ground that "several causes of action have been improperly united in said amended complaint, to wit, a cause of action under paragraph 5 against the Candelaria Waterworks & Milling Company, Limited, alone, and a cause of action under paragraph 7 against the White Mountain Water Company of Nevada alone, and causes of action under paragraphs 6 and 8 against the defendants jointly." The causes of action are of such a character that they might all be properly united in one suit under the provisions of section 64 of the practice act of this state, if the causes of action exist against the same person or persons. Section 3159, Cutting's Comp. Ann. Laws.

The causes of action are separately stated; but the objection to these causes of action is that, from the averments of the complaint,

¶ 1. See Action, vol. 1, Cent. Dig. §§ 511, 524, 525, 528.

it affirmatively appears that the different causes of action are not against both of the defendants, jointly or severally. No allegation is contained in the fifth clause of the complaint that shows any liability upon the part of the White Mountain Water Company, defendant herein, for the value of the bonds and stock sold by plaintiff to the defendant the Candelaria Water Company. Under the averments of the complaint, this cause of action is against the Candelaria Water Company alone. The causes of action stated in paragraphs 6 and 8 are each for a cause of action against the defendants jointly, while the cause of action in the seventh paragraph for services as secretary for the White Mountain Water Company appears to be against that company alone. These different causes of action are improperly united. A cause of action against one defendant cannot be united with a cause of action against the other defendant, nor can such separate causes of action be united with causes of action against both defendants. *Atchison, T. & S. F. R. Co. v. Board of Com'rs of Sumner Co.*, 51 Kan. 617, 630, 33 Pac. 312; *Addicken v. Schrubbe*, 45 Iowa, 315; *Berg v. Stanhope*, 43 Minn. 176, 45 N. W. 15; *Wills v. Shinn*, 42 N. J. Law, 138, 140; *Society v. Wolpert*, 80 Ky. 86; *Moore v. Platte Co.*, 8 Mo. 467; *Higgins v. Crichton*, 11 Daly, 114; *Faust v. Smith*, 3 Colo. App. 505, 34 Pac. 261; *Smith v. Morgan* (Tex. Civ. App.) 56 S. W. 950; *Nichols v. Drew*, 94 N. Y. 22, 26.

The relations between the two corporations which would render them either jointly or severally liable upon the different causes of action are not disclosed in the complaint. There are no facts stated which make this point clear, certain, or definite. Take, for example, the first cause of action set forth in paragraph 5, which avers "that on the ——— day of ———, 1885, the Candelaria Waterworks & Milling Company, Limited, one of the defendants above named, acquired an alleged title to the property and rights of a corporation theretofore incorporated and existing under and by virtue of the laws of the state of New York, known as and commonly called White Mountain Water Company of Nevada, and thereafter, to wit, on or about the 15th day of May, 1885, at the special instance and request of the defendants above named, this plaintiff sold, assigned, and set over to the defendant the Candelaria Waterworks & Milling Company, Limited, one thousand seven hundred and fifty (1,750) shares of the capital stock of said White Mountain Water Company of Nevada, at an agreed price of two thousand five hundred dollars, one first mortgage bond of said White Mountain Water Company of Nevada, No. 325, at an agreed price of five hundred dollars, and four second mortgage bonds of said White Mountain Water Company of Nevada, Nos. 243, 244, 245, and 246, at an agreed price of five hundred dollars each; and this defendant, the Candelaria Waterworks & Milling Company, Limited, promised and agreed to pay this plaintiff, for the said shares of stock and the said bonds, the sum of five thousand dollars, with interest thereon," etc. Surely, these facts do not show any liability against the White Mountain Water Company. So, in paragraph 7, the facts alleged that "on or about the 22d day of June, A. D. 1884, this plaintiff was elected the secretary of the White Mountain Water Company of Nevada, and

was to be paid a reasonable compensation for said services; that from on or about the said 22d day of June, A. D. 1884, until the 31st day of December, 1888, this plaintiff served the defendants as such secretary,"—do not state any cause of action against the Candelaria Water Company. It is not shown that plaintiff was employed at the special instance and request of said corporation, or that it promised to pay him for such services. The fact that plaintiff was elected secretary of the White Mountain Water Company, and was to be paid a reasonable compensation for such services, implies that said corporation would alone be responsible therefor. To hold the other corporation liable for such services, it would be necessary to show that for a valuable consideration it had assumed the debt or agreed to pay for such services.

These causes of action do not, as they now stand, affect both defendants, and, under the rule hereinbefore stated, are not capable of being joined with the other causes of action against both of the defendants.

Why the original complaint was amended so as to make the White Mountain Water Company a party defendant was not disclosed by any fact brought to the attention of the court. It was asked for by plaintiff and granted as a matter of course. In the original complaint all four causes of action were stated against the defendant Candelaria Waterworks & Milling Company alone; and with the exception of the one for services as secretary were, apparently, although perhaps defectively, properly averred against that defendant alone. The amended complaint has complicated, instead of making clear, the objections urged to the original complaint. Under the liberal rules which prevail in applying the provisions of section 68 of the practice act of this state (section 3163, Cutting's Comp. Ann. Laws), the plaintiff will be given the opportunity to again amend the complaint so as to conform to the true facts as they exist, either by striking out the name of one of the defendants, and leaving out the cause or causes of action against it, or by amending so as to show, if he can, by proper averments, that the various causes of action are properly united against both.

The demurrer is sustained.

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GREEN BAY & M. CANAL CO. v. NORRIE.

(Circuit Court, S. D. New York. October 1, 1902.)

1. **SUPERSEDEAS—LIABILITY ON BOND—DAMAGES FOR VIOLATION OF INJUNCTION.**  
A supersedeas bond, given under Rev. St. § 1000 [U. S. Comp. St. 1901, p. 712], and supreme court rule 29 (3 Sup. Ct. xvi), does not suspend the operation of a prohibitory injunction granted by the decree appealed from, but, unless otherwise ordered by the trial judge in allowing the appeal, as authorized by equity rule 93, such injunction remains in full force pending the appeal, and its violation is punishable as a contempt. Hence damages sustained by the appellee by a violation of the injunction pending appeal are not the result of the supersedeas bond, and cannot be recovered in an action thereon.

Action at Law on Supersedeas Bond. On demurrer to complaint.

Clarence Howland, Lyman E. Barnes, and Moses Hooper, for plaintiff.

Huntington & Rhinelander, for defendant.

**TOWNSEND, Circuit Judge.** This action is brought to recover damages on a supersedeas bond given under the provisions of section 1000 of the Revised Statutes [U. S. Comp. St. 1901, p. 712] and supreme court rule 29 (3 Sup. Ct. xvi). A supersedeas stays execution, and under the supersedeas bond can be recovered all damages caused by the stay. The damages here sought are for the wrongful act of the defendant in violating the injunction pending the appeal, and it is claimed that the effect of the supersedeas was to permit the violation of the injunction, and protect the defendant in so doing, and that, therefore, the supersedeas was the cause of whatever damages were sustained by the plaintiff through the acts of the defendant in violating the injunction. The injunction was not a mandatory one, but was prohibitory merely. It being assumed upon demurrer that damage was caused to the plaintiff by such acts, the question is whether such damage was the result of the supersedeas obtained by virtue of the filing of the bond. If the supersedeas did not suspend the effect of the injunction, but merely stayed execution, and prevented the execution of affirmative orders of the court, it cannot be said that the wrongful acts of the defendant were permitted, or that the defendant was protected in committing them, in violation of the injunction, by the supersedeas. In such a case the damage sustained would not be a result of the supersedeas. It has been plainly held by the supreme court that a supersedeas does not suspend the effect of an injunction pending appeal. *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; *Leonard v. Land Co.*, 115 U. S. 465, 6 Sup. Ct. 127, 29 L. Ed. 445; Rev. St. § 1007 [U. S. Comp. St. p. 714]. The supreme court has inherent power to modify or annul an injunction during the pendency of an appeal, and such power is necessary in order to do justice. But as, in practice, the exercise of it would require the examination of the record in many cases, the supreme court adopted equity rule 93, leaving to the determination of the trial judge, at the time the appeal is allowed, the question whether the effect of the injunction should be suspended or not pending the appeal. *Leonard v. Land Co.*, supra. This power is often exercised, and ought to be exercised if there is danger of irreparable injury. But if this affirmative power is not exercised, the effect of the injunction is not suspended pending appeal, and disobedience is contempt of the court granting it, and may be punished by the court as such. *Hovey v. McDonald*, supra; *American Straw Board Co. v. Indianapolis Water Co.*, 26 C. C. A. 470, 81 Fed. 423; *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 71 N. Y. 430; High, Inj. (3d Ed.) § 1699; 7 Am. & Eng. Enc. Law, p. 35. The effect of the supersedeas, therefore, in the present case, was not to permit violation of the injunction pending the appeal, or to protect the defendant in such violation; for the plaintiff might at any time have instituted proceedings in contempt, to the end that the injunction should in the meantime be obeyed, and, if it had done so, would not have been damaged. If the plaintiff mistook its rights

and understood that the effect of the injunction was suspended by the supersedeas, and that, therefore, it could do nothing but rely upon damages to be claimed under the bond, it can gain no rights by such mistake, for it was bound to know the law. Nor does it make any difference, even if all parties misunderstood the legal effect of the supersedeas, including the judge who allowed the appeal, and therefore fixed the bond at a large sum. Such a misunderstanding can give no rights to a party seeking to recover on a bond. The bond cannot, either by the understanding of the parties or by the direct incorporation in it of further provisions, accomplish more than by the statute and the rule of court it was intended to accomplish. *Hotel Co. v. Kountze*, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609, and dissenting opinion by Justice Miller in the same case; *Hays v. Deposit Co.*, 50 C. C. A. 569, 112 Fed. 872. The parallel which the plaintiff seeks to draw between an action in ejectment and a bill in equity for an injunction fails, for the reason that the judgment in ejectment is such as to entitle the plaintiff prevailing to have the process of the court upon that very judgment carried out affirmatively until the party in possession is actually removed. A supersedeas in such case stays the active force of the judgment. An injunction, on the contrary, does not of itself change the status, or go further than to pronounce upon the rights of the parties, and forbid the doing of acts inconsistent with those rights. A supersedeas does not change the pronouncement or reverse the rights even temporarily, but that pronouncement remains in full force until reversed, unless, upon the allowance of the appeal, an order is entered expressly limiting its force. The pronouncement being in force, the court having made it is not, unless and until the appellate court makes a contrary pronouncement, deprived of any of its power to punish for contempt. Its further direct act in execution of its judgment is stayed; but its decree determining the rights of parties is not stayed, nor is its power to punish for contempt stayed.

The plaintiff cannot properly say that this conclusion deprives it of rights or remedies. It had its remedy, either by instituting contempt proceedings or by bringing an action for damages for the wrongful acts of the defendant. If it allowed the violations to go on without complaint, and allowed the statute of limitations to run against an action for damages, its loss of those remedies cannot give rise to a new one.

As the damages claimed appear to be only those resulting from the acts of the Kaukauna Water Company in violation of the injunction, and the damage sustained by those acts cannot be said to be caused by, or as a result of, the supersedeas, the demurrer must be sustained.



## In re DUFFY.

(District Court, M. D. Pennsylvania. December 6, 1902.)

No. 200.

## 1. BANKRUPTCY—EXEMPTION—FORM OF CLAIM—AMENDMENT.

Under the laws of Pennsylvania and the form of schedule prescribed by the supreme court, the exact property which a bankrupt desires to retain under his state exemption must be set out in his schedule; but, where this is not sufficiently done, the defect may be cured by amendment.

## 2. SAME—FRAUDULENT DISPOSITION OF PROPERTY—FORFEITURE OF EXEMPTION.

In Pennsylvania one who is guilty of a fraudulent disposition of his property forfeits his right to his state exemption. But this cannot be charged where he has sold it for a fair consideration and with an honest motive, even though it have the effect of leaving nothing for creditors to get hold of. Neither will this view be taken because the debtor uses the proceeds to pay some creditors rather than others, or even devotes a portion to his own needs.

## 3. SAME—ON THE FACTS.

Where, therefore, a bankrupt continues in business, buying and selling right up to the time he filed his petition, he is not convicted of the fraudulent disposition of his property, so as to forfeit his exemption, although he sold goods in considerable quantities to his immediate relatives, it not being shown that it was not for a fair price; nor because he delivered the goods at night, this being a matter of necessity, and not of concealment; nor yet because he waited to file his petition until after a railroad pay-day, so as to collect in as much as possible of his accounts, paying over the proceeds on a debt due by note to his wife.

## 4. SAME—FRAUD—PURCHASES IN CONTEMPLATION OF BANKRUPTCY—EXAMINATION OF BANKRUPT.

Semble, that a debtor is not deprived of his exemption in Pennsylvania because he has debts which were fraudulently contracted; but, even were that the law, the mere purchase of goods while insolvent is not a fraud in that state, although if in immediate contemplation of bankruptcy it might be. But, even where purchases have been made right up to the time of filing the petition, a fraudulent intent will not be inferred where the bankrupt, on whose cross-examination the case is disposed of, has been prevented by the referee from explaining the transaction.

In Bankruptcy. Exceptions to report of referee.

John W. Miller, for bankrupt.

Ralph B. Little, opposed.

ARCHBALD, District Judge. The referee was clearly right in holding that the particular property which the bankrupt desired to retain under his state exemption must be set out in his schedules. It was not sufficient to simply claim that property to that extent be set off to him. The exact property which he elected to take should have been specified. This is what is required by the state law (*Hammer v. Freese*, 19 Pa. 255), and the bankrupt law is governed by it. Besides that, the schedules prescribed by the supreme court call for a particular description of the property claimed, which of itself is controlling. Bankruptcy Forms, schedule B (5) 18 Sup. Ct. xvi. But this is a curable defect, and the petitioner asks leave to amend his schedules accordingly. To this he is clearly entitled (General Orders

¶ 2. See Exemptions, vol. 23, Cent. Dig. § 128.

11 [18 Sup. Ct. v] ), and having presented his application in due form, an amendment will be allowed as prayed for.

With regard to the merits, it is no doubt true, as decided in *Appeal of Imhoff*, 119 Pa. 353, 13 Atl. 279, and as recently enforced in this court in *Re Yost* (D. C.) 117 Fed. 792, that one who is guilty of the fraudulent disposition of his property forfeits his right to the exemption to which he would be otherwise entitled; but I cannot see that the bankrupt is convicted of this in the present instance. It is said he made large purchases of goods just preceding his bankruptcy, and when he knew he was in failing circumstances; that he held off with his petition until after the railroad company's pay day, so as to collect in as large an amount as possible on his outstanding accounts; that he appropriated the money received from this and other sources to pay off an alleged debt to his wife; and that he made unusual sales of groceries to certain of his relatives, delivering the same covertly by night. The evidence on which the referee is led to sustain these charges is that of the bankrupt, taken at the time he was examined at the instance of creditors with reference to the conduct of his business and the extent of his property. The right to make use of this evidence is challenged, because the referee refused to allow the bankrupt to be examined by his counsel with respect to the matters on which he had been cross-examined, the reason assigned for the refusal being that the interests of the bankrupt were not affected by the proceedings. It is difficult to reconcile that ruling with the use now made of the bankrupt's testimony, but, without disposing of that question, I am satisfied that, taking it as it stands, it does not justify the construction put upon it, or sustain the charges of fraudulent conduct which are made. Aside from the provisions of the bankrupt law, while a person remains in the undisputed possession of his property, he is entitled to complete dominion over it, whether solvent or insolvent, and cannot be said to have made a fraudulent disposition of it where he has sold it for a fair consideration, and with an honest motive, even though it may incidentally have the effect of leaving nothing for creditors to get hold of. It is no doubt true that, if the real purpose is to put the property out of their reach, it is a fraud, whether a full consideration is received or not (*Ferris v. Irons*, 83 Pa. 179); but there must be something more than the mere disposal of the property to give it any such character. Nor will this view be taken of it because the debtor uses the proceeds to pay some creditors rather than others, or even devotes a portion of it to his own needs. *Githens v. Shiffler* (D. C.) 112 Fed. 505. As pointed out in that case, an intent to prefer is not the same as an intent to defraud, nor is a preferential transfer to be confounded with a fraudulent one. In the present instance the bankrupt had a perfect right to sell his goods where and as he could up to the time he filed his petition, and, while it may excite a suspicion to have him do so to his immediate relatives, it can do no more. It is not shown that he did not get a fair price for them; and the delivery by night is explained as a matter of necessity, and not of concealment, this being the only time when he could be away from his store. A considerable part also, which was hauled to his father-in-law's house,

was destined, as he says, to other parties. Nor can it be charged as a fraud that the bankrupt saw fit to defer filing his petition until after the railroad pay day. He had a right to collect his accounts, if he could, in this way, and to dispose of the proceeds as his judgment dictated; and if, as appears, he was indebted to his wife, he could pay her, instead of others, without being charged with fraud. She held his note, and, outside of the provisions of the bankrupt law, it was his privilege to pay her, if he saw fit, in preference to other creditors. As to the alleged purchase of goods by the bankrupt while in failing circumstances, it has never been decided in Pennsylvania, so far as I am aware, that a debtor is deprived of his exemption because he has debts which were fraudulently contracted. But assuming the law to be that way, the mere purchase of goods while insolvent is not a fraud in this state, however it may be elsewhere. *Smelting Co. v. Temple*, 12 Pa. Super. Ct. 99. A purchase in immediate contemplation of bankruptcy, or with no expectation of paying, may be; but it can hardly be said that we have that here. It is true that some purchases were made close up to the time when the petition was filed, but how this chanced to come about we do not know. The determination to take the benefit of the bankrupt act may have been hurriedly made, or forced upon the bankrupt suddenly; and, as he was deprived of the opportunity of making an explanation by the ruling of the referee, it is no more than fair to conclude that he could have made one if it were necessary.

Not being able, therefore, to coincide with the views of the learned referee, the report is set aside, and the case sent back, with directions to allow the bankrupt his exemption.

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Ex parte REARICK.

(Circuit Court, M. D. Pennsylvania. December 8, 1902.)

No. 1.

1. HABEAS CORPUS—FEDERAL AND STATE COURTS.

While the United States courts have power to intervene by habeas corpus in a case where a disregard of the federal law is charged, it is not always expedient to do so, involving as it does a conflict of authority which it is desirable to avoid.

2. SAME—JURISDICTION—INTERSTATE COMMERCE—CANVASSER'S LICENSE.

Where, therefore, an agent of a nonresident corporation was arrested for violating a borough ordinance imposing a license on canvassers, and on conviction an appeal was allowed to a higher state court, he was not entitled to a discharge on habeas corpus in the federal courts, pending determination of the appeal in the state court, on the ground that the ordinance under which he was convicted was invalid as against him, as a regulation of interstate commerce.

Habeas Corpus to the Sheriff of Northumberland County, Pennsylvania, in Said District, to Secure the Discharge of the Relator.

¶ 2. Jurisdiction of federal courts in habeas corpus proceedings, see note to *In re Huse*, 25 O. C. A. 4.

The following facts were agreed upon as controlling the disposition of the writ:

N. L. Rearick, the relator, is an agent of the Citizens' Wholesale Supply Company, a corporation of the state of Ohio, located and doing business as grocers at Columbus, in that state. In the conduct of its business the company employs various agents in different parts of the country, who solicit orders for groceries and other articles of domestic use, by going personally to houses of residents and exhibiting samples, from which selections are made and orders given. These orders are forwarded to the company at Columbus, and are there by them filled and forwarded in packages so marked by numbers as to designate, by reference to a schedule, the exact package intended for each purchaser. These several packages are then shipped in convenient bulk to a second agent of the company at the place where the orders were taken, and by him received and delivered to the persons who gave them, at their respective residences; each being required to pay for the same at the time, after opportunity for inspection to see if they correspond with the samples exhibited. In pursuance of this general plan, in March and April last, one Kunkle went from house to house in the borough of Sunbury, Northumberland county, Pa., in said district, and solicited and obtained orders on the supply company for groceries and various other domestic articles. These orders, having been sent to the company, at Columbus, Ohio, were there carefully filled, and separate packages made up and marked for each customer; and the whole were then shipped by railroad to the relator, N. L. Rearick, another agent residing at Sunbury, who proceeded to deliver the packages and collect the money due thereon, which he remitted to the company. On April 14, 1902, while engaged in making such deliveries in the borough of Sunbury, he was arrested, on process from a justice of the peace of Northumberland county, for an alleged violation of an ordinance of said borough, of which the following is a copy:

"An ordinance: To provide for the licensing of canvassers and all other persons who sell at retail, by sample or otherwise, or who solicit orders at retail, or who solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise or fruits, not of their own production or manufacture, and imposing a penalty for a violation of this ordinance.

"Section 1. Be it enacted and ordained by the borough of Sunbury, in town council assembled, and it is hereby enacted and ordained by the authority of the same, that after the passage of this ordinance it shall be unlawful for any person or persons to sell at retail, by sample or otherwise, or to solicit orders at retail, or to solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise or fruits not of their own production or manufacture, without first obtaining from the chief burgess of the borough of Sunbury a license for such purpose.

"Sec. 2. The license fee required to be paid under this ordinance shall be as follows: For one day, two dollars; for one week, ten dollars; for one month, twenty dollars; for three months, fifty dollars; for six months, one hundred dollars; for one year, one hundred and fifty dollars.

"Sec. 3. Any person or persons violating this ordinance by selling, canvassing, soliciting or delivering as aforesaid, without having first obtained and paid for a license as required in sections one and two of this ordinance, shall, upon conviction thereof before any magistrate or justice of the peace residing in the said borough, forfeit and pay a fine not exceeding fifty dollars and not less than twenty-five dollars for the use of the borough aforesaid for each and every offense together with costs of prosecution; the costs of the magistrate, justice of the peace, and constable, to be the same as the costs fixed by law for them in similar cases. And any person or persons so convicted and fined, in default of payment thereof, together with costs aforesaid, shall forthwith be confined in the common jail for the county of

Northumberland for a period of not less than fifteen and not more than ninety days, until such time as the costs and fine imposed, together with the prison charges accrued, be fully paid and satisfied.

"Sec. 4. The word 'retail' as used in this ordinance shall be construed to mean in small quantities, such as are usually immediately called for by customers.

"Approved December 9, 1899."

The relator had no license such as required by this ordinance, and at the hearing before the justice was convicted of violating it, and sentenced to pay a fine of \$25 and costs, and in default to be committed to the jail of said county for 30 days, or until the fine and costs were paid. From this conviction he applied to the court of quarter sessions of the county for leave to appeal, which was allowed him, and thereupon entered bail for his appearance at the next term. Subsequently, however, he was surrendered by his bail to Samuel Deltrick, sheriff of the county, and by him committed to the county jail. To be released from this commitment the present writ was applied for, it being alleged that the relator, in his capacity as agent for the Citizens' Supply Company, was engaged in interstate commerce, and that the ordinance in question, so far as it attempted to interfere with him, was opposed to the provisions of the United States constitution, and therefore void.

Max L. Mitchell and P. S. Karshner, for relator.  
Harry S. Knight, for respondent.

ARCHBALD, District Judge. The power of the United States courts to intervene by habeas corpus in a case where a disregard of the federal law is charged must be conceded, but to do so is not at all times expedient. To a certain extent, it involves a conflict of authority, which it is desirable, if possible, to avoid. For although the supremacy of the federal court in federal matters must be recognized, yet, where the state court has assumed jurisdiction, the discharge on habeas corpus of one who has been arrested on its process, or is bound by recognizance to observe its commands, is a direct interference with its proceedings, which nothing but the most urgent necessity justifies. Should the state court, either representing the interference, or claiming that the case did not come within the federal law, determine to go on with it, notwithstanding the discharge, a direct clash between the state and the federal authorities would result, into which it is not well to be drawn. The state courts, both original and appellate, are bound by the constitution and the laws of the United States, the same as the courts of the general government, and are entirely competent to interpret and apply them. It is not to be assumed that they will not do so, and if they do not, or if they err in the application, the party aggrieved has a complete remedy by a writ of error to the United States supreme court, where justice will certainly be done.

In the present instance, if the relator had rested upon his conviction before the justice, or, upon application to the quarter sessions of the county for the allowance of an appeal, had been refused, a case for the intervention of this court on habeas corpus might have been presented. But instead of that, an appeal was allowed, and is now pending in the Northumberland sessions, where it would have come up in due course at the present term. There is no reason to suppose that it will not be correctly disposed of when it does. By entertaining the appeal the

court has shown its readiness to do justice to the relator, and, having the power to pass upon disputed questions of fact in a way that this court on habeas corpus would not have, there is every reason for awaiting the result. If the relator should have any cause of complaint with it when it comes, the higher appellate courts of the state are open to him, and last of all, as already suggested, the tribunal which in federal matters is supreme. The present writ may be a short cut to relief, but according to the views expressed in *Baker v. Grice*, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748, and *Minnesota v. Brundage*, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 640, it is not one to be encouraged. Exercising, therefore, the discretion which is vested in me in the premises, I deem it best that the proceedings pending in the state court should be allowed to take their course.

Let the relator be remanded, and the writ discharged, without prejudice.

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STANLEY v. SIERRA NEVADA SILVER MIN. CO.

(Circuit Court, D. Nevada. November 17, 1902.)

No. 739.

1. TROVER AND CONVERSION—PLEADING.

In an action for conversion of a deposit of tailings from a mine, a complaint alleging that plaintiff's decedent was "lawfully possessed" of the tailings, and of a certain tract of land described, on which the tailings alleged to have been converted were deposited, at the time of his death, contained a sufficient allegation of ownership to sustain the action.

2. SAME—DESCRIPTION OF PROPERTY.

A complaint for conversion of mine tailings deposited on lands, describing the land as situated in Edgar ravine, in S. county, Nevada, bounded as follows, to wit: Commencing at the end of the sluice of the mill in said ravine, and running thence in an easterly direction, following the course of said ravine, for 600 feet, with 50 feet of land on the south of said ravine from the center thereof the whole of said length, with 150 feet of land on the north of said ravine from the center thereof the whole of said 600 feet,—and that the tailings consisted of a valuable deposit of mineral concentrations, tailings, and slimes on the land, sufficiently described the property.

3. SAME.

In an action by an administratrix, an allegation that her decedent died intestate, and that on a certain date plaintiff was duly appointed administratrix of decedent's estate, was not objectionable for failure to allege the date of decedent's death, and by reason thereof failing to show that deceased did not die until after plaintiff was appointed administratrix of his estate, since such a contingency would not be presumed.

On Demurrer.

Torreyson & Summerfield and F. M. Huffaker, for plaintiff.  
W. E. F. Deal, for defendant.

HAWLEY, District Judge (orally). This is an action for the wrongful and unlawful conversion of a deposit of tailings alleged to be of the value of \$5,000. It is alleged in the complaint:

"(4) That before and until the time hereinafter mentioned one W. H. Stanley was lawfully possessed of that certain tract or parcel of land

situated in Cedar ravine, in Storey county, and state of Nevada, bounded and described as follows, to wit: Commencing at the end of the sluices of the Mariposa Mill, in said Cedar ravine, and running thence in an easterly direction, following the course of said ravine, six hundred feet, with fifty feet of land on the south of said ravine from the center thereof the whole of said length, with one hundred and fifty feet of land on the north of said ravine from the center thereof the whole of said six hundred feet,—and was lawfully possessed of a valuable deposit of mineral concentrations, tailings, and slimes situate upon said tract of land. (5) That on or about the 26th day of July in the year 1901 the said defendant entered upon said tract of land, and wrongfully, unlawfully, and tortiously, took possession of said deposit, or concentrations, tailings, and slimes, and converted the same to its own use and benefit." "(7) That before the commencement of this action the said W. H. Stanley died intestate, and that on or about the 8th day of August, 1902, on proper proceedings had therefor in the First judicial district court of the state of Nevada, in and for the county of Storey, an order was duly made by said court appointing plaintiff administratrix of the estate of said W. H. Stanley, deceased, and that thereupon plaintiff duly qualified as such administratrix, and letters of administration upon the estate of the said W. H. Stanley, deceased, were duly issued to plaintiff, and that thereupon plaintiff entered upon the discharge of the duties of said office, and ever since has been, and now is, such administratrix."

To this complaint the defendant interposed a demurrer upon the ground that:

"Said complaint does not state facts sufficient to constitute a cause of action, in the following particulars: (a) It does not appear from said complaint that W. H. Stanley ever owned the tract or parcel of land described in said complaint, or that he ever owned the deposit of mineral concentrations, tailings, and slimes, or concentrations or tailings or slimes, situate upon the tract of land mentioned in said complaint. (b) The allegation that W. H. Stanley was lawfully possessed of said land and of said deposit is a conclusion, and not a statement of any fact. (c) It does not appear that W. H. Stanley was at the time of his death the owner or entitled to the possession of either said land or said tailings," and, further, that the description of the land, where the deposit is claimed to be, is uncertain, and that it does not affirmatively appear at what time the said W. H. Stanley died, or whether he was possessed of the land and tailings at the time of his death.

I. The principal objection is as to the use of the words "lawfully possessed of." The general rule is that the averments with reference to the ownership of land must not state legal conclusions. The facts must be expressly alleged, or other facts stated from which the fact of title or ownership would necessarily be inferred. But no certain, fixed rules can be formulated, applicable to all cases which would distinguish allegations concerning titles that are regarded as merely averments of legal conclusions from those that are regarded as traversable facts. Much will depend upon the particular kind and character of the property involved. In *Smith v. Hancock*, 4 Bibb, 222, it was held, where a master sought to recover damages for injuries to his slave, that an averment "that he belonged to the plaintiff prima facie implies a possession, and is therefore sufficient." In *Clay v. City of St. Albans*, 43 W. Va. 539, 541, 27 S. E. 368, 64 Am. St. Rep. 883, the court held that the pleadings in an action of trespass or case for injury to property, real or personal, must show title, but, among other things, said it is sufficient for the plaintiff to allege in regard to personal property that he was "lawfully possessed of certain goods and chattels" (specifying them), and, in case of realty,

to say that "he was lawfully possessed of \* \* \* a certain tract of land" (specifying it). The rule of pleading is that the complaint must allege the ultimate facts required to be proved with such precision, certainly, and clearness that the defendant will know what he is called upon to answer. In *Rogers v. Cooney*, 7 Nev. 213, 217, which was a case similar to this, the court held that it was only necessary "for the plaintiff to prove a rightful possession in himself. It is not incumbent on him to establish any title beyond that." The character of proof necessary to show possession of land, under the peculiar conditions existing in any given case is elaborately discussed in *Garrard v. Silver Peak Mines* (C. C.) 82 Fed. 578, 591. See, also, *North Noonday Min. Co. v. Orient Min. Co.* (C. C.) 11 Fed. 125, 128, 6 Sawy. 503; *Barringer & A. Mines & M.* 608, 611; 1 Lindl. Mines, § 426.

2. The description of the property is sufficient.

3. The averment as to the death of W. H. Stanley, and of the appointment of I. M. Stanley as administratrix of the estate, might, perhaps, have been stated in clearer terms; but the court, from the averments, is not authorized to assume that "said W. H. Stanley did not die until after plaintiff was appointed administratrix of the said estate."

The demurrer is overruled.

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#### CHICK et al. v. NORTHWESTERN SHOE CO. et al.

(Circuit Court, N. D. Illinois. February 13, 1895.)

#### 1. CREDITORS' BILL—CONTRIBUTION TO EXPENSES—ORDER.

A creditor of a corporation filed a bill, in behalf of himself and other creditors who would come in and contribute to the expense of the litigation, to recover property fraudulently transferred by the corporation and to enforce the statutory liability of directors. Under an order requiring creditors, who desired to come in, to prove their claims, certain creditors, including defendants to the suit, who claimed preference by reason of the trust deeds given by the corporation, which the bill sought to set aside as unlawful, proved their claims. *Held* that, there being no funds to discharge the expense of the litigation, unless recovery was had in the suit, an order requiring all parties who had proved their claims to contribute to the expenses necessary to carry on the suit, failing in which their claims so proved should be stricken and not permitted to share in any recovery, was proper.

In Equity.

Bulkley, Gray & Moore, W. J. Manning, and J. W. Bramwood, for complainants.

Chas. H. Aldrich, Frank F. Reed, William Lathrop, Chas. E. Fuller, and S. James, for defendants.

JENKINS, Circuit Judge. The complainants, as judgment creditors of the corporation, principal defendant, filed their bill, in behalf of themselves and all other bona fide creditors of the defendant the Northwestern Shoe Company, similarly situated, who will come in and be made parties complainant and share the expenses of the suit,



to recover from the defendants, other than the judgment debtor, upon several grounds, stated at large in the bill of complaint. A receiver was duly appointed of the Northwestern Shoe Company, but he has as yet been unable to obtain funds wherewith to discharge the expense of the litigation against the parties of whom recovery is sought. On the 5th day of January, 1894, an order was entered requiring all creditors of the Northwestern Shoe Company who desired to come in under the provisions of the bill to prove their claim before the master within 60 days from that date. Under that direction claims to the amount of \$95,850.20 have been proven, of which amount the First National Bank of Belvidere has proven an indebtedness of \$15,907, and the Second National Bank of Belvidere has proven an indebtedness of \$40,601.07. These banks are defendants to the suit, claiming preference by reason of certain trust deeds given by the shoe company, which the bill seeks to set aside as unlawful. The complainant now moves, upon a showing of necessity to raise a fund to pay the expenses of the litigation, for an order requiring all parties who have so proved their claims to pay an assessment of 5 per cent. upon the amount of their claims, respectively, less such sums as they may already have paid on account of the costs mentioned, and that, failing such payment, the claims so proven shall be stricken out and not permitted to share in the proceeds of the litigation.

In several respects the bill is an ordinary creditors' bill, seeking to recover property alleged to be fraudulently transferred by the judgment debtor. In other respects it is a bill to enforce a statutory liability of directors. Thus it is sought to make them liable under sections 16 and 19 of chapter 32, 1 Starr & C. Ann. St., entitled "Corporations." Whatever may be the nature of the several claims in the bill upon which recovery is sought, the proceeds of the litigation by the express condition of the bill are subjected to the payment of all debts due to creditors who may choose to come in under the bill and contribute to the expense of the litigation. Ordinarily the provision by final decree, reimbursing the complainant for all legitimate outlay in the prosecution of a suit by which a fund is impounded for distribution among all creditors, will afford ample protection to the complainant. It appears here, however, that there is no fund out of which the disbursements already incurred can be paid. They amount to a considerable sum. The litigation has been protracted and laborious. The only hope of realizing any fund for the payment of creditors rests in the expectation of a recovery against the directors and the banks named, and some others charged with improperly obtaining the assets of the company. Without assessment, if the complainants fail to recover, they will be obliged to bear the entire expense of the litigation. If they should recover, and a sufficient sum should be realized, they will then first be compensated for their expenditure. So that the position of the creditors opposing this motion is this: that they will remain mere lookers-on of this litigation, participating in its avails, if the complainants shall prove successful, and not sharing in its expense if the complainants shall meet with defeat. This is clearly an inequitable position to assume, and ought not to be permitted if it be competent for equity to afford a remedy. Such an order as is now asked

for is unusual, but not therefore necessarily improper. Mr. Daniell, in his work on Chancery Pleadings and Practice (volume 2, p. 1214, 6th Am. Ed.), remarks:

"It may be mentioned here that under the former practice, where suits were instituted by creditors, or next of kin, or other persons of a class, on behalf of themselves and others of the same class, it was usual for the decree to direct that persons coming in to prove their debts or to establish their claims should contribute to the expense of the suit. \* \* \* It seems that in practice the direction for contribution was seldom, if ever, acted upon. The direction as to contribution is now omitted from the decree."

The decree here referred to, I take it, was not a final decree in the suit, but the interlocutory decree or order providing for the intervention of creditors. The reason that the direction for contribution is now seldom acted upon is said by Lord Eldon to be, so far as relates to creditors, this:

"As the fund brought into court in a creditors' suit is, in part at least, the fund of all the creditors, and as the taxed costs are paid among those who are entitled to it, the plaintiffs and their solicitor receive, in effect, the contribution to which the form of the suit and of the decree gives them a right, without going through a formal process for that purpose." *Lechmere v. Brazier*, 1 Russ. 80.

This declaration would seem to establish that the reason for non-direction for contribution is because it is seldom necessary, as the fund impounded for the benefit of creditors is first subjected to the expense of the suit. This case, however, would seem to be of the exceptional class where resort to the practice is rendered necessary to prevent manifest injustice; for here there is no fund from which the expenses can be paid, and whether such a fund will ever exist is contingent upon a recovery in the suit. The general principle that a creditor, who comes in under the general decree for creditors to come in and prove their debts before the master, is permitted to do so upon the condition of being contributory to the plaintiff for his proportion of the expenses of the suit, was recognized by Chancellor Kent as a well-established principle in *Mason v. Codwise*, 6 Johns. Ch. 297. The rule is in accord with the plainest principles of equity.

It is claimed that the defendants opposing this petition ought not to be compelled to contribute to aid a prosecution against themselves. This does seem incongruous, but the incongruity arises from their own acts in seeking to share in the proceeds which may be obtained from them upon proof of the alleged illegal acts with which they are charged. Their debts aggregate nearly two-thirds of the entire indebtedness. In the event of a recovery, they would upon distribution receive a like share of the fund. If they choose to come in as creditors under the order allowing proof of their claims, and become practically, as they do, parties complainant to the litigation, they must share its burdens if they would participate in its gains.

I am of opinion that the prayer of the petition should be granted.

**DALTON v. GERMANIA INS. CO.**

(Circuit Court, N. D. Iowa, W. D. December 9, 1902.)

**1. FEDERAL COURTS—REMOVAL OF CAUSES—PETITION.**

A petition for removal, alleging that the controversy is wholly between citizens of different states, in that the plaintiff is now and was at the time of filing the petition in the action a citizen and resident of the state of Iowa, and the defendant "is a corporation organized, incorporated, and existing under the laws of the state of New York, and is a citizen and resident of said state, with its principal place of business in New York City, New York, and never has been and is not now a citizen or resident of the state of Iowa," was insufficient for failure to allege that defendant "was" a citizen of the state of New York at the time the suit was brought in the state court.

**2. SAME—AIDER BY PETITION.**

The petition was not cured by an averment in complainant's petition alleging that defendant is and was at all dates therein stated a corporation duly organized and authorized to do business within the state of Iowa, etc., since, if any inference as to defendant's citizenship is to be drawn from that allegation, it is that the corporation was organized within the state of Iowa.

**3. SAME—AMENDMENTS.**

Where the record on removal of a cause to the federal courts fails to show that a defendant seeking removal was a citizen of another state at the time the suit was brought, the federal court, on sustaining a motion to remand, has no power to grant leave to amend the petition of removal.

Submitted on Motion to Remand to State Court.

Martin & Martin and Wright, Call & Hubbard, for plaintiff.

McVey, McVey & Graham, for defendant.

**SHIRAS, District Judge.** This is a suit in equity brought originally in the district court of Plymouth county, in this state, and in due time the defendant filed a petition for the removal of the suit into this court upon the ground of diverse citizenship. Upon the filing of the transcript in this court the plaintiff moved for an order remanding the suit to the state court on the ground that the record, as it appeared in the state court, failed to show the requisite diversity of citizenship, and this is the question presented for determination. The petition for removal states:

"That the controversy in this action and every issue of fact and law therein is wholly between citizens of different states, and which can be fully determined as between them; that is to say, the plaintiff, P. F. Dalton, is now and was at the time of the filing of the petition in this action a citizen and resident of the state of Iowa, and the defendant, the Germania Fire Insurance Company, is a corporation organized, incorporated, and existing under the laws of the state of New York, and is a citizen and resident of said state, with its principal place of business in New York City, New York, and never has been, and is not now, a citizen or resident of the state of Iowa."

The objection taken to this petition for removal is that with respect to the defendant it is not averred that it was a corporation created or

¶ 1. Averments of citizenship to show jurisdiction of federal courts, see note to *Ship v. Williams*, 10 C. C. A. 261.

existing under the laws of the state of New York at the time when the suit was brought in the state court; the statement being, in effect, that at the date of the filing the petition for removal the defendant was a corporation created under the laws of that state. Thus, in *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914, it is said: "The petition for removal does not allege the citizenship of the parties except at the date when it was filed, and it is not shown elsewhere in the record that Stevens and Mirick were, at the commencement of the action, citizens of a state other than the one of which the plaintiff was at that date a citizen;" and for that reason the supreme court, after a trial on the merits, remanded the case. The same result followed in *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249, it being therein stated that "it appears from the record that the citizenship of the parties at the commencement of the actions, as well as at the time the petitions for removal were filed, was not sufficiently shown, and that, therefore, the jurisdiction of the state court was never divested." These decisions settle the proposition that the averment in the petition for removal to the effect that the defendant is a corporation organized and incorporated under the laws of the state of New York refers only to the time the petition for removal was filed, and is not sufficient to show that the defendant was a New York corporation when the suit was brought.

But it is contended that this defect in the petition for removal is cured by the averment found in the petition of complainant, and it is the rule that averments of fact, lacking in the petition for removal, may be helped out by the averments found in the pleadings, as they existed in the state court when the application for removal was filed therein. In other words, if the record of the case, as it appeared in the state court, showed the requisite facts authorizing a removal of the suit, the case will not be remanded simply because the petition for removal did not within itself contain a statement of all the facts necessary to establish the right to a removal.

Turning to the petition filed by complainant, we find it therein recited "that the defendant is and was, at all dates hereinafter named, a corporation duly organized and authorized to do business within the state of Iowa, as insurer against loss and damage to property by fire." It certainly cannot be contended that the complainant intended by this averment to allege that the defendant company was a corporation created under the laws of the state of New York. The averment is that the corporation was organized to do business within the state of Iowa, and if any inference is to be drawn therefrom it is rather to the effect that the corporation was organized within the state of Iowa.

The contention of counsel is that the averment in the petition of complainant, which was filed in the state court on August 13, 1902, shows that at that date the defendant company was a corporation, and that the petition for removal, filed on September 22d, shows that on that date the company was a corporation created under the laws of the state of New York, and therefore it must be inferred that the defendant was a New York corporation on August 13th. The rule is well settled, however, that the facts necessary to terminate the jurisdiction of the state court must be clearly stated, and that the jurisdiction of

the federal court cannot be sustained on possible or even probable inferences, or, as is said in *Brown v. Keene*, 8 Pet. 115, 8 L. Ed. 885: "The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact upon which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

As there is not to be found either in the petition for removal or in any other part of the record an averment to the effect that the defendant was when this suit was begun a corporation created under the laws of the state of New York or of any state other than Iowa, it cannot be held that the record shows the requisite diversity of citizenship at the date when the suit was commenced, and therefore it must be held that the record does not show facts authorizing a removal of the suit.

On behalf of defendant leave is asked to file an amendment in this court to the petition for removal for the purpose of supplying the lack of the averment necessary to show that the defendant was, when the suit was brought, a corporation created under the laws of the state of New York. The question of the right of this court to grant leave to file amendments to the petition for removal, in cases of this character, was fully considered in the suit of this same plaintiff against the Milwaukee Mechanics' Insurance Company, and the conclusion reached was that this court had not the power or right to allow amendments to be filed in cases wherein the existing record failed to show that the case was a removable one under the statutory provisions.

Following the ruling in that case, it must be held that the court cannot allow the proposed amendment to be filed, and as the record, as it now stands, does not show the facts necessary to sustain the jurisdiction of this court, the motion to remand the suit to the state court must be granted.

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#### DE LONG HOOK & EYE CO. v. FRANCIS HOOK & EYE & FASTENER CO.

(Circuit Court, W. D. New York. November 8, 1902.)

##### 1. TRADE-MARKS—SCOPE—FORM AND LETTERING OF CARDS.

A corporation engaged in manufacturing patented hooks and eyes is not entitled to appropriate the form of the cards on which the hooks were fastened, lettered horizontally between rows of hooks and eyes, in connection with and as a necessary corollary to its trade-mark.

##### 2. SAME—UNFAIR COMPETITION—INJUNCTION PENDENTE LITE.

In an action for unfair competition, affidavits in support of a preliminary injunction showed that plaintiff's trade-mark consisting mainly in the words, "See that Hump?" in connection with the name "De Long," and that the arbitrary word "Hump" was an essential characteristic by which its goods became known to the public, and that these words were not used by defendant; and that the manner in which defendant dressed its goods on cards, while similar to the cards used by plaintiff, were not such as to mislead an ordinary purchaser. *Held*, that an injunction would not be granted pendente lite.

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¶ 2. Unfair competition, see notes to *Scheuer v. Muller*, 20 O. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

In Equity.

Stern & Rushmore (Charles E. Rushmore and William C. Strawbridge, of counsel), for complainant.

Macomber & Ellis (Tracy C. Becker, of counsel), for defendant.

HAZEL, District Judge. A bill in equity has been filed by the De Long Hook & Eye Company against the Francis Hook & Eye & Fastener Company for unfair competition in trade and recovery of damages for imitating complainant's form of hook and eye and its manner of placing the same upon the market. This is an application for preliminary injunction. A careful examination of the affidavits presented and of the various exhibits, consisting of cards upon which hooks and eyes are attached, leads to the conclusion that the words of complainant's trade-mark, "See that Hump?" in connection with the name "De Long," and the arbitrary word "Hump," were the essential characteristics by which its goods became known to the public. It would appear that complainant sought thereby to not only completely distinguish its product from that of defendant and other competitors, but also by its use and extensive advertising to acquire a special value and larger market. The complainant cannot appropriate the form of the cards lettered horizontally between rows of hooks and eyes, in connection with and as a necessary corollary to its trade-mark. *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 297, 42 Am. Rep. 294; *Adams v. Heisel* (C. C.) 31 Fed. 279. The especial attention of the public is called to complainant's registered trade-mark by its advertisements and cards. The adopted trade-mark evidently is employed to distinguish its goods from the goods of all competitors. On the reverse side of the cards are printed the words: "It's genuine if on the face and back of every card of the Famous De Long Hooks and Eyes you find the words, 'See that Hump?'" The words "De Long Hook and Eye," "See that Hump?" and "Hump" are made distinctively prominent upon complainant's wares and in its advertisements. Neither the trade-mark nor the words "De Long" and "Hump" are used by defendant. By the affidavits of the defendant, read on the motion, it appears that the formation of words and letters, shading, size of cards, etc., are not in themselves calculated to deceive an intending purchaser of complainant's article. Complainant contends that in some instances witnesses for defendant have made false statements in regard to the period of time when the hump hook made its appearance on the market. The De Long Hump Hook was patented October 1, 1889. It is not claimed that defendant infringes it. Defendant, however, claims that the hump hook came into use a long time prior to the date of complainant's patent. In reply to this assertion complainant argues that the particular hump hooks alluded to by defendant were abandoned because of their faulty construction. Many affidavits read by defendant tend to show that the manner of printing the cards, of attaching hooks and eyes, labeling their backs, and other collocations of elements are old, and were in common use prior to their adoption by complainant. If this be true, complainant has sustained no injury. It is held that, when the style and manner

of dressing a commodity is old, and in common use, such methods may be adopted without infringing the rights of others who may use the same style. These averments of prior use are denied, or attempted to be explained, by complainant on the argument. The establishment of facts showing a general as well as a prior use is of prime importance. Cross-examination of defendant's witnesses may demonstrate the falsity of the evidence on this and other points. Proof is now sufficiently before the court to preclude the issuance at this time of a preliminary injunction, which, in effect, would be a final determination of the points in controversy at the threshold of the proceeding. The general rule of law in cases of this character is stated as follows in *Scheuer v. Muller*, 20 C. C. A. 165, note, 74 Fed. 225:

"Independently of the existence of any technical trade-mark, no manufacturer or vendor will be permitted to so dress up his goods by the use of names, marks, letters, labels, or wrappers, or by the adoption of any style, form, or color of packages, or by the adoption of any or all of these indicia, as to cause a purchaser to be deceived into buying his goods as and for the goods of another."

Defendant's affidavits tend to show that an ordinary buyer purchasing in the usual manner is not deceived by any simulation in defendant's manner of dressing its goods into believing that he is buying the goods of complainant. The similarities pointed out by the complainant in view of the employment of the trade-mark itself as a distinctive identification is no deception upon the public, if proper consideration be given upon this motion to the opposing affidavits. It does not appear that any ordinary purchaser has been misled. It is not clear from the large number of exhibited cards with hooks and eyes attached, many of them apparently like complainant's cards, but without its trade-mark, or any simulation thereof, that defendant's article is a fraud upon the complainant. As the case appears upon this motion, complainant's goods have achieved distinctive recognition by the public by the exploitation of its trade-mark, an arbitrary designation, and not by any other of the collated elements which it employs to dress its goods. Nor does the defendant's manner of placing the invisible eyes upon its cards in imitation of complainant disturb this view. It now appears that complainant should rely upon its trade-mark, an arbitrary designation, to prevent the competition of enterprising rivals in trade. I am therefore satisfied that the proofs before me at this time do not disclose sufficient facts to justify this court, in the exercise of its equitable jurisdiction, to enjoin the defendant pendente lite.

**Motion denied.**

## In re GONZALEZ.

(Circuit Court, S. D. New York. October 7, 1902.)

## 1. CITIZENSHIP—NATIVES OF PORTO RICO—RIGHT TO ENTER UNITED STATES.

A native of Porto Rico did not become a citizen of the United States by virtue of the treaty of Paris, or Act April 12, 1900, providing for the government of the island, and is subject to all the provisions of law regulating the admission of aliens into the United States.

Petition of Isabella Gonzalez for Writ of Habeas Corpus.

Charles E. Le Barbier, for the writ.

Edw. Van Ingen, opposed.

LACOMBE, Circuit Judge. Petitioner, an unmarried woman, is a native of Porto Rico, 20 years of age, who arrived here from that island on August 24, 1902. She was detained at Ellis Island immigrant station, was duly examined by a board of special inquiry, and was excluded from admission into the United States upon the ground that she was liable to become a public charge.

The only question open for discussion on this application is whether or not petitioner is an alien. Upon all other questions the decision of the appropriate immigration officers, when adverse to the admission of the alien, is made final, unless reversed on appeal to the secretary of the treasury. Act Aug. 18, 1894, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303]. It is true that this court held to the contrary in *Re Martorelli*, 63 Fed. 437, following *In re Panzara* (D. C.) 51 Fed. 275; but the act of 1894 was not before it. The *Martorelli* Case was decided in October, 1894, before the statutes of that year were published.

The fourteenth amendment to the constitution provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. It is not disputed that petitioner was by birth an alien. Unless in some appropriate way she has since been naturalized, she is still an alien. There is no suggestion that she was ever naturalized under the general laws prescribed by congress regulating the admission of aliens to citizenship. The treaty of Paris, unlike earlier treaties which dealt with the Louisiana and Florida purchases, with California, and with Alaska, did not undertake to make the native-born inhabitants of Porto Rico citizens of the United States. It expressly provided that:

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the congress."

In conformity with this provision of the treaty it was provided in Act April 12, 1900, c. 191, § 7:

"That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United

¶ 1. Citizenship and alienage under federal and state laws, see note to *City of Minneapolis v. Reum*, 6 C. C. A. 37.



States (excepting such as had preserved their allegiance to Spain), and they, together with such citizens of the United States as may reside in Porto Rico, shall continue a body politic under the name of 'The People of Porto Rico,' with governmental powers as hereinafter conferred and with power to sue and be sued as such."

This legislation has certainly not operated to effect a naturalization of the petitioner as a citizen of the United States. Being foreign born and not naturalized, she remains an alien, and subject to the provisions of law regulating the admission of aliens who come to the United States.

The writ is dismissed.

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BROOKFIELD et al. v. HECKER et al.

(Circuit Court, S. D. New York. October 7, 1902.)

**1. JURISDICTION OF FEDERAL COURTS—SUIT BY RECEIVER—ANCILLARY PROCEEDINGS.**

A federal court which has appointed ancillary receivers for the property of a corporation within its jurisdiction has jurisdiction of a suit by such receivers in their own name to protect the business carried on by them from injury by unfair competition, also carried on within the state, without regard to the citizenship of the parties.

In Equity. On demurrer to bill. See 114 Fed. 1021.

Sullivan & Cromwell, Henry W. Clark, and William V. Rowe, for complainants.

Wilson & Wallis, for defendants.

TOWNSEND, Circuit Judge. Complainants were appointed receivers by the court of chancery in New Jersey, and by the United States circuit court for the Southern district of New York, of a corporation organized under the laws of the state of New Jersey, and carrying on business in the state of New York. The receivers bring this suit in their own names for infringement of trade-marks and unfair competition in trade. Complainants claim that the court has jurisdiction notwithstanding the lack of diverse citizenship, on the ground that the courts which appoint receivers have the power to protect the assets in their possession; citing *Porter v. Sabin*, 149 U. S. 473, 479, 13 Sup. Ct. 1008, 37 L. Ed. 815, and *Pope v. Railway Co.*, 173 U. S. 575, 19 Sup. Ct. 500, 43 L. Ed. 814.

Defendants demur on two grounds:

First, that a trade-mark is property, and must be held to be located where the corporation was incorporated, viz., New Jersey; that the decree of the said United States circuit court for the Southern district of New York appointing the complainants ancillary receivers only appointed them, and could only appoint them, receivers of the property in that district; and that, therefore, the court has no jurisdiction. If the suit concerned tangible property situated in New Jersey, this contention might be well founded. This suit is brought not merely or principally on the ground of a technical trade-mark, but to pro-

¶1. Jurisdiction of suits by and against receivers in federal courts, see note to *Plow Works v. Finks*, 26 C. C. A. 49.

tect the business carried on in New York against unfair competition, also carried on in New York, and this court, having charge of the assets and the business, has jurisdiction of such a suit in accordance with the principle enunciated in the cases cited.

The second ground of demurrer is that the complainants are receivers pendente lite, and have no title to the property of the corporation, and have no right to maintain any suit in their own names for the determination of the title to the property. It is unnecessary to consider this question, as this is not a suit to obtain title to property. It is a suit to restrain injury to the business now carried on by the receivers, and the right to bring it in the name of the receivers is sustained on the authority of *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Harland v. Telegraph Co.* (C. C.) 33 Fed. 199.

The demurrer is overruled.

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### THE FAYERWEATHER WILL CASES.

(Circuit Court, S. D. New York. August 25, 1902.)

#### 1. CIRCUIT COURTS—RULES OF DECISION—FOLLOWING DECISION OF SUPERIOR COURT.

A decision of the circuit court of appeals that a matter is *res judicata* by reason of judgments of state courts is conclusive upon a circuit court in which the issue subsequently arises between the same parties or their privies, where the evidence is substantially the same, whatever may have been the intervening decisions of the state courts thereon.

In Equity. On final hearing. See 103 Fed. 548.

Roger M. Sherman and Wm. Blaikie, for complainant.

C. J. Bovee, Jr., Jno. E. Parsons, James L. Bishop, and Henry L. Stimpson, for respondents.

LACOMBE, Circuit Judge. In whatever way the questions arising in these causes are presented, whether by bill and plea, or bill and answer, or cross-bill and plea or answer, the claim preferred by "widow and next of kin," or survivors and privies, is conclusively shut out by the releases, if such releases are valid. The question whether or not they are valid was held by the circuit court of appeals to be no longer an open question, because it had been adjudicated in a prior litigation between the same parties or their predecessors or privies. It is not perceived that the record here, so far as it deals with such prior litigation, is materially different from that on which the circuit court of appeals passed. The testimony of the state judge who heard the prior cause at special term has added nothing. His opinion showed quite as clearly that he did not consider the question whether the releases were or were not obtained by fraud or misrepresentation. Where the facts are the same, the decision of the circuit court of appeals is controlling here. Whether later decisions in the state courts should induce a modification of the principles of law enunciated by the circuit court of appeals is a question for that court, not for this.

The several pleas are sustained, and bill and cross-bill dismissed. Decrees appropriate to the situation presented by the pleadings, not in all instances uniform, of the different parties, may be entered on notice.

**C. O. BURNS CO. v. W. F. BURNS CO.**

(Circuit Court, S. D. New York. August 26, 1902.)

**1. UNFAIR COMPETITION—PRELIMINARY INJUNCTION—LACHES.**

A preliminary injunction to restrain unfair competition 'will not be granted on conflicting evidence, where complainant had known of the purposes and practices of defendant for a year and a half before commencing suit, during all of which time they were active competitors in business.

In Equity. On motion for preliminary injunction.

David A. Sullivan, for the motion.

Hastings & Gleason, opposed.

THOMAS, District Judge. The defendant was incorporated in September, 1900, and thenceforth its purposes and practices were known to the complainant. The bill was filed about April, 1902. Meantime the parties have been active rivals in business, pursuing each other in various states, and menaces and representations, true or false, on either side, have not been absent. After these mutual experiences the present suit was begun, and the differences are sought to be settled upon a motion for a preliminary injunction, and from the conflicting evidence presented by affidavits the court is expected to find the truth. The complainant tardily asks that the defendant, for some time treated as its rival, be condemned. Had it shown earlier zeal in bringing this suit and pressing it to trial, a final hearing could have been had long since; but during the period of its delay pecuniary damage does not seem to have befallen it, as the present records seems to show that it thrived sparingly until the defendant's activity stimulated the business. The defendant has been guilty of some acts that it professes to have abandoned, and in view of all this it is thought that the complainant's laches and continued recognition of the defendant as a competitor should constrain it to await the final hearing for such relief as may be due it. Therefore the motion is denied.

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

## THE S. L. WATSON. (Nos. 431, 432.)

## THE THOMAS P. SHELDON. (No. 433.)

(Circuit Court of Appeals, First Circuit. November 20, 1902.)

**1 SHIPPING—VALIDITY OF CHARTER—AUTHORITY OF AGENT.**

Authority given an agent by a shipowner, who was a nonresident, to "look after" certain barges employed in the general carrying trade, to make contracts for their services, collect freight, etc., is not to be so narrowly construed as to render invalid a charter for the carrying of five cargoes by two of the barges, to be performed within two months, which was accepted and acted upon by the charterer in good faith.

**2. SAME—WAIVER OF TIME BY CHARTERER—DUTY OF OWNER TO MAKE DEFULT GOOD.**

The owner of certain vessels was in default in the provisions of a charter to carry a number of cargoes within a specified time, and thereupon, the charterer having consented to a substantial performance within a reasonable period of time not specified, it was incumbent on the owner, in order to avoid the effect of his default, to use reasonable efforts to make good the default, so that the mere fact that certain vessels substituted by him for that purpose might have been subjected to some delay in loading would not justify him in refusing to load after the cargoes were ready and tendered to the vessels.

**3. SAME—DAMAGES FOR BREACH.**

While negotiations were pending between the owner of vessels in default on a charter party and the charterer, looking to a substantial compliance with the charter, the market for freights advanced. Thereupon, after the negotiations were broken off, the charterer, having been compelled to charter other vessels, was entitled to be compensated in damages on the basis of the intervening advance.

**4. ADMIRALTY—EFFECT OF MISJOINDER.**

A decree in admiralty will not be reversed on appeal because of a misjoinder of causes of action in the libel, where one was dismissed by the court, either on exceptions or on final hearing, and a decree on the merits entered upon the other only. Where the final condition of the record is in accordance with the substantial rules of the law, a court of admiralty does not look at the intervening steps.

**5. MARITIME LIENS—BREACH OF CHARTER.**

Although the owner may contract in a single charter for the carriage of a number of cargoes by one or by a number of vessels, the vessels themselves are not bound so as to be subject to a lien for a breach of the charter so far as it remains wholly executory; nor are they in any case bound for each other, or with respect to any cargo not received on board, although they may have entered on a performance of the contract by carrying one or more cargoes.

Appeal from the District Court of the United States for the District of Rhode Island.

Frederic Dodge and Harrington Putnam, for Lake Shore Transit Co.

Edward E. Blodgett and Addison C. Burnham (Eugene P. Carver, on the brief), for Virginia Iron, Coal & Coke Co.

Before PUTNAM, Circuit Judge, and ALDRICH and LOWELL, District Judges.

PUTNAM, Circuit Judge. These appeals arise out of a breach of a written contract designated a "charter party," dated on July 26, 1899, by which one Mr. Stanwood, as agent for J. C. Gilchrist, the

owner of the barges, and the claimant, who did business under the style of Gilchrist Barge Company, contracted that the barges Thomas P. Sheldon and S. L. Watson should transport five cargoes of coal from Lambert's Point, in Norfolk, Va., to Providence, R. I., at 80 cents per ton. The cargoes were to be delivered in Providence previous to October 1st. It was stipulated that the barges should "take turn in loading, as customary," and that, in case coal was not ready to load them when they reported for cargo, within a reasonable time, the owners should have the option of loading on other coal, and returning next trip to load under the charter. Forty dollars per day demurrage in case of detention of either barge by default of the charterer was also agreed on.

The first contention on the part of Gilchrist is that Stanwood had no authority to tie up the barges for five voyages. Gilchrist lived and did business at Cleveland, Ohio. The barges originally were engaged in lake navigation, but they had been sent to the Atlantic coast, and had been left without steady employment. Stanwood lived at Boston, where the charter party was negotiated and made. In a letter from Gilchrist to the representative of the charterer, who is the libellant, dated on October 23, 1899, in reference to the questions involved in these appeals, he wrote as follows:

"I think, if you will see Stanwood, that you can fix the matter up with him, if he is in any way at fault. I am most too far away from Boston to know just what to do."

This letter, in connection with the other facts, shows that the circumstances called for a broad authority with reference to the employment of the barges. That authority was contained in the following agreement of July 24, 1899:

"Cleveland, O., July 24, 1899.

"We have this day arranged with A. Stanwood, of Boston, Mass., to look after the barges F. A. Georger, Moonlight, Charles Foster, T. P. Sheldon, S. L. Watson, M. S. Bacon, Verona, and W. S. Crosthwaite, now on the Atlantic coast, for us, and to allow him ten dollars (\$10.00) each per month for the eight barges, beginning August 1st. Also a further compensation of 6% (six per cent.) of the net earnings of the barges. By the net earnings we mean what is left after all the bills are paid; and 6% (six per cent.) interest on a valuation of \$120,000.00, and 10% (ten per cent.) for insurance on the same valuation, is deducted as an additional expense.

"Stanwood is to collect all freights promptly, and deposit same in the National Bank of the Redemption at Boston, to the credit of the Coal & Iron National Bank of Cleveland. He is to make no charge for commissions for the securing of the cargoes for the above barges, unless he cannot get his cargo direct, and is obliged to pay a broker a commission to secure it.

"This contract can be terminated any time that I may so desire.

"J. C. Gilchrist.

"Accepted by A. Stanwood."

Immediately on the barges being chartered, Stanwood telegraphed to Gilchrist as follows: "I have chartered Watson and Sheldon eighty Providence and tug has left." There was no reply to this, and no inquiry by Gilchrist as to the terms of the charter; and, although it is conceded that one voyage was made under it, and payment was received for the freight thereof, no objection was made by Gilchrist until a letter from him of October 17, 1899, to the representatives

of the charterer, which was after the present controversy arose. In this he said that Stanwood had no authority to tie up any of the tonnage for more than a trip at a time. He also referred to the expression "beginning August 1st" in his contract with Stanwood.

As, under the circumstances, it is evident that a contract so loose and informal as that of July 24th, on which both Stanwood and innocent parties had acted, must be construed to sustain such action, if reasonable to do so, the expression "beginning August 1st," is easily disposed of, as pertaining only to the time from which the monthly compensation should be computed. In the same way the sweeping expression in the contract "to look after the barges" can properly be held to have given Stanwood large discretion as to the method of chartering them, provided nothing unreasonable was attempted by him. It is too clear to need detailed remarks in regard thereto that, looking at the nature of the business, and the season of the year, and the character of the business involved, it was quite as reasonable for Stanwood to have arranged by one charter for a certain number of voyages within a limited time of about two months, as to have stipulated in several charters for voyages one on the heel of another. In order to keep the barges steadily employed, he would have been obliged to do one or the other, even under the strictest terms of his authority; and it would be unreasonable to hold that Gilchrist intended his property should remain unemployed. However, the contract between Gilchrist and Stanwood can easily be construed to sustain the charter party before us, and therefore, according to settled rules, it should be so construed, if necessary, to uphold what was done, if not unreasonable, between Stanwood and innocent parties.

We reach this conclusion without going into the question of ratification, although, on ordinary principles, if Gilchrist, on being informed as to the charter party, saw fit not to inquire into its terms, he must, for the just protection of the charterer, be assumed to have been content to rely on Stanwood, and thus, under the circumstances, to be held estopped from afterwards disputing, to the prejudice of the charterer, what was done.

The parties agree that the Sheldon performed one voyage under the contract. It is claimed by Gilchrist that the Watson performed one thereunder, but this is denied. The charterer admits that the Watson performed a voyage, but claims that it was under a prior oral charter for a single trip, also made by Stanwood. Aside from these voyages, neither barge performed any, and Gilchrist was in fault in that respect, without any justification, or even excuse, therefore. Therefore Gilchrist must be held to have been a willful violator of his contract in this particular, and the remaining facts in the case are to be scrutinized and weighed from that standpoint.

The district court found, as claimed by the charterer, that no voyage was performed by the Watson under the written contract, and assessed damages based on a refusal to transmit four of the five cargoes stipulated for. The claimant maintains that damages should be assessed for only three cargoes, on the ground that the Watson performed one voyage. It is admitted that the Watson did perform a voyage, sailing from Lambert's Point for Providence at the same

date as the Sheldon,—that is, August 2d,—delivering the coal to the same consignee, and receiving payment therefor at the same rate, 80 cents per ton. There is nothing in what was done in connection with this voyage to enable the court to distinguish it from a voyage under the written charter. The case, however, is made positive in favor of the claimant by a letter from the charterer to the Providence Gas Company of July 20, 1899. This was written while the barges were about loading at Lambert's Point. It was as follows:

“Virginia Iron, Coal and Coke Company, General Offices, Bristol, Va.—Tenn.

“104 Water St., Boston, Mass., July 31, 1899.

“A. B. Slater, Esq., Providence Gas Company, Providence, R. I. Dear Sir: We beg to advise you that we will load this week barges Watson & Sheldon to apply on your orders. One cargo to be applied on the 5,000-ton contract, and one on order previously given for 1,400 tons at \$2.30, delivered. You need have no fear about demurrage in case the barges report at the same time. They are owned by the one company, and, according to the terms of charter, must take their turn to discharge.

“Very truly yours,

Virginia Iron, Coal and Coke Co.,

“Henry T. Allechin, Agt.”

The last two sentences of this letter are a substantial admission that, whatever may have been the prior negotiations, the cargoes then loaded on both the Watson and the Sheldon, and which were the cargoes already referred to, were loaded in pursuance of one charter. Therefore, although, as found by the learned judge who tried these cases in the district court, it is quite clearly proved that an oral charter of the Watson was attempted on July 18th, this may have been merged in the written charter on which the libels now before us were brought. The contract between Gilchrist and Stanwood, to which we have referred, was dated on July 24th. The record contains two letters from Gilchrist to Stanwood, dated, respectively, July 17th and July 19th. These refer to Stanwood's taking charge of the barges Bacon and Georger, and of no others. There is nothing to show that he had any authority on July 18th to charter the barge Watson. It rests on the libelant to prove this, and not on the claimant to disprove it. Therefore, the libelant having failed to prove that Stanwood had any authority on July 18th to charter the Watson, its case would necessarily fail so far as that alleged charter is concerned; and it is possible that, after the contract between Gilchrist and Stanwood of July 24th, Stanwood prevailed on the charterer to abandon the oral charter, and to substitute in lieu thereof the charter of July 28th, which he was authorized to make.

It appears that the Watson delivered on the voyage in question 907 tons. In determining the damages which the district court assessed, it included an allowance of 95 cents per ton for the increased freight which the libelant was compelled to pay, computed on 4,024 tons. The decree of the district court (113 Fed. 779) must be so far modified as to make this computation on 3,117 tons, instead of on 4,024.

The claimant also maintains that, after he had been in default on his contract, Stanwood made an arrangement with the charterer by

which two other barges should be substituted for the Watson and the Sheldon; that those barges reported at Lambert's Point; that, not having been laden within a reasonable time, they withdrew, and that they had a right so to do. If the contention of the claimant were correct in this particular, it would be necessary to hold that the charter was satisfied for all substantial purposes, or that the damages were of a comparatively small amount.

The substance of this arrangement is found in the testimony of Mr. Friend, who was the representative of the charterer. He fixes its time as early in September. He says that he urged on Stanwood the necessity of putting in some barges to carry out the contract; that Stanwood said he would report the first barges he could get; that he told Stanwood that he would not hold him to the barges named in the charter if he would only bring the coal forward; and that he kept urging him every few days, until Stanwood finally named two barges which he would have report. Apparently, from Mr. Friend's testimony, this was in season to have had the coal delivered in Providence within the time named in the charter; that is, the 1st of October, if the barges had reported promptly. The barges named were the Georger and the Marion W. Page.

Evidently there was no new contract made between the parties, but simply an expressed urgency on the part of Friend that the original contract should be fulfilled. Therefore, whatever was done or to be done with reference to the substitution of the barges, was merely an urgent request and a permission on the part of the charterer that their owner should substantially perform his contract. Of course, under those circumstances, the terms of the charter would apply to the substituted barges only so far as the then circumstances would call therefor. With reference to this substitution, the pith of the resulting position is that, Gilchrist being in fault, it was his duty to use reasonable efforts to make his contract substantially good, and that the charterer consented that he might do so, and waived holding him to a literal compliance.

The Georger reported at Lambert's Point on September 18th. A schooner, whose capacity was in excess of 2,000 tons, reported the previous day. In accordance with the terms of the charter, the Georger could not claim to be loaded in advance of her turn. Apparently the steamer Cynthia, which took some 400 or 500 tons of coal, was put in ahead of the barge, although she reported later. In accordance with our opinion in *Cargo of 2,383 Tons of Soft Coal*, passed down on September 4, 1902, reported under title of *Donnell v. Manufacturing Co.*, 118 Fed. 10, this could not have been done ordinarily. Nevertheless, under the special circumstances, which placed on the owner of the Georger the duty of using reasonable efforts to make good his unexcused default, this did not end the case, so far as that barge was concerned. The charter would have given her demurrage in case it had been determined finally that the charterer was in default so far as she was concerned; and also it gave her the privilege of loading "other coal, and returning the next trip" to load thereunder. Therefore, unless the delay was very unreasonable or clearly willful, as her owner had ample compensation se-



cured, he was not relieved from his duty to make good his previous default.

Nevertheless, on October 3d, Stanwood gave the charterer a peremptory notice that he had decided to take this barge and load her elsewhere, and he did so, and she never returned. The testimony of Wilmer, who, as the agent of the charterer, controlled the loading at Lambert's Point, is uncontradicted that on October 3d there were 600 tons of coal ready to load aboard the Georger, and that on the two following days sufficient additional coal arrived to complete her cargo. Whatever may have previously occurred, and whatever may be the facts with reference to an alleged unjustifiable detention of the Georger at Lambert's Point,—matters which we do not find it necessary to determine,—it was the reasonable duty of her owner, on being advised on October 3d that the charterer was ready to load her, to cause her to remain and receive her cargo, and thus to contribute towards making good his previous default.

With reference to the Page, there are not any circumstances shown by the record favorable to Gilchrist. She did not report until September 26th, although the arrangement for her substitution was made early in September. Thus Gilchrist was again in default; not, to be sure, by refusal, but by an unreasonable delay. Wilmer testified that on October 10th he notified her captain that he had coal on hand for her. He also testified that on that day he telegraphed Stanwood that the coal was ready for her, but that another party claimed the barge. Thereupon Stanwood loaded with the coal of the other party. This testimony is supplemented by the correspondence between Stanwood and the representative of the charterer, as follows: On October 9th, apparently in view of the delay subsequent to the new arrangement early in September, that representative wrote Stanwood, urging further modification, which would enable Stanwood to substantially carry out the contract. This was not answered by Stanwood until by his letter of October 13th, in which he observed that the original contract expired October 1st, and added, "Any business done from now will have to be done on a new deal." It cannot be questioned that the Page abandoned the charterer's coal on October 10th in pursuance of the position thus taken by Mr. Stanwood, and, for the same reasons which we have stated with reference to the Georger, it follows that, so far as the Page is concerned, there was again no proper exertion on the part of Gilchrist to make good his previous default. Therefore, looking at the relations of the parties in the early part of September, and at the facts that Gilchrist was then in default without excuse, and that it was his duty to use reasonable efforts to make good that default, we entirely agree that the learned judge in the district court was right in holding that there was nothing with relation to either the Georger or the Page to relieve him from his liability for his original tort.

Apparently freights rapidly advanced after the dates which we have named, and, as the charterer did not get its coal forwarded until early in November, it cost considerably more to do so than it would have cost early in October. The district court allowed the enhanced

cost, and the claimant complains thereof, because he says that it might have been saved by chartering vessels at the earlier date. It is to be noted, however, that the first apparent repudiation of the contract was Stanwood's letter of October 13th, to which we have already referred. On receipt of that letter the charterer appealed to Mr. Gilchrist, as it had a right to do. Gilchrist replied by the letter of October 23d, which we have already cited. In that letter, instead of insisting that the contract was determined, he referred the charterer back to Stanwood. This held the matter in suspense so far as Gilchrist was concerned, and it so remained until October 26th, when he wrote again, ending the relations between the parties. New charters were obtained immediately afterwards; so that the position of the district court that, as until then negotiations were pending, the charterer was justified in delaying accordingly, cannot justly be gainsaid.

A question was made by the claimant with reference to certain demurrage paid to one or more of the vessels which brought forward the coal, and which was included by the district court in its assessment of damages; but this has not been brought to our attention in such way that we are required to give it consideration, or as to enable us to dispose of it properly if we did.

Two questions peculiar to the admiralty remain to be considered, as to which we are clear that the learned judge of the district court was right in all particulars. In the proceedings concerning the *Watson* the libel was in rem against the vessel, joining also a claim in personam against the owner. The district judge dismissed the libel so far as the vessel was concerned, and retained it against the owner, compensating the vessel by a special allowance of costs. It is claimed that this was a misjoinder. It is not necessary for us to determine whether it was or not. The district court left the matter in practically the same form as though, on an exception being filed, the libelant had stricken out the claim against the vessel. In this particular the case is strictly in accordance with the result which was sustained in *Newell v. Norton*, 3 Wall. 257, 18 L. Ed. 271. In that case the libel was improperly filed against the vessel, master, owners, and pilot. On exceptions being taken, the libelant discontinued against the owners and the pilot, and a decree was entered against the vessel and master. On an appeal to the supreme court the decree was sustained, the only point being as to the effect of the original joinder of the owners and pilot. In the present case the record before us is in precisely the same form as though there had been a discontinuance in the district court against the barge, and a decree as in *Newell v. Norton*. When the final condition of the record is in accordance with the substantial rules of the law, neither admiralty nor equity looks at the intervening steps. This is clearly within the principles touching admiralty proceedings stated by us in *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 Fed. 669, 675, 676.

In this connection we have not deemed it necessary to determine whether the rules of admiralty as to joinder are so stringent as stated by Mr. Justice Story in several cases decided by him, because, in

view of what is said on this topic in Conklin's U. S. Admiralty Practice (2d Ed.) 37, and sequence, and in *The Corsair*, 145 U. S. 335, 342, 12 Sup. Ct. 949, 36 L. Ed. 727, where *Newell v. Norton* is restated, and especially in view of the subsequent rules of the supreme court permitting joinders, which Mr. Justice Story seemed to think were contrary to fundamental principles, we imagine that his position in this particular would not now be upheld in all respects. The question, however, so far as this case is concerned, is clearly disposed of by the circumstances which we have stated.

The libelant, however, claims that he had a lien on the *Watson*, and that for that reason the libel as against her should not have been dismissed. Also, in the proceeding against the *Sheldon*, which formed the basis of one of the appeals before us, the owner was not joined, so that the district court dismissed the libel absolutely; and against this the libelant appealed, claiming that it had a lien on that barge for the breach of the charter.

It is to be observed, first of all, that no complaint is made with regard to the cargoes which were laden aboard the barges. They were properly delivered. The only claim is for the breach of a contract, which, so far as the remaining three cargoes were concerned, was purely executory. It has now become a settled practice, where several vessels make up a line, for the managers to make contracts that goods shall go forward by one or any other of the vessels of the line, depending on the times of arrival and other contingencies. It seems an extraordinary position, heretofore unheard of, that all the vessels of such a line can be held in solido for the breach of such contracts so far as executory, even if parts of the cargoes contracted for had been sent forward. Yet this is necessarily the fundamental principle underlying the position of the libelant in the cases before us. To permit liens to be sustained as claimed by it in solido against sundry vessels, would be to go entirely beyond the purpose of the admiralty law in granting them.

The several vessels of a supposed line, and in this particular case, by analogy, the barges, so far as voyages not completed are concerned, are in no fault. The latter never entered into any contract, either expressly or by implication; but they well and truly performed such voyages as their owner directed them to perform. They should not be held liable for breaches of duty of merely their owners.

The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for, but not actually put aboard. *The Kiersage*, 2 Curt. 421, Fed. Cas. No. 7,762; *Par's Ship. & Adm.* (1869) 142, 143. It follows out the same principle that Mr. Justice Curtis states in *The Kiersage*,

2 Curt. 424, Fed. Cas. No. 7,762, that admiralty liens are *stricti juris*, and that they cannot be extended argumentatively, or by analogy or inference. He says, "They must be given by the law itself, and the case must be found described in the law."

One of the latest works on admiralty published in the United States, Henry's Admiralty Jurisdiction and Procedure, 180, without hesitation gives the rule as said by us. It has been stated in the opinions of the supreme court in a positive way by Mr. Justice Curtis in *The Freeman*, 18 How. 182, 188, 15 L. Ed. 341; by Mr. Justice Grier in *The Yankee Blade*, 19 How. 82, 90, 15 L. Ed. 554; by Mr. Justice Davis in *The Lady Franklin*, 8 Wall. 325, 329, 19 L. Ed. 455; and by Mr. Justice Davis again in *The Keokuk*, 9 Wall. 517, 519, 19 L. Ed. 744. It is claimed by the libellant that all the expressions in the cases cited are mere dicta. It is possible that all four might have been decided without any reference to the rule which we have stated. It is certainly true that *The Freeman* and *The Keokuk* might have been rested on the same ground as *Refining Co. v. Maddock*, 36 C. C. A. 42, 93 Fed. 980, 982. Both were cases where bills of lading were given for cargo never received by the vessel, and, of course, they could have been rested on the mere proposition that it is settled law that the master of a vessel has no authority to give a bill of lading for cargo which he has not received, and that that is known to the commercial public, so that all parties dealing with bills of lading, even though innocent, take them subject to that known limitation. Nevertheless, the opinions cited did not see fit thus to rest the cases, but put them on the broader rule which we have stated.

In conclusion, we may add that expressions may be found in opinions, which, although not necessary to the results reached, must be accepted as statements of learned judges of the settled rules of law. Some of the particular expressions referred to are positive; and, independently of our own knowledge of the rules of law, and the reasoning which leads up to them, we would not be justified in rejecting such unqualified statements as we find from such eminent and experienced admiralty lawyers as Mr. Justice Curtis, Mr. Justice Grier, and Mr. Justice Davis.

Following our general rules with reference to the weight to be given to decisions of the circuit courts of appeals in other circuits, we might have reached the same conclusion by accepting that of the circuit court of appeals for the Ninth circuit in *The Eugene*, 31 C. C. A. 345, 87 Fed. 1001, the circumstances of which are more fully reported under the same title in (D. C.) 83 Fed. 222.

It is true that in the various cases cited no reference is made to the fact, if it ever existed, that there was a single contract for several voyages, and that one or more of the vessels proceeded against had in fact performed one or more voyages contracted for. However, the rules of law which we have stated demonstrate that this distinction is unsubstantial. It is enough, as to that, to restate what we have already said,—that to permit liens such as are now claimed would go beyond the necessities of the admiralty law, would extend liens in violation of the principles stated by Mr. Justice Curtis in *The*

Kiersage, and would assess damages against a vessel not a party to a contract for a particular voyage either directly or by partial execution of that voyage. As to the latter proposition, we may well add that while, so far as the charterer and the owner of the barges were concerned, the charter was continuous, yet the vessels, being inanimate, could not, by the very nature of things, enter into a strictly executory contract. Each of them could be subjected to such duties only as might arise by implication of law from the circumstances of a voyage, or other concrete act, on which it had in fact entered; and therefore, as to them, each of the several voyages was logically independent and single.

Several of the questions covered by this opinion are discussed in a very careful and interesting manner by Judge Addison Brown in *The Monte A* (D. C.) 12 Fed. 331, and his opinion in that case will well repay examination.

In No. 431 and No. 432, appeals relating to the barge *S. L. Watson*, the judgment is that the decree of the district court is modified in accordance with the opinion passed down this day, and the case is remanded to that court, with directions to proceed in accordance with that opinion; and the costs of appeal are awarded to the claimant.

In No. 433, relating to the barge *Thomas P. Sheldon*, the decree of the district court is affirmed, and the costs of appeal are awarded to the claimant.

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#### THE FLOTTBEK.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 826.

1. ADMIRALTY—APPEAL—QUESTIONS REVIEWABLE.

Objection to awards made for salvage services to the officers and crew of the salvaging vessel on the ground that they were not made parties to the libels cannot be raised for the first time in the appellate court.

2. SAME—SALVAGE SUIT—PARTIES.

According to the prevailing practice in admiralty, the owners of a vessel may maintain a suit for salvage services rendered on their own behalf and on behalf of the master, officers, and crew, and it is not essential that the names of the officers and crew should be stated in the libel, but they may be identified by evidence at any time before the award made is distributed.

3. SALVAGE—SERVICES ENTITLED TO COMPENSATION.

A steamship which went to the rescue of a distressed ship in response to her signals, and, after attempts to take her in tow proved unsuccessful, because of the breaking of the towline, proceeded to a port, and dispatched word to a tug company for relief, also at the request of the master of the imperiled ship, is entitled to a salvage award for her services, as are also her officers and crew, in so far as they contributed to the final rescue.

4. SAME.

The officers and crew of a tugboat, which started with another to the rescue of an imperiled ship, in response to her request for assistance,

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¶ 4. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

but encountered sea perils which disabled her and compelled her return, so that she did not actually take part in the rescue, are entitled to a salvage award proportionate to their services and the risk to which they were exposed.

5. SAME—CONTRACT FOR TOWAGE SERVICES.

A contract by which a tugboat company agreed to perform all towage services that might be required by any of the vessels of a shipowner in the waters of the straits of Juan de Fuca, Puget Sound, British Columbia, or vicinity, at stipulated prices, did not cover salvage services rendered in the rescue of a ship of such owner from a place of danger outside the straits, and the towing of such ship to a safe port inside the sound.

6. SAME—NATURE OF SERVICE—PERIL OF RESCUED SHIP.

A sailing ship lay for two days and nights within a few hundred feet of rocks along the coast, during stormy weather and heavy seas, being held only by her anchors. On the second day the mate and half the crew abandoned her, and made a dangerous passage to the land in a lifeboat. On the following morning, when libellant's tugs came to her rescue, the wind had abated, but the sea was still high. The ship's distress signals were still up, and no objection was made to the assistance of the tugs, which was rendered at considerable peril in passing the lines, owing to the heavy seas. The ship also slipped her anchors, losing both anchors and chains, of the value of over \$5,000, rather than take the few hours' time which would have been required to save them. *Held*, that a finding that the ship, when rescued, was in a position of great peril, was supported by the evidence.

7. SAME—EXCESSIVE AWARD—REVIEW BY APPELLATE COURT.

Awards made for salvage services in the rescue of a ship considered by the appellate court, and, under all the evidence, *held* excessive, and reduced.

Appeal from the District Court of the United States for the District of Washington.

In the court below there were two independent libels against the German ship Flottbek,—one by the Saginaw Steel Steamship Company, as the owner of the steamship Matteawan, and on behalf of her officers and crew; the other by the Puget Sound Tugboat Company, as owner of the tugs Wanderer, Tacoma, and Holyoke; and on behalf of their officers and crew, for salvage services. These two actions were, by stipulation of counsel and order of the court, consolidated for the purpose of taking testimony, trial, and entry of a final decree, but the interests of the libellants remain separate and distinct, and have been separately presented to this court in oral argument and by briefs. All of the testimony at the trial court was taken before commissioners. After the appeal was taken, this court gave permission to have further testimony taken as to the employment of certain named persons on the tugs owned by the tugboat company. The court, upon consideration of all the facts, awarded salvage to the owner of the steamship Matteawan, \$6,000, and to her captain, officers, and crew \$3,830; to the Puget Sound Tugboat Company, \$8,000; to the captain, officers, and crew, \$5,000,—making a total of \$22,830, with interest at the rate of 6 per cent. per annum and costs. A general statement of the facts, applicable to both actions, was made in the court below, which is here adopted for the purpose of giving a general and correct history of the case: "By reason of the absence of the government lightship from her station at Umatilla Reef on the night of January 13, 1901, the German ship Flottbek, bound from Yokohama to Puget Sound, sailed into dangerous proximity to the rocks and reefs on the coast south of Cape Flattery. When land was sighted, all hands were immediately called, the yards were braced, and every possible effort made to change the course of the ship, but just at the critical moment the wind entirely subsided, so that the vessel became helpless, with the sea driving her inshore. Then both anchors were dropped in 25 fathoms of water. Almost immediately after coming to anchor, the wind came

strong from the west, and soon increased to a gale, which continued until the evening of January 15th. It is impossible to determine from the evidence whether the vessel actually dragged her anchor at any time. Her captain admits that she might have drifted a little; but this is certain: if she did not drag, then the anchors were not dropped a moment too soon, for when she was finally rescued on the morning of the 16th the distance between her stern and White Rock was less than 500 feet, and she was in a position between White Rock and a reef, on which the sea was breaking. During the entire interval from 1 o'clock a. m. of the 14th until 9 o'clock a. m. of the 16th the sea was tempestuous, and the Flottbek was saved from destruction only by her anchors. The usual signals of distress were given and displayed, and soon after daylight on the 14th the steamship Matteawan, a large vessel, worth \$350,000, owned by the Saginaw Steel Steamship Company, bound from San Francisco to Tacoma, responded to the call for help conveyed by the signals, and upon request of the captain of the Flottbek attempted to take her in tow. In the raging storm several hours were spent maneuvering to take a towline from one ship to the other. During this time the Matteawan was at anchor, and her violent surging on her cable broke and destroyed her windlass, and disabled her to such an extent that she was obliged to sacrifice the anchor and chain, having no means to raise it. In view of their situation, the men on the Flottbek ought to have performed the labor and encountered the risks of carrying a line from their ship to the steamer. They did so in the first instance, but the line broke, and then one of the Matteawan's boats was launched and manned by her second officer and three others of her crew, who buffeted with the waves until a second line was passed, which was used to draw the towline from the ship to the steamer. The boat was liable to be capsized by the high rolling waves. \* \* \* The Flottbek's towline was finally secured on the steamer, but, before any strain had been put on it other than the violent dashing of the waves, it parted. The captain of the Matteawan, then seeing that he could not rescue the Flottbek nor remain where she was without endangering his own vessel, signified that it was necessary for him to go on his way, and was thereupon requested by the captain of the Flottbek to report his position and send relief, and the Matteawan did hasten as a dispatch boat to call relief, consuming in that service an extra amount of coal. She arrived at Neah Bay after dark, and spent some time there, giving an alarm by signals which resulted in a message being telegraphed to the Puget Sound Tugboat Company at Seattle. Accurate information as to the location of the Flottbek was also communicated to the Puget Sound Tugboat Company by giving the information to the company's steamer Magic, which met the Matteawan in the straits of Juan de Fuca, and finally, on arrival at Tacoma, the captain of the Matteawan sent full information to the tugboat company and to the Merchants' Exchange at Seattle and San Francisco. \* \* \* In less than one hour after receiving the message from Neah Bay on the night of the 14th, the steamtug Richard Holyoke was dispatched from Seattle. On her way to the cape she met the Wanderer, owned by the same company, and the two proceeded together towards the cape, and actually encountered heavy seas at the entrance to the straits; but the machinery of the Holyoke became disabled, and both returned to Neah Bay. The steamtug Tacoma, towing a ship down the straits, also received orders to go to the rescue of the Flottbek, and at once took the ship into Callam Bay, and left her at anchor, and then proceeded to Neah Bay, where she met the Wanderer, and the two waited there during the night of the 15th, and when daylight came on the morning of the 16th they proceeded together, and arrived in the vicinity of the Flottbek between 8:30 and 9 o'clock a. m. At that time there was very little wind, but the waves were rolling high, washing over the decks of the tugboat, making it extremely difficult for men to stand up on the deck, or to do the work necessary in taking a ship in tow, and the Flottbek was rolling and surging heavily on her cables. In spite of all difficulties, a towline was promptly and skillfully passed from each of the tugs, and the Flottbek slipped her cables, sacrificing two anchors and about 195 fathoms of chain, and was towed by the two tugs to a place of safety within the straits, when the

Tacoma was detached, and the towage was finished by the Wanderer to Tacoma. On the 15th, while the storm was still raging, and with no help in sight, the men on the Flottbek considered that the extreme danger of their situation justified them in taking to the boats and abandoning the ship. Accordingly the first mate and half the crew left the ship in a boat, and effected a landing on the beach, and then gave a signal agreed upon, signifying that they had succeeded in getting ashore without any of the men being drowned. By that time the storm had commenced to abate, and the captain determined that he would not leave the vessel, and upon making that announcement those who were still in the ship decided to remain with him. During the night the wind fell to a light breeze, and hauled around to the east, and on the morning of the 16th, before the Tacoma and the Wanderer came in sight, the captain and men on the Flottbek indulged hopes of being able to get their ship away with the help of the offshore breeze, but they had not taken any steps to do so, and the distress signals were still displayed when the tugboats arrived." The Flottbek (D. C.) 112 Fed. 682. Other facts will be mentioned in the opinion whenever necessary to meet the contentions of the respective parties.

There are in the record 21 assignments of error. These are reduced to 11 in the brief of appellant. The points to be discussed under these assignments may be classified under the following heads: (1) Did the court err in holding that the Matteawan, owned by the Saginaw Steel Steamship Company, its master, officers, and crew, were entitled to any salvage reward? (2) Did the court err in awarding salvage compensation to the Puget Sound Tugboat Company for the services performed by the tugboat Richard Holyoke? (3) Did the court err in holding that the services of the tugboats Wanderer and Tacoma were not governed by the contract of the owners of the Flottbek with the Puget Sound Tugboat Company? (4) Did the court err in holding that the Flottbek, when taken in tow by the Wanderer and Tacoma, was in a position of great danger or peril? (5) Were the awards allowed by the court in favor of each of the libelants herein, its officers and crews, excessive?

Williams, Wood & Linthicum, J. C. Flanders, J. M. Ashton, and W. L. Sachse, for appellant.

Struve, Allen, Hughes & McMicken, for appellee Puget Sound Tugboat Co.

Metcalf & Jurey, for appellee Saginaw Steel Steamship Company and master and crew of the Matteawan.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The essential ingredients to be considered by the courts in determining the amount of the award that should be decreed in cases of this general character for salvage services is clearly expressed by Justice Clifford in *The Blackwall*, 10 Wall. 1, 14, 19 L. Ed. 870, as follows: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued. *The Mary E. Dana* (D. C.) 17 Fed. 353, 357; *The Queen of the Pacific* (D. C.) 21 Fed. 459, 472.



The Matteawan was of the value of \$300,000. The tugs were of the value of \$40,000 each. The Flottbek was of the value of \$60,000. There are certain preliminary objections raised by appellant to the right of certain of the parties, to whom awards were made, to maintain the suit, or to recover any salvage whatever, which will be first disposed of.

1. Appellant contends that the officers and crews of the Matteawan and of the tugboats are not entitled to any award whatever because they were not made parties to the libels brought by the owners of the Matteawan in the one case and the owners of the tugboats in the other; that they never intervened therein, or in any manner ratified the acts of the respective libelants, and that their claims to salvage are not supported by any proper allegations in the libels or by proofs. None of these objections were made in the court below, as they should have been if there was any merit in them, because, if timely suggestions had been made, they could easily have been remedied; and we are of opinion that, not having been made in the court below, they ought not to be considered for the first time in this court. The Commander in Chief, 1 Wall. 44, 52, 17 L. Ed. 609. But the objections are without any merit whatever. The record shows that both libels were brought by the owners "and on behalf of the master, officers, and crew," and in this respect the libelants followed a practice which prevails in admiralty. There is no pretense that any of the men to whom awards were given were not officers or members of the crew of the ship or the tugboats. It would doubtless have been better to have mentioned all the names of the officers and crew. It would at least have obviated the objections here made. But the object of naming them is simply to bring them before the court, so that it will know the names of the officers and crew entitled to an award. This was done in the present case by the evidence. The tugboat company, after the case was tried in the court below, evidently anticipating that objections might be made to the manner of proof on this point, took additional evidence by leave of this court, and Capt. J. B. Lilly, the manager of the tugboat company, who employed all the men on the tugs, gave the names of all the officers and crews employed on the respective tugs. But even if the names did not appear, the court would have had the power to award a specific sum for their services, and retain the money in court, until proper steps were taken to ascertain their names. In *The Blackwall*, supra, the court said:

"Salvage suits are frequently promoted by the master alone, in behalf of himself and the owners and crew, or in behalf of the owners and crew, or the owners alone, without making any claim in his own behalf, and the practice has never led to any practical difficulty, as the whole subject, in case of controversy, is within the control of the court. \* \* \* Cases may also be found where co-salvors, who neglected to appear and become parties to the suit until the decree was pronounced, were allowed to petition the court for such compensation out of the fund in the registry of the court, and where their claim received a favorable adjudication."

See, also, *The Adirondack* (D. C.) 2 Fed. 872; *The Leipsic* (D. C.) 5 Fed. 109, 112; Ben. Adm. (3d Ed.) § 384.

2. It is claimed by appellant that the award to the Matteawan

should have been based only upon the value of the services actually rendered by her in reporting the position of the Flottbek to the Puget Sound Tugboat Company, and that the court erred in considering the services rendered by it, its officers and crew, in their unsuccessful attempt to tow the Flottbek. The court, in the course of its opinion, said:

"The owner of the Matteawan is entitled to be compensated for the injury resulting to that vessel from efforts in behalf of the imperiled ship in response to the direct request of her captain."

We do not understand appellant to deny this proposition. It was stipulated by the respective parties that "\$2,512.46 is the actual damage to the said steamship Matteawan happening by reason of the efforts of the said steamer to save the said ship Flottbek," on the 14th day of January, 1901. This would leave about \$3,500 that was awarded to the Matteawan for salvage services. It has frequently been said that success is an essential element of salvage service, and its absence fatal to a claim for salvage compensation. As a general rule, this is true. But there are certain exceptions to this rule. Much depends upon the peculiar facts of every particular case. In determining the point at issue, we shall endeavor to confine ourselves to the undisputed facts of the present case. There is no pretense that the Matteawan at any time ever abandoned its efforts to relieve the Flottbek, and it must be kept in mind that her services in going to the Flottbek and in leaving that ship to signal for aid were performed at the special request of the Flottbek, and, in so far as these services resulted, in connection with the efforts of the tugs owned by the Puget Sound Tugboat Company, in rescuing the Flottbek from its peril the Matteawan, its officers and crew, independent of and in addition to the compensation of the ship for repairs, are entitled to salvage services. Among the recognized elements of salvage services is the "taking aid to a distressed ship, or information for her to port," and "standing by a distressed ship." Hughes, Adm. 127, 128; The Undaunted, Lush. 90; Allen v. Canada, Bee, 90, Fed. Cas. No. 219; The New Orleans (C. C.) 23 Fed. 909. Salvors are more than common laborers, and their reward is of a character essentially different from wages. Salvage is decreed by courts of admiralty as a reward for services successfully rendered in saving property from maritime damage, not on the principle of a quantum meruit, or as compensatory remuneration, but as a reward for perilous services, and as an inducement to seamen and others to readily engage in such undertakings and assist in saving life and property. Danger, peril, and a successful deliverance therefrom either by voluntary effort, special request of, or by contract with the owner, constitutes a case of salvage, whether rendered by one or more salvors. Each salvor that renders a meritorious service directly aiding in the rescue and saving of the property is entitled to a salvage award. The Island City, 1 Cliff. 210, Fed. Cas. No. 55; Id., 1 Black, U. S. 121, 17 L. Ed. 70; The Fanny Brown (D. C.) 30 Fed. 215, 220, and authorities there cited; The Jewel (D. C.) 41 Fed. 103; The Strathnevis (D. C.) 76 Fed. 855, 862, and authorities there cited;

The Sabine, 101 U. S. 384, 387; 25 L. Ed. 982. In this connection it is claimed that the officers and crew of the tugboat Holyoke are not entitled to any salvage award. The Holyoke never reached the Flottbek. The services performed by its officers and crew were very slight, but, in view of the conclusions just reached as to the Matteawan, and the authorities cited, we are not prepared to say that the services rendered by them did not entitle them to any salvage award.

3. The court did not err in holding that the Puget Sound Tugboat Company was not estopped from claiming any salvage award by reason of its contract with the owners of the Flottbek to tow its ships. This contract reads as follows:

"The party of the first part agrees to tow with reasonable and quick dispatch all the vessels owned and controlled by parties of the second part that may be in the waters of Straits of Juan de Fuca, Puget Sound, British Columbia, or vicinity, whether inside or outside of Cape Flattery, and that may require any towage service during the continuance of this agreement, at the rates specified below."

There is a marked and clear distinction between a towage and a salvage service. When a tug is called or taken by a sound vessel as a mere means of saving time, or from considerations of convenience, the service is classed as towage; but if the vessel is disabled, and in need of assistance, it is a salvage service. In cases of simple towage, only a reasonable compensation is allowed, as upon a quantum meruit. In case of salvage, the award is upon a broader and more liberal scale, as we have before stated. In *McConnochie v. Kerr* (D. C.) 9 Fed. 50, 53, Judge Brown said:

"A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger."

The authorities upon this subject are quite numerous. Many of them are cited in *The J. C. Pfluger* (D. C.) 109 Fed. 93, 95, and in *Hughes*, Adm. § 57. See, also, the *Veendam* (D. C.) 46 Fed. 489, 491.

Applying this distinction to the case at bar, it is manifest that the contract between the parties does not, and was not intended to, include the character of salvage service rendered by the tugs of the tugboat company to the Flottbek under the circumstances and conditions established by the evidence in the present case. In construing contracts we must search for the intention of the parties at the time the contract was made. The contract in question, by its plain language and clear import, was evidently understood and intended by both parties to cover only towage services pure and simple, no other. In addition to the portion of the contract above quoted, there is a provision therein whereby the shipowners "agree to employ exclusively the tugs under the management of said party of the first part as long as said party performs the services with reasonable dispatch." And it is further provided "that if, at any time during the terms of this agreement, the party of the first part shall sign a contract with shipowners establishing rates of towage less than

herein specified, then this contract shall be so modified that the said parties of the second part hereto shall be required to pay thereafter for towage service only at the lesser rate agreed to in such last-named contract." Then follows the rate of towage services from and to the points therein specified. And these rates, as well as other portions of the contract, clearly indicate that they were not intended to cover services of the character rendered by the tugs of the tugboat company in releasing the Flottbek from the risks and dangers she was in and towing her to a port of safety.

4. It is contended by appellant that the court erred in finding that the Flottbek, when taken in tow by the tugs Wanderer and Tacoma, was in a position of great peril and danger. This point is argued with much earnestness on the part of appellant. The question is one of great importance. The greater the peril, the greater the award; less danger, less compensation. We do not understand appellant to deny that the Flottbek was, on the evening of the 13th and on the 14th and 15th days of January, 1901, in a perilous position, in great need of help and assistance. This is clearly shown by all the testimony beyond any controversy or conflict. The disputed conditions relate to the night of the 15th and morning of the 16th of January. The records at Neah Bay kept by the observer of the weather bureau show the velocity of the wind and conditions of the barometer at that point. At 5 a. m. on the 14th the barometer rating was 29.645; the direction of the wind was southwest, 10 miles per hour. In the afternoon of that day the barometer rating was 29.955; direction and velocity of the wind was west, 12 miles; maximum velocity, 32 miles from the west. The morning of the 15th, barometer 30.163; direction of wind, southwest; velocity, 9 miles; maximum velocity during the preceding 12 hours, 30 miles from the southwest. P. M. of the 15th, barometer 30.198; direction of the wind west, 15 miles; maximum velocity, 28 miles from the west. A. M. of the 16th, barometer 30.482; velocity and direction was calm; maximum velocity and direction 17 miles from the west. P. M. of the 16th, barometer 30.503; velocity and direction was calm; maximum velocity, 6 miles from the east. The observer stated that Cape Flattery had a higher velocity of wind than Neah Bay; that Neah Bay is much more sheltered. The contention of appellant is that these conditions would have enabled the Flottbek—that had remained for over 48 hours in the roughest portion of the weather without any special injury to herself—to have sailed away without assistance, and it was the intention so to do when the tugs arrived on the morning of the 16th. Capt. Schoemaker, master of the Flottbek, testified that during the night of the 15th "the ship was all right; there was no danger at all"; that on the morning of the 16th he told the men there was a little breeze, and that he thought there would be breeze enough to sail off; that there was an offshore breeze from the east; the men said, "If we had a little more breeze, we could do it, we could slip our chains;" and at daylight we made everything ready so we could slip the chains at short notice, and then I said we should take breakfast, and we would put sail on and sail her off;" that after breakfast, about 8 o'clock, the tugs came in sight; that the crew

of one of them took some photos of the ship; "they gave us their ropes; we let go our cables, and they towed us through the straits of San Juan de Fuca;" "when they got the hawsers tight, we immediately let go chains, and went out to sea." About 20 minutes after the tugs came alongside of the Flottbek, everything was ready. After testifying that there was "a little water on deck when the Matteawan was there," the following questions and answers were given:

"How was it the afternoon of the 15th, or night of the 15th and the morning of the 16th? A. Then I don't think there was any water on board. Q. She was rolling? A. Yes, sir. Q. Was she pulling at her anchors? A. No, the anchors were slack. Q. The anchors were slack when? A. All the night \* \* \* from the 15th to the 16th. Q. How were they the morning of the 16th, when the tugs came alongside? A. They were hanging right up and down. Q. At the time the tug was made fast, was there any danger to your ship or your crew from the rolling of the vessel? A. Well, no, not actual danger then, I think. Every movement of the ship can make an accident. Q. Were any of your crew hurt, as a matter of fact, while your ship was lying at anchor in that position? A. No, sir. Q. You may state, captain, whether or not your vessel sustained any injury in any part by the pulling while she lay there at anchor. A. No, sir; there was no injury to the vessel, except a little to the windlass. Q. When did the windlass receive that injury? A. Little by little; on this morning some, and the next morning also some, when the gale was blowing. Q. When you slipped your cable, did anything break aboard your ship? A. Yes, sir; the chain stoppers broke. Q. You lost both anchors? A. Yes, sir. Q. How much chain did you lose? A. About 195 fathoms of chain. Q. Did you undergo any other repairs here in Tacoma other than the cables and the chains and anchors? A. Well, hardly any repairs; a little bit to the windlass, that is all. Q. You lost your towrope, you say? A. Yes, sir. Q. Did you lose any other rope? A. Yes, sir; a great many other ropes. I think about a dozen coils. Q. Any blocks? A. Yes, sir; a great many blocks, as well. Q. How much, captain, was the cost of replacing to the ship these items which you have mentioned? A. About \$7,000, that I lost."

The testimony of several members of the crew of the Flottbek corroborated the foregoing testimony of the master. Mr. Williams, the mate of the tug Tacoma, among other things, testified as follows:

"Q. Well, was there any difficulty in paying out your hawser? A. Well, it was dangerous on account of the water coming over us all the time. We would be down on our hands and knees and taking hold on the rope. It was pretty dangerous for the men to be around the deck. Q. Who attended to paying out the line? A. Myself and the other two men, and there was one man at the wheel. \* \* \* Q. On account of the seas, was your tugboat able to hold its position, or did it back the fill? A. He held the position there. He would have to work the wheel all the time backwards and forwards to turn her around,—to get her around so as to head the seas, and to try to keep her heading on to the sea. Q. What was your duty in paying out the hawser? A. To see that it would not get foul of the wheel, and to see that everything was all clear. \* \* \* Q. You say the seas were washing over you while you were there? A. The seas were washing over us all the time. Q. How did you manage to hold fast? A. We would get right down on our face and hands on the grating. \* \* \* Q. Did you get your hawser made fast, and get it all out before the Wanderer did? A. No, sir; not all of it. The captain gave me orders to shackle the other hawser on it because the sea was so heavy we daren't pull on the one rope. I didn't pay much attention to the Wanderer, because I had enough to do to look after our own rope."

Substantially the same testimony was given by Nelson, the mate of the Wanderer.

In connection with all of this testimony it must be remembered that the Flottbek, on the morning of the 16th, only had one-half of its regular crew present. The master upon this point gave the following testimony:

"Q. Now, you say that the first officer, with eleven men, left the ship? A. Yes, sir. Q. And they would rather risk their lives, you state, to get ashore, than to stay with the ship and run their chances? A. Yes, sir. Q. Of being lost with her? A. It was a poor thing to be in sight of a lighthouse and no steamers coming there. Q. They would risk their lives to take the boat and go ashore? A. Yes, sir. Q. And they did that because they were so much afraid on the ship; that is it, wasn't it? A. Well, in a gale of wind there was danger. Q. I say that is why they left,—they were afraid of their lives on the ship? A. Yes, sir. Q. And the first officer left you with eleven men? A. Yes, sir. Q. You had no officer left with you,—just yourself and twelve men? A. That is right."

The master, after his safe arrival at Tacoma, entered in his logbook the following:

"January 15th. Heavy gale from southwest, with very much strain on the chains. The tackles didn't always hold, and had to be replaced. No assistance in sight. The crew wished hard to leave the ship with the first moderate weather, because behind the reef astern of the ship was to be seen from aloft a place where possibly a boat could land. It was thought better to try at least to land than to stay on board, where there was certain destruction if no assistance arrived."

There is considerable conflict in the testimony as to how close the Flottbek was to the rock; some of the witnesses placing it from one-fourth to one-half mile. The court found that when the tugs arrived upon the scene the stern of the Flottbek was towards White Rock, and distant not more than 500 feet. This finding is supported by the testimony of the officers and crew of the tugs and by the photos taken from one of the tugs, and, without entering into all the details upon this point, we are of opinion that the finding of the court is fully sustained by the preponderance of the evidence. The position of the Flottbek was constantly changing more or less. In this connection the peril of the ship and its situation on the afternoon of the 15th of January is shown by the testimony of the mate of the Flottbek when he, with 11 members of the crew, without objection of the master, abandoned the ship, and by means of a lifeboat left for the shore:

"Q. And when you left her, you left her because you thought you would be safer in risking your life to get on shore than to stay on the ship? A. Yes, sir. Q. Now, this was a very dangerous trip that you took in your small boat, too, wasn't it? A. Yes, sir; it was. Q. The lives of yourself and the men were in constant danger from the time you left the Flottbek until you reached the shore? A. Yes, sir. Q. As you passed along these reefs you could almost put your hands out and touch the rocks? A. Sometimes we touched the rocks with the oars. Q. And the sea was rolling heavily at the time? A. Yes, sir. Q. If that boat had struck any one of these rocks, you would have all gone down? A. Yes, sir. Q. You and these men that left with you preferred to risk your lives in going to the shore than to stay on the ship? A. Yes, sir; that is what we did. Q. You felt that staying on the ship was putting your lives in peril every moment? A. Yes, sir."

While the master of the Flottbek testified that "there was no danger at all" on the night of the 15th of January, he admits that he or

some of the crew were on deck during the entire night, constantly displaying signals for assistance. "Q. You say you kept putting up signals of distress? A. Yes. Q. You meant something by that, didn't you? A. Yes, we wanted a tug steamer."

In the light of all the testimony it seems to us apparent that the master, his officers and crew, considered the Flottbek in peril on the morning of the 16th of January. This is shown by at least three of the undisputed facts: (1) When the tugs arrived upon the scene, her distress flags were still flying,—“fluttering in the breeze,”—and remained until the ship was rescued by the tugs. (2) No objections were made to the services of the tugs. The master willingly accepted their aid. He did not tell the tugs that he was in no peril, and could safely sail his ship. (3) The master and crew were not anxious to remain, and take their chances of getting away from the breakers and the rock, because, notwithstanding the “calm weather” testified to by the master, just as soon as the tugs made fast their hawser, he slipped his cables, and abandoned both his anchors and chains, of the value of over \$5,000, in order, as he stated, to save time. It would not have taken more than a few hours, or half a day at furthest, to save this property; but no such suggestion was made. Is it not apparent that he left because he considered there was danger to remain? Do not his actions at the time speak more strongly than his words, uttered long after all danger was over?

5. This brings us to the main question, were the awards in the present case excessive? In the light of the principles already decided, but little more need be said on this question. It is one that appeals to the conscience, the common sense, sound judgment, and legal discretion of the court. It is no easy task to arbitrate this vexed question. The *nisi prius* courts are sometimes in favor of high awards,—too high, in fact; while others lean strongly in favor of low awards,—too low, in fact. The question being one that rests largely within the discretion of the trial judge, the appellate courts are loth to interfere. Hence it is that the books are full of cases where decrees have been sustained in the one case deemed too small and in the other where it seemed too large.

In *The Baker* (C. C.) 25 Fed. 771, 773, the court said:

“The allowance of salvage is necessarily largely a matter of discretion, which cannot be determined with precision by the application of exact rules. Different minds, in the exercise of independent judgment upon the same evidence, seldom coincide exactly in their views of the facts, or give the same prominence to the varied elements which make up the case. An approximate concurrence is all that can be expected. For this reason appellate courts are not disposed to interfere with decrees in salvage cases merely because the sum allowed the salvors is larger than the appellate court would have allowed.”

In *Simpson v. Dollar*, 48 C. C. A. 663, 109 Fed. 814, 816, this court said:

“No exact criterion can be found for estimating the amount of salvage in any case. The judgments of courts must necessarily differ as to the precise amount to be allowed under given circumstances. Where there has been no mistake in fact, or application of an unwarranted rule of compensation in arriving at the award, and the amount allowed cannot be clearly

seen to be inappropriate, the courts on appeal have been reluctant to disturb the decision of the trial court. *The Bay of Naples*, 1 C. C. A. 81, 48 Fed. 737; *The Amity*, 16 C. C. A. 170, 69 Fed. 110; *The George W. Clyde*, 30 C. C. A. 292, 86 Fed. 665; *The Trefusis*, 39 C. C. A. 96, 98 Fed. 314; *The Emulous*, 1 Sumn. 214, Fed. Cas. No. 4,480."

But the appellate courts are the final arbiters, and it is their duty to decide the question fearlessly and impartially, with an eye single to reach the ends of justice. *The Sirius*, 6 C. C. A. 614, 57 Fed. 851; *The Elmbank*, 16 C. C. A. 164, 69 Fed. 104, 109; *The Haxby*, 28 C. C. A. 33, 83 Fed. 715; *The Brandywine*, 31 C. C. A. 187, 87 Fed. 652; *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.*, 36 C. C. A. 201, 94 Fed. 214, 219; *The New Camelia*, 44 C. C. A. 642, 105 Fed. 637. That the awards in the present case are high must be conceded. Recognizing the meritorious services performed by the salvors, the peril they were in, at least during a portion of the time in the performance of their services, and the conditions, peril, and circumstances that surrounded the *Flottbek*, were the awards excessive? Taking into consideration all the rules upon this subject, and guided by all the lights furnished by the evidence, our conclusion is that the awards were excessive, and should be reduced. This conclusion does not, however, call for the reversal of the decree. The decree will be modified by reducing the award to the *Matteawan*, its officers and crew, one-third; to the *Puget Sound Tugboat Company* and the officers and crews of the tugboats *Tacoma* and *Wanderer*, one-third; and the officers and crew of the *Holyoke* one-half. Each party to pay its own costs upon appeal.

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**COMPUTING SCALE CO. v. STANDARD COMPUTING SCALE CO.,  
Limited.**

(Circuit Court of Appeals, Sixth Circuit. November 5, 1902.)

No. 1,064.

**1. TRADE-MARKS—DESCRIPTIVE WORDS—"COMPUTING" SCALES.**

The word "computing," as applied to the class of scales which, in addition to weighing, indicate the price of the article weighed, is aptly descriptive of such function, and cannot be appropriated by one manufacturer as a trade-mark for his own product, to the exclusion of other makers, of whose scales it is equally descriptive.

**2. SAME—"STANDARD."**

The word "standard," as applied to scales, is descriptive, and cannot be appropriated as an exclusive trade-mark to designate a scale of a particular make, either alone or in connection with the word "computing."

**3. UNFAIR COMPETITION—GROUNDS FOR RELIEF.**

In the absence of evidence showing that the words "standard" or "computing," as applied to scales, either singly or together, have acquired a secondary meaning in the trade, as indicating a scale made or sold by complainant, it is not entitled to enjoin their use by another manufacturer or dealer, as constituting unfair competition, unless it ap-

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¶ 1. Arbitrary, descriptive or fictitious character of trade-marks and trade-names, see note to *Searle & Hereth Co. v. Warner*, 50 C. C. A. 323.

¶ 3. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.



appears that they are used by defendant in such manner as to show a purpose to deceive purchasers into buying its scales for those of complainant.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is a bill seeking to restrain an alleged infringement of a common-law trade-mark, and for the purpose of restraining unfair competition. The complainant is a corporation organized under the laws of Ohio, and bears the corporate name of the Computing Scale Company. It was incorporated in 1891, and its factory is in Dayton, Ohio. The defendant is a corporation of the state of Michigan, organized in 1899, and is doing business in Detroit under the corporate name of the Standard Computing Scale Company, Limited. Both companies are engaged in making a class of scales which, in addition to weighing, indicate the price of the thing weighed, and are commonly and generally known as "computing scales." The complainant claims that it and its predecessors in business have been the pioneers in the business, and have created a large market for such scales, and that its predecessor adopted the name "computing" as a fanciful name, not descriptive of the article, but pointing out the origin or maker of the scale, and that, for further indicating the manufacturer, complainant adopted the word "standard," and has since used both words as trade-names, and that it has, by long prior use, acquired an exclusive right to the use of both said words as valid trade-marks. It further claims that, if it has not a technical trade-mark in said names, those words have acquired a secondary meaning which does point to complainant as the maker of computing standard scales. The bill charges that the defendant not only makes a scale which in form is needlessly made to resemble the scale made by complainant, and therefore intended to deceive the public into buying its scale as a scale made by complainant, but that it has also adopted complainant's trade-names, and is fraudulently calling its scale "Standard Computing Scales," with the purpose of misleading and deceiving the purchasers into the belief that its scale is the scale made and sold by complainant. The answer put in issue every averment of fraud or deceit, and denied that complainant has any valid trade-mark in the name "computing" or "standard," or that those names have come to stand for or indicate any particular manufacturer. Much proof was taken. Upon final hearing, relief was denied upon both aspects of the bill. From the decree dismissing the bill, the complainant company has appealed.

Archibald Cox, for appellant.

Charles H. Fisk, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The relief prayed by the complainant is sought upon two grounds: First, violation of a specific common-law trade-mark in the words "computing" and "standard," whether used separately or together; second, unfair competition, irrespective of any technical trade-mark, resulting from the use of the words "computing" and "standard" by the defendant company as a means of misleading or deceiving the public into the purchase of the scale made by the defendant as the scale manufactured by the complainant.

Treating these questions in their order, we have first to find whether the complainant company has acquired an exclusive right to the use of the word "computing" as a technical common-law trade-mark. Now, a trade-mark may consist in any symbol, sign, word, or form of words. But it was forcefully said by Chief Justice Fuller in *Elgin*

Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 673, 21 Sup. Ct. 270, 273, 45 L. Ed. 365, that:

"As its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark, which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose."

The primary meaning of "computing" is calculating, numbering, counting, or estimating. Complainants say that "computing" implies an intellectual operation, and that as a scale cannot think, calculate, or compute, the term, when applied to weighing scales or balances, has no such meaning, and is therefore wholly without any descriptive significance. On this assumption, it has been urged with much pertinacity that a word, though primarily descriptive, may be used in a nondescriptive sense, and, when so used, be a valid trade-mark. This is a misapprehension of the result of such cases as *Reddaway v. Banham* [1896] App. Cas. 199; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; and *Thompson v. Montgomery*, 41 Ch. Div. 35, 50. If there is anything settled by the American and English cases, it is that any word or form of words which is primarily descriptive cannot be withdrawn from public use by adoption as a trade-mark. Referring to the English cases heretofore cited, where the use of descriptive or geographical words in a secondary sense was protected, Chief Justice Fuller, in *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 677, 21 Sup. Ct. 270, 275, 45 L. Ed. 365, said:

"These and like cases do not sustain the proposition that words which in their primary signification give notice of a general fact, and may be used for that purpose by every one, can lawfully be withdrawn from common use in that sense; but they illustrate the adequacy of the protection from imposition and fraud in respect of a secondary signification afforded by the courts. In the instance of a lawfully registered trade-mark, the fact of its use by another creates a cause of action. In the instance of the use in bad faith of a sign not in itself susceptible of being a valid trade-mark, but so employed as to have acquired a secondary meaning, the whole matter lies in pais."

It the complainant has a technical trade-mark in the words "computing," its use by others will be restrained, for a wrongful intent in so using it will be presumed. But when the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has by use come to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his article as the product of another. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Bennett v. McKinley*, 13 C. C. A. 25, 65 Fed. 505.

In support of the contention that a word having a common or primary meaning may become a valid trade-mark when it has acquired in trade a secondary meaning, the complainant has cited the cases of *Reddaway v. Banham* [1896] App. Cas. 199; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; and *Thompson v. Montgomery*, 41 Ch. Div. 35, 50. In the first of these cases the words "camels' hair belting," descriptive of a belting made of camels' hair, were protected against use in such manner "as to deceive purchasers into the belief that they are purchasing belting of the plaintiffs' manufacture." The court did not hold that the words constituted a valid, technical trade-mark, but that they had acquired a secondary meaning, and had come to mean "belting made by the plaintiffs, as distinguished from belting made by other manufacturers, and did not mean belting of a particular kind, without reference to any particular maker." In other words, the case turned upon the moral and equitable principle "that nobody has any right to represent his goods as the goods of somebody else." *Wotherspoon v. Currie* and *Thompson v. Montgomery* were instances in which the name of a town, when applied to certain lines of manufacture conducted there by particular manufacturers, has come to stand for a particular manufacturer; that, while the name could not be held a valid trade-mark, its use in this secondary sense would be restrained, because, as used, it operated to deceive purchasers into believing that they were buying the goods of one manufacturer, when in fact they were getting goods made by a different person. The case of *Plant Co. v. May Co.*, 44 C. C. A. 534, 105 Fed. 375, is supposed to sustain the contention that a word or name primarily descriptive or geographical may be a valid trade-mark. The case was decided by this court, and involved the question as to whether the name "Queen" could be a valid trade-mark when applied to a line of shoes to indicate origin of manufacture. The decision was put upon the cases of *Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co.*, 20 C. C. A. 402, 74 Fed. 222, *Raymond v. Baking Powder Co.*, 29 C. C. A. 245, 85 Fed. 231, and others of like character there cited, in which the name "Kaiser," as applied to a beer, "Royal," as applied to a baking powder, and names of like character, such as "Monarch," "Victor," "King," etc., were sustained as valid trade-marks. But these cases rest upon the peculiar and specific character of the names so adopted as trade-names, being names not primarily descriptive of kind, quality, or class, when applied to inanimate things, and only standing, in a purely figurative way, for excellence or quality or grade or class. Not being descriptive words, they were capable of adoption as trade-names.

But it is said that, as "computing" implies a mental operation, its application as the name of any class of weighing balances or scales is a palpable misnomer. If this be so, the English language is inadequate, by any word or name, to indicate in an intelligent way the function of such a machine, for the synonyms of the word, "calculate," "estimate," "count," or "reckon," would equally imply a mental operation, and be just as inexact as "computing." Neither would the suggested term "price scale" be free from the like objection. "Price" primarily signifies the sum which the seller will receive in exchange,

and implies a mental operation requiring the exercise of memory and calculation. If the name fairly signifies some quality or function which the machine does or aids in doing, it cannot be regarded as an arbitrary or fanciful name; and if the word so adopted is one of common use, with a well-understood primary meaning, which is fairly descriptive of the article to which it is applied, or of some quality which it has, its exclusive use by one would manifestly deprive all others from using the same word in describing their own similar article or machine. That the word does aptly describe the class of scales to which it has been applied would seem to be indicated by long usage. When complainants adopted it, it had at an earlier day been applied to scales of the same class, and a number of patents had been granted to patentees for scales described as "computing scales." When the defendant engaged in the manufacturing of such scales several years later, more than 50 patents are said to have been issued for scales called or described as "computing scales," and not less than 8 or 10 companies were then engaged in making such scales, and calling them "computing scales." Of course, if the complainant has an exclusive prior right to the use of the word as a trade-mark, the fact that many others were endeavoring to filch the name when defendant entered the field would not make the defendant any the less an infringer, whatever the effect of such facts upon the question of damages. But the facts we have referred to, showing the prior use of the word as descriptive of the scale, and its subsequent wide adoption, are very forceful in showing that the word has from the origin of such scales been by common consent and general usage regarded as a descriptive term aptly describing the function of the scale in aiding the operation of computing or calculating the aggregate price to be paid for the article weighed thereon when properly adjusted by an intelligent operator. In view of the significance of the word "computing" when applied to a scale of the class here involved, it is very plain that it cannot lawfully be appropriated as a valid trade-mark, and that others may employ it with equal right and truth as descriptive of their own scales, when constructed for a like purpose. The effort to turn the descriptive word "standard" into an exclusive trade-mark, either separately or in connection with the verb "computing," is still less defensible, and we need say no more than we have said. The court below was clearly right in holding that the complainant had no technical trade-mark in either word.

We come now to consider the case made for an injunction upon the ground of deceit and fraud. To sustain this aspect of the bill, the complainant must show that the word "computing," though primarily descriptive, and therefore not the subject of a technical trade-mark, has acquired in the trade a secondary signification, indicating a scale made or sold by the complainant. The evidence wholly fails to show that the word "computing," associated with scales, had come to stand for the scale made by complainant at the time the defendant began its use as descriptive of its own scale. Upon the contrary, the weight of evidence is that its trade meaning accorded with its primary signification, and that, instead of standing for any manufacture, it stood for a

class of scales. In short, the name stands for a machine, and not for a maker. It will be of no public importance to summarize the evidence in order to support this conclusion. The testimony as a whole, including the catalogue and other advertising matter issued by the complainant, is ineffectual to show that either the public or the complainant itself regarded the word "computing" as indicative of the maker, and not the machine. The complainant never stamped its scales either as "computing scales" or "standard scales." The only name placed on its scales is its corporate name, "The Computing Scale Company." It is true that the word does very frequently appear in its catalogues and other advertising matter. But an attentive examination of that class of matter tends to convince us that its use is generally in a descriptive way, rather than as a "fanciful" or "arbitrary" word used to denote origin. To illustrate the mode of its use in connection with other words of a descriptive character, we take from complainant's catalogue a few instances where the word is used in explanation of some one of the many different kinds of computing scales made by the complainant, and intended for different kinds of dealers. Thus, "The Standard Market Money Weight Computing Scale, No. 2;" "The Standard Cylinder Computing Scale, No. 21;" "The Swinging Butcher Money Weight Computing Scale, No. 16;" "The Standard Butcher Money Weight Computing Scale, No. 15." At the bottom of each page of one of the catalogues is the statement, conspicuously displayed: "We are the pioneers in the computing scale business." And among the claims made for the complainant, and much pressed in its catalogues, are these: "We are the originators of computing scales." "We own all foundation patents on practical working computing scales." "The money weight system has revolutionized the method of selling goods by weight."

The other evidence does not help the case. Complainants claim the rights, patents, and good will of one Julius E. Pitrat, who made the scale from 1885 to about 1889, when he sold out to a company or corporation which carried on the business under the name of the Detroit Computing Scale Company. This company failed, and its assets passed into the hands of a firm who carried on the business for a time as Canby & Ozias, and finally sold their rights to the present corporation, who are incorporated as the Computing Scale Company. Now, Pitrat himself used a name plate on each scale made by him, which can hardly be regarded as sustaining his claim that he adopted the name "computing" as a purely arbitrary name signifying a scale made by him. That name plate was as follows: "Pitrat Computing Scale." Patented March 31, 1885, and June 6, 1886, Gallipolis, Ohio." Pitrat's business card is also in evidence, and reads as follows: "The Pitrat Computing Scale Co., Manufacturers of the Celebrated Pitrat Scales, Gallipolis, Ohio." It is plain that his own name was the sign or symbol of origin relied upon by Pitrat, whatever his present opinion as to the fanciful character of the verb "computing."

We will not pursue the facts further. The complainant's case is not made out, so far as it is built upon the claim that "computing" had come to have a well-known secondary meaning, pointing to the origin or maker of the scale.

The case is even weaker for the word "standard." It is a descriptive word, and has been used by the complainant only as a descriptive word. This is shown by the names of scales heretofore set out, taken from complainant's catalogue, and is used to designate, not a scale made by a particular maker, but a particular class of scales, supported on standards, in distinction to "swinging," "spring balance," or "cylinder" scales. In short, "standard" stands for a particular subclass of computing scale, and was a term used only to indicate that class, and was never in any sense a word signifying the maker. It is also a word commonly employed in the scale trade as indicative of excellence and adherence to the standard of weights and measures fixed by the government.

But it is said that the defendant has copied the curved form of standards used by the complainant for that type of scale. This is true. But it is clearly shown that the double curved lines of the supporting iron standards is a form in very large use in machines made from metal. Examples are shown in sewing machines, lathes, and many other kinds of machinery. The curved lines of the supporting standards were therefore not a design peculiar to the weighing machine of the complainant, but copied from many earlier machines of a different type.

Finally it is said that the copying of the outlines adopted by complainant for its standard scales, and the use of the names "computing" and "standard," collectively establish a design to palm off the defendant's scale for the scale made by complainant. A court of equity will not tolerate deceit as a means of acquiring the business which legitimately belongs to another. But an attentive consideration of this case leads us to an agreement with the court below in respect to the absence of any such evidence as to resemblance as is likely to deceive the public into buying the scale of the defendant as a scale made by complainant. The complainant has not shown that the names "computing" or "standard" have come to have a trade significance differing from their primary and common meaning. They do not stand for or signify any particular maker of scales. They signify a particular class of scales, an article or a machine, and not a particular maker. The complainant's scales have in a conspicuous place on each scale the words: "The Computing Scale Co. Dayton, Ohio, U. S. A." This is complainant's corporate name, and no other name or descriptive words are placed on its scales. The defendants place on each of their scales their corporate name, "The Standard Computing Scale Company, Limited, Detroit, Michigan." On the beam used by complainant for their corporate name the defendants have placed the words, in conspicuous letters, "Standard Computing Scale." These two name plates plainly distinguish the scale made by the defendant from the scale made by complainant. In addition to this, there is a marked mechanical difference in the two structures, resulting in a different mode of operation, which could not but be noted by one familiar with the scales, in even a slight degree. In general appearance there are resemblances and differences, but if the complainant has no exclusive right to the words "computing" and "standard," as specific trade-marks, and has

not shown that either word has acquired a secondary meaning in trade, pointing to it as the manufacturer, the resemblances, considered by themselves or in association with both words, are far from sufficient to show that the public is likely to be deceived into buying the defendant's scale in the belief that it is the scale made by complainant.

There is no error, and the decree dismissing the bill must be affirmed.

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THE LAKME. THE TYEE. THE QUEEN ELIZABETH.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 819.

1. COLLISION—STEAM VESSELS MEETING—VIOLATION OF RULES.

A tug proceeding up Puget Sound with a large ship in tow on a line 600 feet long, having on her starboard, and within a mile, a shore toward which the tide was setting, and along which there were shoals, was not guilty of a violation of the navigation rules in signaling her intention of passing a meeting steamer starboard to starboard where the shore on that side was 4 or 5 miles distant, and where the signal was given and assented to when the approaching steamer was a mile distant, coming nearly head on. In such case there was no danger of collision if both vessels promptly complied with the signals agreed on, and the course of the tug was justified by the greater safety to her tow, and did not cast upon her the burden of proof to avoid liability for a following collision between the steamer and the tow.

2. SAME—FAILURE TO COMPLY WITH AGREEMENT FOR PASSING.

Evidence considered on which a steamer was held solely in fault for a collision with a meeting ship, in tow of a tug, on the ground that she proceeded under a port helm after assenting to a signal from the tug to pass starboard to starboard, until immediately before the collision, although there was ample room for her to go to port, and both the tug and her tow at once changed their course in compliance with the signal.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

In Admiralty. See 113 Fed. 772.

This is a case of collision. The undisputed facts are few. The Queen Elizabeth, a large sailing vessel, with ballast, was lying at Port Townsend, desiring to be towed to Port Blakely. In pursuance of a towage contract, the tug Tyee, owned by the appellee the Puget Sound Tugboat Company, took her in tow at Port Townsend between 1 and 2 o'clock on the morning of April 14, 1900. She was made fast to the Tyee with a hawser 100 fathoms in length. The Tyee rounded Point No Point at 3 o'clock and 31 minutes on the morning of April 14th, and thereupon changed her course to south southeast by the pilot-house compass. This course carried her nearly parallel with the adjacent western shore between Point No Point and Apple Cove Point. The collision occurred south of Point No Point lighthouse a few minutes after the Tyee and the Queen Elizabeth had passed that point. The speed of the Lakme was  $7\frac{1}{2}$  miles per hour, and the Tyee with her tow was making between 8 and 9 miles per hour. The vessels were seen approaching each other by the officers in charge of both the Tyee and the Lakme when they were distant from each other 3 or 4 miles. The Lakme was in charge of her second mate; her captain and the first mate being

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¶2. Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

asleep until the masthead lights of the Tyee were seen, when the captain was called and told that they were near Point No Point. He was not informed that the other vessels were seen ahead, and he did not come out on the bridge until it was too late to avoid the collision. The second mate of the Lakme did not have a license or certificate entitling him to be employed as an officer of the steam vessel, either as master, pilot, or mate, and there was not at that time any licensed pilot on duty. The Lakme carried all the lights required. There is some controversy as to whether some of the lights were properly arranged. The tug, up to and at the time of the collision, was in command of a duly licensed and competent pilot, and was properly officered and equipped. The lights of the tug and her tow were properly placed and burning, as required by law in such cases. The Queen Elizabeth, during the same period, was in command of her captain, and had a lookout on deck, beside the man at the wheel. The tide was ebbing for a short time prior to the collision, and a strong current set in toward the western shore between Point No Point and Apple Cove Point. The original libel was brought by the Queen Elizabeth against the Lakme to recover damages for injuries received in the collision. The tug was not made a party to the libel, and the Lakme brought a cross-libel against the tug Tyee to recover the damages it sustained. These causes were consolidated, tried, heard, and disposed of together. It is admitted that the Queen Elizabeth was entirely free from fault. Upon the hearing the district court found that the Lakme was alone at fault: (1) For being under way without being in charge of a licensed pilot; (2) for approaching Point No Point from the southward, in the way of vessels going in the opposite direction, without any necessity or reason for being so far over toward the west shore; (3) for steering an irregular course after the lights of the Tyee and her tow had come into view ahead of her; (4) for porting her helm when she was distant from the Tyee one mile or less, without having previously given the proper signals indicating her purpose to change her course to starboard; (5) for being too slow in putting her helm hard astarboard, after answering and assenting to the signal of the Tyee indicating that the steamers were to pass each other starboard to starboard; (6) for not stopping and reversing her engines promptly when the danger of a collision became apparent. A decree was entered (113 Fed. 772) in favor of the Queen Elizabeth and against the Lakme for \$4,500, from which decree this appeal is taken. The conflict in the testimony relates to the course and direction in which the vessels were moving; how far they were apart when the signals were exchanged between the Tyee and the Lakme; how far distant the Tyee was from the western shore. Did the Lakme at any time exhibit its green light to the Tyee? Were there any shoals near the western shore; if so, at what points? To fully understand the conflict in the testimony it is deemed best to quote largely from the record, and, inasmuch as several of the witnesses testified upon different points, it is, perhaps, best to arrange their testimony covering all the points, instead of separating it upon each point involved and grouping them under the name of the vessel in whose employ they were at the time of the collision.

On behalf of appellant, the Lakme, Captain Schage, the master of the Lakme, testified as follows: "Q. Did you notice how far out in the sound from the west shore, how far you were from the Point No Point light shore? A. \* \* \* We were nearer the west shore than the east shore. The sound is about five miles and a half or six miles across, something like that, and of course we were about two miles probably from the west shore; either a mile and a half or two miles from the west shore. Q. Were there any shoals or obstructions of any kind that you know of between you and Point No Point shore at that time? A. None."

F. Guilfoyle, the acting second mate of the Lakme, testified as follows: "Q. What was the first that you saw of the tug Tyee and its tow, the Queen Elizabeth? A. The first I saw was her masthead light coming around the point. Q. About how far off was she at that time? A. She must have been three or four miles off. I could not judge exactly the distance. \* \* \* Q. What was the position of the Lakme at that time with reference to being inshore or out towards the middle of the sound? A. We were coming down



the middle of the channel, and the tug Tyee, with her tow, was coming round Point No Point, and the first that I saw was her masthead lights. I kept them in view all the time. Q. What other lights did you see? A. I did not see her starboard light until she crossed our bow. Q. What was the first light that you saw after she came in full view; I mean, with her side lights? A. I saw her red light. Q. After you had seen her red light, in what position was that with reference to the bow of your vessel, whether dead ahead or one side or the other? A. It would probably be about two points when I first saw her. Q. Two points where? A. On our port bow. \* \* \* Q. Did you leave the bridge at any time after you first saw the Tyee? A. Yes, sir; I did. Q. About what time was it with reference to the time that you first saw her? A. After I sighted the lights. \* \* \* I went down and called the captain. \* \* \* Q. How long were you gone? A. I could not have been gone more than about two or three seconds. \* \* \* Q. What happened after that with reference to signaling? A. There was no signaling at all. He was coming on our port bow. I had my hand up to pull the whistle when he blew two, and of course I answered him with two. I said 'Hard astarboard.' The man at the wheel put the wheel hard astarboard. Q. How long was that after you got back on the bridge and had called the captain before those signals were passed? A. It must have been between three and five minutes. \* \* \* I was there walking up and down the bridge, I should judge for about five minutes, before the captain came up. Q. And during that five minutes, what was the course of the two vessels? A. We were going about west half north, I should judge, or west quarter north. I would not be sure. \* \* \* We were right in the center of the stream. We were just coming a midway course down the sound." Upon cross-examination: "Q. When the tug blew two whistles, could you make out whether she was swinging on her starboard helm or not? A. No, sir; she was coming straight on. When she blew her two whistles, then she swung on her starboard helm. \* \* \* Q. How far were you apart when you first ported your helm? A. We must have been probably a mile. Q. Then you changed from west half north to what course? A. To west by south, just to give myself a little more sea room. \* \* \* Q. With a port helm, and then the tug and the Lakme were about a mile apart when you ported your helm? A. Yes, sir. \* \* \* Q. When you ported your helm, did she swing off slowly to starboard? A. No, sir; she was just swinging off. \* \* \* Q. When you got the two whistles, she was just swinging off? A. No, sir. When I ported my helm, I just had my hand up to pull the whistle, and he pulled two. Q. Just as you ported your helm? A. Yes, sir. Q. And you had your hand up? A. I had my hand up to blow one, to let him know what I was doing. I had no idea that he would do anything of that kind. Q. You gave the man at the wheel the order to put his helm apart? A. Yes, sir; to port his helm. Q. Then you had your hand up to the whistle to blow one? A. When he blew two. Q. Then you blew two? A. Yes, sir; I answered him, hard astarboard."

Oscar Hanson, the lookout of the Lakme, testified as follows: "Q. How far from you was the light of the tug which you saw, when you first saw it? A. It was a good mile,—it was about a mile. Q. What lights did you see? A. His mast light,—the tug's mast light. Q. After you saw the masthead light, did you see any other light? A. Just after I reported to the second mate, I got an answer back; he said, 'All right,' and a couple of minutes I see the side lights. Q. What did you report to the second mate? A. I sung out, 'A light on the port bow,—a bright light.' Q. Where was the second mate at that time? A. On the bridge. \* \* \* Q. How long after you reported the light on the port bow, was any signal given by any ship? A. A few minutes after he gave us two whistles. \* \* \* The tugboat gave us two whistles first. Q. What was done then? A. We answered the two whistles back again and turned the wheel over. Q. What way was the wheel turned when the whistle was given? A. I was steering straight; after the whistle came he turned to the port; that called for hard astarboard; it was turned to the port. Q. You put your helm hard astarboard? A. Hard apart. Q. When the two signals came? A. When the two signals came. Q. How was your helm when you first saw the light? A. It was straight;

as far as I could see she was going along straight. After that we kept off to the starboard. Q. What do you mean by 'you kept off to the starboard'? A. Well, when we saw the bright light we kept off. Q. Which way did the Lakme head after the signal blew? A. She was a couple of points or a little off to go clear,—going this way to go to starboard,—and when the whistle blew we turned the wheel and go another way. Q. When you first saw her distinctly she was going toward the starboard, was she? A. Yes. Q. Now, which side was the tug when you first saw her? A. On the port. Q. After the tug blew her two whistles, did she make any change in her course? A. Not before we came close to them, we make the change." On cross-examination: "Q. You saw a light about three points on your starboard bow? A. Yes, sir. Q. Which you took to be a lighthouse? A. Yes. Q. About how far away? A. I don't know how far away it was. Q. Was it farther away than the light of the tug? A. Yes, sir. \* \* \* Q. You saw no light on the land side off your port bow? A. No, sir. \* \* \* Q. When you first saw the mast light of the tug, she was about a mile away? A. Yes, sir. Q. A mile away? A. Yes, sir. Q. About two minutes after that you saw her side lights? A. Yes, sir. Q. You saw both of them? A. I saw the red light first. Q. And about two minutes after you saw her mast light you made out her side lights? A. Yes, sir. Q. And that was about the time that the tug gave the two whistles? A. Yes, sir. Q. Now, how far away do you judge you were when the tug gave the two whistles,—about three-quarters of a mile? A. Not so much as three-quarters. Q. A half a mile? A. About a half a mile. Q. Your vessel immediately answered with two blasts of the whistle? A. Yes, sir. Q. The tug immediately changed her course? A. Not before she saw we had changed our course. Q. You changed your course immediately? A. Yes, sir. Q. And then the tug changed her course? A. Yes, sir. Q. And then you were then about half a mile apart? A. Yes."

Olaf Johnson, mate of the Lakme, testified: "Q. Did you notice how far you were out in the sound when you came up on deck? A. When I got up on deck I should judge—I don't remember exactly—I should judge somewhere about a mile away. Q. A mile from the shore? A. A mile from the shore."

Tennas Olson, the pilot in command of the tug, testified as follows: "Q. Now, did you at any time give her (Lakme) any signals? A. I did. Q. What light was she showing when you gave the signal? A. Showing the green light. Q. About how far out from you was she at the time you gave the signal? A. About a mile or so. Q. What signal did you give? A. Two whistles. Q. What were your reasons for giving that signal? A. Because I wanted to pass her on my starboard bow, because I had a ship in tow and it was more safer for me. I could not go inside, it was not safe to go inside of her. Q. Why was it not safe to go on the inside of her? A. Because I did not think there was water enough, I didn't think. Q. How far were you off shore? A. About three-quarters of a mile; somewhere like that; I passed Point No Point very close. Q. How was the tide at that time? A. Well, the tide changed about just off Point No Point, and it was then about ten minutes after that until I blew my signal and gave the whistle. Q. Which way was the tide then? A. The same tide; going down; and you will always see the tide sets you in on the south shore; on the ebb tide. Q. The ebb tide sets you in toward the shore? A. It sets you in toward the shore. Q. \* \* \* About how much time elapsed, Mr. Olson, after these whistles were blown by the tug and the Lakme before this collision occurred? A. There was about four minutes I should imagine,—about four." Cross-examination: "Q. You were not more than three-quarters of a mile off shore? A. About three-quarters of a mile, as near as I can recollect. \* \* \* Q. Do you know the shore from Point No Point down to Appletree Cove? A. I do. Q. Are there any shoals along that shore? A. Yes, sir. Q. How far do those shoals extend? A. Well, there is a shoal from Point No Point up to Pilot's Point pretty near, a little point there, and there is a shoal right along up there. Q. How far out into the sound does that extend? A. A quarter of a mile or something like that. Q. About how far? A. About a quarter of a mile, I should think. Q. You say the tide had just turned?

A. The tide turned off Point No Point, because I felt the current. Q. You say the tide had just turned before the collision, or when? A. Before the collision. Q. About how long before? A. Well, of course, you could not say exactly; it must have been about half an hour or so. Q. Did you notice when the tide turned? A. Well, I felt the tide when I was going around Point No Point, I felt some ripples on the boat, and you could see in the water; it makes a little move more when the tide turns. Q. You knew the tide had turned as you swung around Point No Point? A. I knew the tide was ebbing then, going the other way. \* \* \* Q. About how far away was the Lakme when you blew the two whistles? A. She was off about a mile, I suppose, \* \* \* as near as I could judge."

Oscar Andresen, the quartermaster of the Tyee, testified: "Q. What course were you steering up to the time when the whistles were sounded, after rounding Point No Point? A. I think we were steering something about south southeast. \* \* \* Q. About how far off shore were you? A. Probably three-quarters of a mile or a mile."

Captain Bailey, master of the Tyee, testified: "Q. How far off shore? A. Not to exceed a mile away, about three-quarters of a mile. \* \* \* Q. What kind of a shore is there along there? A. From Point No Point to Pilot Point the shoal makes out quite a ways before you get to Pilot Point, and before you get to Pilot Point there is large bowlders, and they come out at extreme low water in the summer time. Q. How far from the shore line? A. I should say 100 yards or 200 yards. It runs dry between Pilot Point and Appletree Cove; it runs dry at low water. Q. Is it shallow water some distance from there out? A. It drops off gradually. Q. Now, Captain, having a vessel like the Queen Elizabeth in tow, and the Tyee proceeding on the course which you have described, and seeing the Lakme approaching end on or nearly so, what would you say would be the proper course for the officer in charge of the Tyee to pursue, having in view the safety of his tow? A. Well, in that case I should do as the officer of the Tyee did,—pass to the starboard and give more room. Where he would have more room for his ship. A tug will swing much quicker than a ship would. Q. Would there be any danger in getting close inshore with a light-laden large ship like the Queen Elizabeth? A. There would; yes, sir. Q. How was the tide at that time? A. The tide at that time was ebbing, ebbing on the shore. Q. Would that tend to set a light-laden vessel like the Queen Elizabeth inshore? A. It would. In other words, in that case, in the case of the Tyee that night, the ship's wheel would have—should have been put hard to port, and after being put hard apart, before they could have recovered her with a starboard wheel, she would have got in onshore; there was not room enough for the ship to turn from the distance to the beach from where the Lakme struck him. Q. That is, if they took the other course? A. Yes, sir; the ship could not have passed inside the Lakme, and recovered himself before she would have been on the beach. She would have to have come off again on the starboard wheel after the wheel was put hard to port, and before he would have time to have done that he would have been on the beach. There was lots of room on the outside; there was most room there."

Captain Fulton, master of the Queen Elizabeth, testified: "Q. Who took charge of the deck when the vessel left Port Townsend in tow of the Tyee? A. I was in charge. I was in charge all the time. Q. Who was at the wheel? A. Conrad Berg. Q. Who was on the lookout? A. Oscar Johnson, an able seaman. \* \* \* Q. Now, I wish you would state when you first saw the Lakme, where you were and about what hour it was? A. It was near four o'clock in the morning, and we were a mile, I think, above Point No Point. \* \* \* I mean, that is, up the Sound, that is, to the southward of Point No Point; and about a mile and a half off our starboard shore I observed a steamboat light about two degrees to our port bow. Q. What lights did you first observe? A. The masthead and red light. Q. Now, at about what distance was she at that time? A. Well, I think about three miles. \* \* \* Q. Now, what, if any, signals did you hear given by your tug to the Lakme? A. Well, shortly afterwards I heard our tug give two blasts. \* \* \* Q. Now, how long before the whistles blew did you first observe the Lakme? A. I could hardly tell, but I was walking backwards.

and forwards on the poop. I didn't stop and look at her when I first saw her light. I think she was three miles off anyway, and I did not keep constantly looking at the light. Q. Did you know which whistle it was that blew first? A. Yes, sir; I could see that our boat was the one that blew the first whistle. Q. What kind of a night was it? A. It was a beautiful clear morning,—a moonlight morning,—just break of day. \* \* \* Q. Did you see the Lakme's green light at that time? A. No, sir; I never saw the green light all through the business, not once. Q. Well, then, were you following at that time the exact course of the tug? A. Right after. Q. All the time? A. All the time. Q. And on which side of your ship, the port or starboard, did you observe the Lakme? A. When I first observed her she was about two degrees on the port bow. Q. Two degrees on the port bow? A. Just about two degrees, I could see her— If I was standing amidships she might appear directly ahead; but, me standing on her port side, I could see her just open a little on the port bow. Q. And you saw her red lights? A. I saw her red lights. \* \* \* Q. Do you know about how far away you were from the Lakme at the time those whistles were blown? A. Well, I think we must have been a mile,—in the vicinity of a mile. \* \* \* Q. Were you as far away from the Lakme as you were from the shore on the starboard? A. I think so; yes, sir."

Conrad Berg, an able seaman and boatswain's mate on the Queen Elizabeth, testified: "Q. Were you on the Queen Elizabeth on the 13th day of April last? A. Yes, sir. Q. At the time of the collision with the Lakme? A. Yes, sir. \* \* \* I was standing at the wheel at the time. \* \* \* Q. When did you first see the vessel Lakme? A. The first I saw of the vessel was a bright light ahead, and shortly after I noticed a red light, and a little after that I heard our tug give two blasts, and he was immediately answered by the approaching steamer with two blasts, and our tug starboarded her helm and went to port, and I was steering after the towboat, and starboarded my helm too, and shortly after that I heard the captain holler out, 'Hard aport,' or 'Hard astarboard.' So the steamer came up between the towboat and us, and struck us on the port bow, and as she struck us on the port bow \* \* \* she shot over toward the land. Q. Now, could you see the approaching steamer all the time? A. Yes, sir, I could see her. I can't say how far she was from the ship, but then she came close up to the ship, and I only could notice her masthead light. Q. State whether or not you ever saw her green light? A. No, sir; I never saw the green light. \* \* \* Q. At the time you were struck were you following the tug, directly in line with the tug? A. When the vessel struck us the towboat was a little more on the beam, because we could not swing so fast. Q. That is, you had not got swung fully around? A. No. Q. Now, after she struck you this glancing blow, how was the Lakme heading? A. She was heading for the land, for the land we had on the port quarter. \* \* \* Q. Have you any idea whether, from the Lakme's light, whether the reason you could not see the Lakme's green light was that her course lay to the left of you so far that you could not see it, or whether it was not burning? A. I never noticed any green light. I never noticed any green light on board. Q. From the position of the boats do you think you would have been able to see it if the light had been burning? A. No, sir; not at the time I noticed her first. Q. Her course laid so far across yours that you would not hardly have seen the green light at all? A. Not at first, but then, when she came closer, it might be that I should have seen it then. Q. Now, did you notice the Lakme as it approached the tug particularly; were you keeping watch of the position and of the distance the Lakme was away from the tug all the time? A. No, sir; I did not watch the steamer much. I had to watch the towboat and look out for the steamer too. \* \* \* Q. Have you any idea about how far the vessels were apart when the four whistles were blown? A. It must be that it was between two and three miles."

Oscar Johnson, lookout on the Queen Elizabeth, testified: "Q. Now, when you got down from Port Townsend, did you see any other steamer's light? A. Yes, sir. Q. How far away? A. I could not tell you. Q. What lights did you see? A. Masthead lights. Q. What other lights? A. And a red light. Q. Did you ever see her green light? A. No, sir."

Nathan H. Frank, Herbert S. Griggs, and Peters & Powell, for appellant.

Struve, Allen, Hughes & McMicken, for appellee Puget Sound Tugboat Company.

Preston, Carr & Gilman and Page, McCutchen, Harding & Knight, for appellee Queen Elizabeth Company.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement of facts, delivered the opinion of the court.

After reading the foregoing statement of facts, it will be observed that the evidence upon many of the material points is conflicting. The testimony upon some of the points cannot be harmonized. It is apparent that some of the witnesses must have been mistaken. The judgment of others was, evidently, expressed without a full knowledge of all the facts. The testimony of witnesses as to distances is frequently variable, and often very unsatisfactory. In some instances it is a mere guess. So in relation to the question as to lapse of time that transpired before the occurrence of certain events, it is often difficult for the court to determine where the truth of the matter lies. When the testimony of the witnesses is taken before commissioners, or by deposition, as in the present case, the court is deprived of the opportunity of seeing them, of judging the weight to be given them by their manner and appearance upon the witness stand, and the opportunity afforded of asking questions concerning doubtful matters, which always materially aids a court or jury in determining the reasonableness of their statements, and affords safe guides for arriving at the probability or improbability of the story they tell. Nevertheless, there are other landmarks that can be taken hold of, weighed in the scales, and balanced up, in measuring their reliability and truthfulness; their opportunity to discern the conditions, their position and opportunity to correctly ascertain the facts, the duties charged upon them by the positions they hold, etc.; and in many cases there are independent facts which tend to shed more or less light upon the testimony of the witnesses.

We are of opinion that the weight of the testimony establishes the fact that the exchange of signals took place about four minutes before the collision, and that at the time the signals were given the steamers were about a mile apart. The admitted rate of speed of the steamers indicates, as strongly as the testimony of the witnesses, that at the time the signals were given the steamers must have been about one mile apart. The testimony also supports the position that the vessels were about one mile from shore. The testimony also establishes the fact that the *Lakme* must have been steering an irregular course. The fact that at the time the signals were given the *Lakme* was showing her green light is positively testified to by Olson, the pilot, and Andresen, the quartermaster of the tug *Tyee*. These men were at their posts of duty; they had the opportunity to observe; they must have known the facts. The pilot was charged

with the important duty of directing the course of the tug in such a manner as to save not only his own tug but also the steamship which the tug had in tow. Surely he would look and see the position of the Lakme before he gave the signals. Their testimony is not impeached, and it is the duty of the court to accept it as true unless there are other circumstances which question its correctness. The mere fact that the officers of the Queen Elizabeth did not see the green light of the Lakme does not impeach, or tend to impeach, the testimony of these two witnesses, and is not in any manner inconsistent therewith. The fact that none on board the Queen Elizabeth saw the green light is sufficiently explained in the testimony. They were following the course of the tug and looking after their own steamer. When the course of the tug and steamer is taken into consideration, it will be seen that the steamer was following the tug on a hawser 600 feet in length when rounding Point No Point; the Tyee would naturally change its course much quicker than the steamer; hence it would necessarily follow that when the tug changed her course the steamer would vary its course, because she could not respond as readily, and in rounding the point would keep in nearer the shore. The tug would swing much more quickly than the ship.

With reference to Guilfoyle and Hanson, of the Lakme, we have given their testimony at greater length than others. It speaks for itself. It need not be discussed at length; it is neither clear nor convincing, and in our judgment is not entitled to as great weight as the testimony of Olson and Andresen.

Appellant invokes the law of the road to show that the tug Tyee was at fault in giving the signals and then changing its course. Whether the tug was at fault, or the law of the road applies, depends upon the facts of the case. If the signals were given in ample time to make the change without any danger of collision, the tug Tyee, having received the consent of the Lakme, had the right to act as it did. The channel was wide enough for both vessels. They were one mile apart; there was no danger of collision if both vessels promptly complied with the signals agreed upon. There is no pretense that the tug was in any manner at fault except in giving the signals. Appellant does not deny the proposition that, on a body of water five miles or more in width and navigable almost from shore to shore, vessels approaching from different directions are not prohibited from navigating in any direction that will not interfere with the course of the other vessel, unless so situated as to come within the law of the road.

The facts in this case fail to show any breach of the statute upon the part of the Tyee which would, as claimed by appellant, bring it within the settled rule announced in *Belden v. Chase*, 150 U. S. 674, 699, 14 Sup. Ct. 264, 37 L. Ed. 1218, "that, when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so." At the time the signals were given there was no danger of collision. The tug, having a large steamship in tow and being within a mile of the western shore, where there were more or less shoals, and with an ebb tide, the current setting in strongly

against the western shore, there might be danger for his tow; and it was deemed safer and less dangerous to change its course and go to the left. The signal was given, and immediately assented to by the Lakme, and when this consent was given the Tyee put its helm astarboard and proceeded to the left in compliance with the signal. The Lakme, in porting her helm in the manner which she did, after she had assented to the two whistles, was certainly at fault. The *Minnie R. Childs*, 9 Ben. 200, Fed. Cas. No. 9,639; The *Richmond* (D. C.) 28 Fed. 332; The *Sammie* (C. C.) 37 Fed. 907; *Kiernan v. Stafford* (C. C.) 43 Fed. 542; The *Nutmeg State*, 14 C. C. A. 525, 67 Fed. 556; *City of Macon* (D. C.) 85 Fed. 236. The Lakme was at fault for being too slow in putting her helm hard astarboard, after assenting to the signal of the Tyee, which indicated that the vessels were to pass each other starboard to starboard.

It will be noticed from the testimony that all the witnesses on board the Tyee testified that the Lakme proceeded under a port helm from the time the signals were exchanged until she was nearly opposite the Tyee. Upon this point we did not quote, in the statement of facts, the testimony of Captain Fulton of the *Queen Elizabeth*. The record shows that he testified, upon cross-examination, upon this point as follows:

"Q. At that time you and the Lakme were approaching directly head on, were you not? A. I could not tell you whether he was approaching direct, but I was swinging off on an angle, and it appeared to me that he must have been swinging—I was swinging on an angle from south southeast to east, and it appeared that he must have been swinging on an angle from northwest to north. \* \* \* I was swinging to port on my starboard helm, and he kept coming about on the opposite direction, and he must have been swinging to starboard on the port helm, otherwise he would have gone clear of me; if he ported his helm he would have cleared me."

The log of the *Queen Elizabeth*, after mentioning the fact that the lights of the Lakme were discovered off Point No Point, contains the following:

"A few moments after our tug gave two blasts with its whistle, which was immediately answered by the approaching steamer, two blasts. Our tug at once starboarded his helm, and our helm was also starboarded to follow the tug. The tug was noticed to be going to port very fast, and our helm was ordered by master to be put hard astarboard. The approaching steamer did not seem to alter her course to port, but came directly between our tug and ship; struck us a very heavy glancing blow on the port bow."

Appellant contends that the vessel which is first to depart from the rules takes upon herself the risk of passing in safety, and, failing in the maneuver, the law holds her in fault. The *Oceanic* (D. C.) 61 Fed. 338, 352, and authorities there cited. We have already stated that the situation of the vessels—one mile apart—at the time the signals were exchanged did not make the rule of the road applicable. Moreover, it is not shown that the Tyee failed to execute the maneuver she undertook in changing her course in accordance with the signals she had given. It is manifest from the testimony that, if the Lakme had done nothing to embarrass the Tyee, the collision would not have occurred. Our conclusion is that the Tyee was free from fault, and that the Lakme alone was blamable for the collision.

The decree of the district court is affirmed, with interest and costs.

## BROWN v. SCHLEIER et al.

(Circuit Court of Appeals, Eighth Circuit. November 10, 1902.)

No. 1,724.

**1. NATIONAL BANKS—POWERS—LEASING AND IMPROVEMENT OF REAL ESTATE.**

The power conferred on national banks by Rev. St. § 5137 [U. S. Comp. St. 1901, p. 3460], to purchase and hold such real estate "as shall be necessary for its immediate accommodation in the transaction of its business," includes the power to lease real estate for such purpose, and a bank does not exceed its powers by leasing ground for a term of years under an agreement with the owner that it will erect a building thereon for its use, providing it acts in good faith, and for the purpose of obtaining an eligible location and a suitable building in which to conduct its business. Nor is it limited to the construction of a building only sufficient for its own use; but, where it has acquired property by purchase or lease for the purpose authorized by the statute, it may improve the same in any manner that other prudent owners would do, so as to render it most productive.

**2. SAME.**

A lease of property by a national bank for 99 years is not ultra vires and void because the term will outlast its corporate life. Being authorized by the statute to purchase real estate in fee simple for specified purposes, it may acquire any lesser estate or interest which is vendible.

**3. SAME—INDEBTEDNESS—OBLIGATION TO PAY RENT.**

Nor is such a lease invalid because the aggregate rental which the bank agrees to pay during the term in monthly installments exceeds its capital stock. Such an agreement does not create an indebtedness for the aggregate amount of the installments, within the meaning of Rev. St. § 5202 [U. S. Comp. St. 1901, p. 3494].

**4. SAME—ACTS ULTRA VIRES—LIABILITY OF THIRD PARTIES.**

A lessor of real estate to a national bank for a long term, in which the bank covenants to erect a bank building which shall become part of the realty, cannot be held accountable to the stockholders or creditors of the bank because it may have exceeded its powers by expending more money in the erection of the building than it was authorized to do under the law, and more than was required by the terms of the lease; nor can such excessive expenditure be charged as a lien upon the property in favor of creditors after the same has passed into the hands of the lessor.

**5. SAME—POWERS OF RECEIVER.**

A receiver of a national bank, appointed by the comptroller of the currency, is not vested, by virtue of his appointment, with all of those visitatorial powers over national banks which the United States, acting in its sovereign capacity, may exercise.

**6. SAME—SUIT AGAINST THIRD PARTIES.**

A receiver of a national bank cannot maintain a suit against a third party, based upon the alleged invalidity, as ultra vires, of a contract made by the bank which was fully executed 10 years prior to his appointment, and to which no objection was made at the time, either by the United States or by any stockholder.

Appeal from the Circuit Court of the United States for the District of Colorado.

This case passed off below on a demurrer to the bill of complaint, which was once amended before the demurrer thereto was sustained. (C. C.) 112 Fed. 577. The case made by the bill of complaint, as amended, is as follows: The People's National Bank of Denver, one of the appellees, was incorporated on July 30, 1889, under the national bank act, for the period of 20 years from July 1, 1889, with a capital stock of \$300,000, divided into shares of \$100 each. On September 12, 1889, it leased a lot of ground in the city of Denver, having



a front on Lawrence street of about 99 feet, from George C. Schleier, one of the appellees, for the term of 99 years from February 1, 1890, at a yearly rent of \$13,975, which rent was to be paid in monthly installments of \$1,164.58 during each month of the term. The lessee, the People's National Bank, hereafter sometimes termed the "Bank," agreed to erect within 18 months from and after February 1, 1890, at its own cost and expense, a substantial building, not less than four stories in height, to cost not less than \$100,000. By the terms of the lease the lessee was to have no right to remove the building, but the same was to become a part of the realty. The lease also gave to the lessee and its assigns an option to extend the lease for the same rental for a term of 50 years from and after the expiration of 99 years. The bank took possession of the demised premises, and on or about the month of January, 1891, had completed the erection of a building thereon, eight stories in height, at a cost of \$305,725.39. On July 19, 1893, the bank became unable to pay its depositors in due course of business, and the comptroller of the currency appointed J. B. Lazear as receiver thereof, pursuant to the provisions of the national bank act. Said Lazear remained in possession of its assets and affairs until August 21, 1893, when he was discharged; the bank having in the meantime levied an assessment of 20 per cent. upon its shareholders, and thereby restored its capital so that it was deemed safe for it to resume business. At the date last mentioned the business and affairs of the bank had become somewhat involved and commingled with the business of another bank known as the People's Savings Bank, which latter bank was located and did business in the bank building that had been erected by the People's National Bank, in which the latter bank also transacted its business. The People's Savings Bank, having become embarrassed, subsequently made an assignment to Fermor J. Spencer, assignee, who thereafter, on June 26, 1897, brought an action against the People's National Bank, in which action he recovered a judgment against it in the sum of \$475,825.71 on November 30, 1899. About the month of January, 1897, the People's National Bank commenced to liquidate its affairs with a view of surrendering its charter, and on April 27, 1897, its stockholders, at a meeting duly held for that purpose, resolved to go into voluntary liquidation. On September 20, 1897, the bank called a meeting of its stockholders to consider a proposition to surrender the remainder of its leasehold term to Schleier, the lessor, stating in its notice to the stockholders that, as the income from the property which it had leased was less than the fixed charges, it had become necessary to take some action to relieve the bank. At that time there was due for rent in arrear under the lease, and for taxes which the lessee was obligated to pay, a sum amounting altogether to about \$6,000. In compliance with action which appears to have been taken at said stockholders' meeting, the bank, subsequently, on October 30, 1897, surrendered its leasehold term to the lessor, and the lessor agreed, in consideration of such surrender, to discharge the bank from its liability to pay such rents and taxes as were then in arrears; also to discharge the bank from all further installments of rent which were to accrue under the lease. Some time after the bank had resolved to go into voluntary liquidation, to wit, on December 20, 1899, Earl M. Cranston was appointed receiver of the People's National Bank for the purpose of winding up its affairs. He continued to serve as receiver until May 27, 1901, when he resigned his office, and Edwin F. Brown, the present receiver and appellant, was duly appointed in his place and stead by the comptroller of the currency. In view of the premises, the complainant prayed that the court would decree that the lease executed by Schleier to the bank on September 12, 1889, was null and void, in view of the national bank act; that the agreement purporting to cancel and surrender said pretended lease was also null and void; that there might be a full accounting between Schleier and the receiver; and that whatever was found due to the receiver upon said accounting be declared a first and prior lien upon the bank building which the bank had erected, as well as upon the ground upon which it was situated. The bill was demurred to for want of equity, and the demurrer was sustained, whereupon a decree was entered dismissing the complaint. To reverse such decree an appeal has been prosecuted to this court.

James H. Brown (H. M. Orahood, Earl M. Cranston, Robert J. Pitkin, and William A. Moore, on the brief), for appellant.

R. D. Thompson (G. C. Bartels and James H. Blood, on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bill in this case appears to have been exhibited, and a recovery is sought, upon the theory that the lease of September 12, 1889, was executed by the People's National Bank in excess of its corporate powers, and was therefore void; that Schleier, the lessor, was a party to the act whereby the charter of the bank was violated, and is therefore liable as a joint tort-feasor for all the damage which the creditors of the bank have sustained in consequence of the execution of the lease without lawful authority. It is urged, in substance, that the lease was ultra vires the bank, because it undertook, in violation of section 5137 of the Revised Statutes [U. S. Comp. St. 1901, p. 3460], to erect a building on the demised premises which it did not contemplate using "for its immediate accommodation in the transaction of its business," but did intend to rent in part to third parties. It is also claimed that the bank exceeded its powers in making the lease, because it contracted an indebtedness to an amount exceeding its capital stock, in violation of section 5202 of the Revised Statutes [U. S. Comp. St. 1901, p. 3494], by engaging to pay rent at the rate of \$13,975 per annum for the term of 99 years; and incidentally it is claimed that the power conferred upon national banks by section 5137 of the Revised Statutes to purchase and hold such real estate "as shall be necessary for its immediate accommodation in the transaction of its business" does not comprehend the power to lease property with a view of erecting a building thereon for its accommodation in the transaction of its business, nor the right to lease property for a longer period than it is to exist as a corporation.

We entertain no doubt that the power conferred on national banks by section 5137 of the Revised Statutes to purchase such real estate as is needed for their accommodation in the transaction of their business includes the power to lease property whereon to erect buildings suitable to their wants. The power to purchase land is larger than the power to lease by as much as a fee simple estate is larger than a term for years, and the greater power includes the less. In the larger towns and cities of the United States, national banks usually find it necessary to locate themselves in the business centers, where property is most in demand and likewise most valuable. In the large cities it will doubtless sometimes happen that a bank cannot locate itself in a quarter where its business interests demand that it should be located, unless it leases property for a term of years and agrees with the owner to erect a building thereon suitable to its wants. That a national bank may purchase a lot of land and erect such a building thereon as it needs for the accommodation of its business admits of no controversy under the language of the

statute, and we perceive no reason why it may not likewise lease property for a term of years and agree with the lessor to construct such a building as it desires, provided, always, that it acts in good faith, solely with a view of obtaining an eligible location, and not with a view of investing its funds in real property or embarking them in speculations in real estate. Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined. The act was framed with a view of preventing such associations from investing their funds in real property, except when it becomes necessary to do so, either for the purpose of securing an eligible business location, or to secure debts previously contracted, or to prevent a loss at execution sales under judgments or decrees that have been rendered in their favor. When an occasion arises for an investment in real property for either of the purposes specified in the statute, the national bank act permits banking associations to act as any prudent person would act in making an investment in real estate, and to exercise the same measure of judgment and discretion. The act ought not to be construed in such a way as to compel a national bank, when it acquires real property for a legitimate purpose, to deal with it otherwise than a prudent landowner would ordinarily deal with such property.

We think that the lease in question was not invalid because it created a term that would outlast the life of the corporation in whose favor it was created. If a corporation is empowered to acquire real estate by purchase or lease for the transaction of its business, it matters not that it acquires an estate or interest which will not expire until after the death of the corporation, provided the estate or interest so acquired is vendible. *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 12 C. C. A. 365, 64 Fed. 628; *Nicoll v. Railroad Co.*, 12 N. Y. 121, 128; *People v. O'Brien*, 111 N. Y. 1, 37, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; *State v. Laclede Gaslight Co.*, 102 Mo. 472, 482, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 592, 16 Sup. Ct. 1173, 41 L. Ed. 265; *Id.*, 10 U. S. App. 192, 2 C. C. A. 174, 51 Fed. 309. If the rule were otherwise, no corporation, unless it had a perpetual existence, could acquire land in fee, and in that event the objection made to the lease, based on the length of the term thereby created, would apply equally well if the grant had been in fee. The lease in question created an interest in land which was doubtless supposed to be of considerable value when the lease was executed; and although the interest so created was what is usually termed a "chattel interest," the term being less than a freehold, yet it was an interest which was salable during the life of the corporation or on its dissolution, and

might have become a very valuable asset of the bank. Such terms as the one created by this lease are sometimes as marketable as estates in fee, and we perceive no reason why the instrument which created it should be held invalid, any more than a deed conveying an estate in fee, which would outlast the life of the bank. A corporation, like a natural person, should be allowed to hold and enjoy a leasehold estate that will outlast its own existence, provided it can be alienated at or prior to its dissolution. Moreover, the rule being that, in such a case as the one at bar, the personal covenant of the corporation to pay rent would not be enforceable against it after the expiration of its charter (*Lorillard v. Clyde*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113, and cases there cited), it is not apparent that any sufficient reasons exist, based on the length of the term, to render the lease invalid.

We are furthermore of opinion that the lease in controversy was not invalid because the gross rents payable during the term would have amounted to a sum exceeding \$300,000, which was the amount of the bank's original capital. The gross rents that were to accrue and would have accrued at intervals during the 99-year term, if the lease had not been surrendered or canceled, do not, in our judgment, constitute an indebtedness, within the fair intent and meaning of section 5202 of the Revised Statutes [U. S. Comp. St. 1901, p. 3494]. The national bank act confessedly confers power upon national banks to lease property which they need for the convenient transaction of their business, and it contains no express provision limiting the duration of such leases. Their duration is left to be determined by the judgment and discretion of the bank or its board of directors. Very frequently such associations are compelled to pay a large annual rental, and it can hardly be supposed that congress intended that the various installments of rent that an association has obligated itself to pay under a lease for a long term of years, which it executed because it was necessary to do so to secure an eligible business location, should be aggregated and counted as a debt within the purview of section 5202, *supra*. Rent is one of those ordinary expenditures which such associations are compelled to incur and pay; and installments of rent that are to be earned by the occupation of the demised premises in future years, and may never in fact be earned, can hardly be esteemed an indebtedness, and certainly not an indebtedness within the fair purview of section 5202, until it has accrued. In *Deane v. Caldwell*, 127 Mass. 242, 244, it was held that, before the day on which rent is covenanted to be paid, it is in no sense a debt. It was also held by the circuit court of the United States for the Southern district of Ohio in *Trust Co. v. Armstrong*, 35 Fed. 567, that rent which was to accrue in future, under the terms of a long lease taken by a national bank, but which had not been actually earned by occupation, could not be proven, as against the receiver of the bank, as a debt; it appearing that the receiver had declined to take possession of the demised premises and assume the burdens of the lease. It was also held by the supreme court of the United States in *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19, 19 Sup. Ct. 77, 43 L. Ed. 341, that the annual installments of rent which a city had agreed to pay to a

water company for the period of 25 years, for the use of water, could not be aggregated and counted as a debt, and added to the other indebtedness of the city, for the purpose of showing that the city had contracted an indebtedness in excess of the amount permitted by its charter. See, also, *City of South Bend v. Reynolds* (Ind. Sup.) 57 N. E. 706, 707, 49 L. R. A. 795. We conclude, therefore, that it cannot be successfully claimed that the bank exceeded its powers in executing the lease, because it thereby contracted an indebtedness in excess of the amount prescribed by section 5202, Rev. St. [U. S. Comp. St. 1901, p. 3494].

It follows, from what has been said, that if the lease in question was invalid when it was executed, that which rendered it so was the covenant of the bank to expend as much as \$100,000 in the erection of a building on the demised premises. The bill avers that it spent more than that amount, to wit, the sum of \$305,725; but the lease did not bind it to incur that expense, and we fail to see any ground upon which Schleier, the lessor, can be held accountable to the creditors of the bank or to the United States because the bank saw fit to erect a more expensive building than it had engaged to build. The lessor, after the execution and delivery of the lease, was not in a situation where he could be heard to complain because the lessee was making more expensive improvements than it had agreed to make. Even if it be conceded, therefore, that the bank exceeded its powers in expending as much as \$305,725 in the construction of a building, yet we are unable to hold that the lessor is chargeable with the amount of an excessive expenditure which he was powerless to prevent. Another fact to be kept in mind is that the case in hand is not one where the bank assumed to exercise a power which did not belong to it; but it is a case where, in the exercise of a power that was clearly conferred, it misused or abused it by making a greater expenditure for an authorized object than it ought to have made. Besides, the wrongful expenditure was made 10 years before the present bill was filed. The building was completed in January, 1891, and the transaction at that time became an executed transaction. Moreover, while the matter was in fieri, no stockholder, or other person authorized to complain, raised his hand to arrest the unauthorized expenditure, although the act was done publicly; nor did the United States, which granted the bank's charter, take any steps to arrest the unauthorized expenditure by the bank, on the ground that its charter was being violated. Furthermore, the act complained of was not *malum in se*, but at most was simply *ultra vires*.

On this state of facts the inquiry arises whether the transaction is one of which the receiver of the People's National Bank is authorized to complain; and this question, we think, should be answered in the negative. The receiver is one who was appointed by the comptroller, under section 5234 of the Revised Statutes [U. S. Comp. St. 1901, p. 3507], to liquidate the affairs of the bank; it having become insolvent. As such receiver he is vested with all the rights of creditors and the rights of the corporation itself, and may doubtless challenge any wrongful act which creditors could challenge, and maintain such suits against third parties, including actions against directors and

stockholders of the bank on account of wrongful and fraudulent acts, as the corporation might maintain. *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60, and cases there cited. But we think that, in virtue of his office as receiver, he is not authorized to challenge or impeach an executed transaction between the bank and a third party, like the one now in hand, that was simply *ultra vires*, and which, though known to the United States, through its proper officials, at the time it was undertaken and consummated, and while the excessive investment of its funds was being made, was neither arrested nor complained of by the United States or any creditor or stockholder of the bank. In *Case v. Terrell*, 11 Wall. 199, 202, 20 L. Ed. 134, it was held that a receiver of a national bank represents the bank, its stockholders, and creditors, but that such officers do not in any sense represent the government. A receiver of a national bank, therefore, by virtue of his appointment under section 5234, is not endowed with all of those visitatorial powers over national banks which the United States, acting in its sovereign capacity, may exercise. The United States, if it had thought proper to have done so, could have proceeded against the People's National Bank for a forfeiture of its charter because of the alleged abuse or misuse of its charter powers. It did not do so, but permitted the investment to be made, evidently upon the theory that it would be profitable to the bank and not harmful to the public; and, having done so, a receiver appointed by the comptroller years afterwards, has no right to impeach the investment, and ask that it be declared void, and that the property of a third party, who dealt with the bank in good faith, be charged with a lien for the sum expended, now that the investment has proven to be unprofitable.

There are some *ultra vires* acts, when committed by a national bank, which the government alone is permitted to call in question after such acts are committed. For example, in *Bank v. Stewart*, 107 U. S. 676, 678, 2 Sup. Ct. 778, 27 L. Ed. 592, where such a bank had loaned money on the security of its own stock in admitted violation of section 5201 of the Revised Statutes [U. S. Comp. St. 1901, p. 3494], the court decided, in substance, that, if any one "except the government" could challenge the transaction, it could only be done before the contract was executed. In the well-known case of *Bank v. Matthews*, 98 U. S. 627, 628, 629, 25 L. Ed. 188, it appeared that a national bank had loaned money on the security of real property in violation of section 5136 of the Revised Statutes [U. S. Comp. St. 1901, p. 3456], and was proceeding to foreclose the mortgage, whereupon the mortgagor sought to enjoin the foreclosure proceedings upon the ground that the mortgage was a nullity, because the bank had no authority to accept it as security for a loan. It was held, however, that the act of making the loan on the security of real property, although *ultra vires*, did not render the mortgage void; that the mortgagor could not successfully resist the foreclosure proceedings because of the *ultra vires* character of the transaction; and that the United States alone could challenge it, doing so by a proceeding to oust the bank of its franchises. The court said that a private person could not directly or indirectly usurp this function of the government, but that it was the right of the government to determine wheth-

er it would complain of the transaction. The same rule was reaffirmed in *Reynolds v. Bank*, 112 U. S. 405, 413, 5 Sup. Ct. 213, 28 L. Ed. 733, and was followed and enforced by this court in *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 83, 82 Fed. 124, 134. We are of opinion that the same doctrine is applicable when, as in the present case, a national bank makes an excessive investment in real property for the purpose of obtaining an eligible business location. Granting that it is guilty of an abuse of its powers in so doing, and that while the act is under way a stockholder may enjoin the threatened wrong, yet after the investment is made, and the conveyance to the bank has been executed and delivered, it is not void, but operates to vest in the bank such an estate as the conveyance by its terms creates. Moreover, when the conveyance is made, and the funds of the bank have been invested therein, the estate so acquired becomes an asset of the bank, and no one can question the transaction, unless the government, acting in its sovereign capacity, elects to do so. The remedy for the wrong is solely in the hands of the government. A receiver appointed by the comptroller of the treasury on the insolvency of the bank, pursuant to section 5234 of the Revised Statutes [U. S. Comp. St. 1901, p. 3507], and armed simply with the rights of the corporation and its creditors, cannot do so.

The bill of complaint in this case does not charge or suggest that the cancellation and surrender of the lease on October 30, 1897, was inspired by an intent on the part of the bank or Schleier, the lessor, to hinder, delay, or defraud the bank's creditors. The motives of Schleier, the lessor, in that transaction are not impugned. All that is alleged concerning the cancellation of the lease is that on September 20, 1897, when the bank was about to go into voluntary liquidation, a notice was issued by the president of the bank to stockholders, advising them of a meeting which had been called to be held on October 30, 1897, to consider the advisability of surrendering the lease to the lessor, because the income from the building upon the demised premises had become less than the fixed charges. This statement, as contained in the notice to stockholders, that the income was insufficient to meet the fixed charges, is denied in the bill only upon information and belief; but no allegation is contained therein showing what the income amounted to at that time, although it is admitted that two or three installments of ground rent and certain taxes were at the time in arrears. The conclusion that may be fairly drawn from the averments of the bill is that the leasehold had become a burden to the bank, rather than an asset; that it was not salable; and that the officers and stockholders considered it prudent and for the best interests of the bank to surrender the term and avoid liability for further installments of rent. At all events, there are no allegations in the bill showing that the lease was fraudulently canceled by collusion between the lessor and lessee, and with a view of depriving the bank of an asset which was deemed to be of value; nor does the bill seem to have been filed with a view of obtaining relief on that ground. The bill was evidently framed upon the theory that the lease was void ab initio for want of power on the part of

the bank to execute it, and that the receiver could for this reason charge the amount that had been expended upon the demised premises in the erection of the building as a lien upon the same and upon the ground on which it was erected. We are of opinion, for the reasons already stated, that this theory is unsound.

We conclude that the demurrer to the bill was properly sustained, and that the decree below should be affirmed. It is so ordered.

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O'CONNELL v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1902.)

No. 1,122.

**1 REVIEW ON APPEAL—MATTERS OF PRACTICE—DISCRETION IN PERMITTING CROSS-EXAMINATION.**

While conceding to the trial court wide discretion in the suspension or enforcement of the rule limiting cross-examination to matters testified to in chief, and in respect to the order in which evidence is introduced, an appellate court must reserve the right to grant a new trial, even for the relaxation of such rules of practice, when necessary, to prevent serious injury to the rights of a party.

**2 EVIDENCE—CONDITION OF CAR—SUFFICIENCY OF IDENTIFICATION.**

A witness testified that in company with one R. he examined a certain numbered Erie car on the morning after plaintiff had been injured thereon, and described its condition. R. testified that he examined an Erie car with the previous witness, in the yards of defendant company, but did not remember its number. *Held*, that he sufficiently identified the car, in connection with the testimony of the previous witness, to render his testimony as to its condition admissible.

**3 ACTION FOR INJURY TO SWITCHMAN—DEFECTIVE CAR—SUFFICIENCY OF EVIDENCE UNDER OHIO STATUTE.**

By the Ohio statute (Bates' Ann. St. § 3365-21) evidence of a defective appliance on a railroad car, and that an employé of the company was injured by reason of such defect, is made prima facie evidence of negligence on the part of the company. In an action by a switchman to recover for an injury caused by his falling while attempting to climb on a car in the night, he testified that in attempting to put his foot on the step or stirrup it struck the side, and slipped off, and that, from the way his "foot hit it, it was slanting way back." Witnesses who examined the car the next morning while standing in the yards testified that one of the steps was bent back under the sill. The car had been switched onto an intersecting track during the night, and the question whether the step on which plaintiff tried to place his foot was the one described by such witnesses, or the one on the opposite corner of the car, depended upon whether the car had been transferred over one or the other of two connecting tracks, upon which point there was no evidence, and on the conclusion of plaintiff's case a verdict was directed for defendant. *Held*, that the evidence was sufficient to require the submission of the case to the jury; that, in the absence of evidence from defendant to show over which track the car had been transferred,—which was a fact peculiarly within its knowledge,—the jury might reasonably infer that the step found defective the next morning was the one which plaintiff attempted to use.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

The plaintiff, while a switchman in the service of the Pennsylvania Railroad Company, sustained the loss of a leg. For this injury he brought this



sult, claiming that his foot slipped from a bent and damaged iron step at one end of a car he was climbing in discharge of his duties, and that his foot was thereby thrown on the rail in front of a revolving wheel and crushed. At the conclusion of the plaintiff's evidence, and before any evidence by the defendant, the court below instructed the jury to find for the railroad company.

Charles Koonce, Jr., for plaintiff in error.

Wm. C. Bayle, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, announced the opinion of the court.

Three errors are assigned: First. In the admission of evidence in chief for the defendant in cross-examination of the witness Forney, a witness introduced by the plaintiff for the sole purpose of proving the number of the car from which the plaintiff fell. Second. In the exclusion of the testimony of the witness Richards touching the identification and condition of the car from which plaintiff fell. Third. As to the action of the court in directing a verdict. These may be treated in the order stated.

1. The evidence tended to show that the plaintiff was a switchman employed in switching ore cars in a yard assigned to the National Steel Company at Youngstown, Ohio. At about 7 o'clock on the night of December 8, 1899, while attending to his duties, plaintiff opened a switch to admit a train of ore cars being pushed by an engine; the object being to transfer the cars from one part of the yard to another. After setting the switch for the main track, he gave the signal to the engineer to "come ahead." When the first car reached the point where he was standing, he attempted to climb on, by reaching out and grasping the handhold, and then springing so as to place his foot in the stirrup at what was the then forward and westward end of the car, the car being the first or front car as the train was then moving. Plaintiff testified that the train at the time was moving at a speed of not exceeding three miles per hour. The tracks at the locus in quo run east and west, and the train of cars was being pushed westwardly. Plaintiff was on the north side of the track. He testified, among other things, as follows:

"I had my lantern on my right arm; put my hand up for the handhold; got it all right, and sprang for the step; I just got a glimpse of it, and saw that there was a step there, and my foot slipped off,—hit the side of the step, and slipped off, and fell on the rail."

He further said that the step he undertook to place his foot in was on the corner of the car,—the northwest corner as the car then stood; that it was an iron step, bolted on the sill, and hung below the outer edge of the bottom of the car; and that such steps are a part of the ordinary equipment of freight cars. When asked as to the condition of the step and the circumstances of the accident, the plaintiff, among other things, said "that his foot hit the side of the step," "on the north side or on the west side; and, from the way my foot hit it, it was slanting way back, the same as I would put my foot up, and felt as though it was slanting back towards the end sill of the car." For

the purpose of identifying the car from which he fell, plaintiff introduced one Elias Forney, a member of the switching crew, and asked Forney if he knew the number of the first car in the train which was being pushed up the track at the time he (O'Connell) sustained his injury, and to give any other marks or words by which it was distinguished. The witness answered that the number of the car was 47,923, and that it was an Erie car. The plaintiff then stopped, and turned the witness over to the other side for cross-examination. On cross-examination he stated that he discovered the number and description of the car at between 11 and 12 o'clock the night of O'Connell's injury, having first gone with O'Connell to the hospital. He said that the car had been shifted while he was gone, but that he got its number from the conductor's report, and then hunted it up, and saw it was an Erie car. In further cross-examination the following occurred:

"Q. Did you examine the northwest step of the car? A. Yes, sir. Q. Was that step bent back on the car you examined? A. No, sir. Q. What was the position of the step on car 47,923 when you saw it? A. The step was solid. Q. Straight down? A. Yes, sir; bolted on the side sill with bolts."

All this was objected to by the plaintiff in error as not legitimate cross-examination, but evidence in chief. It was, however, admitted, over objection, as proper cross-examination. This statement as to the condition of the step on the car examined by the witness was plainly evidence in chief. The witness should have been recalled if the defendant so desired, and thus made the witness of the defendant as to the condition of the step of the car he had identified by number and name as the car from which plaintiff fell. *Montgomery v. Insurance Co.*, 97 Fed. 913, 38 C. C. A. 553, 557; *Wills v. Russell*, 100 U. S. 621, 625, 25 L. Ed. 607; *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503. The cases cited above are all cases where the trial court had properly applied the rule limiting the cross-examination to the matters opened up by the examination in chief, and in *Wills v. Russell* the court calls attention to the fact "that the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury." "Cases," said the court, "not infrequently arise where the convenience of the witness, or the court, or the party producing the witness will be promoted by a relaxation of the rule to enable the witness to be discharged from further attendance; and if the court, in such a case, should refuse to enforce the rule, it clearly would not be ground of error, unless it appeared that it worked serious injury to the opposite party." While we are disposed to concede to a trial judge wide limits in the suspension or enforcement of the rule in reference to the proper limits of a cross-examination and in respect to the order in which evidence is to be introduced, yet we must reserve to this, as a reviewing tribunal, such authority in respect to even such questions of practice as that any serious injury to the rights of the party complaining of the relaxation of the rule may be corrected by granting a new trial, if necessary. In the instance before us the case turned upon the question as to whether the

plaintiff's injury was due proximately to a defective appliance. Without having asked the witness Forney a single question in respect to this matter, the defendant was permitted to affirmatively show that no such defect existed as that claimed by the plaintiff. A consequence was that, upon this very affirmative evidence, the defendant, at the close of plaintiff's evidence, asked and obtained a direction to find for the defendant in error. This verdict was directed, as is shown by the charge of the court, upon the ground that this positive evidence, delivered by Forney, that the step was not defective, was not so contradicted by the evidence of other witnesses as to make a case for the jury. We are not prepared to say that in this particular instance the suspension of the usual and proper rule in regard to the limits of a cross-examination did not operate to the very serious injury of the plaintiff's case. Certain it is that no reason appears which appealed to the discretion of the trial judge. Inasmuch, however, as the case must be reversed upon other grounds, we reserve the question as to whether the action of the court in this instance would, independent of any other ground, be reversible error.

2. The evidence of the plaintiff's witness Watkins Richards touching the defective condition of a step on the corner of Erie car No. 47,923 was erroneously excluded. The plaintiff's witness William Edwards had already testified that on the morning after the injury to O'Connell he and Watkins Richards had together examined Erie car No. 47,923, and found the step on the northeast corner of the car, as it stood when examined, bent backwards against the sill. Richards was then called. He did not remember the number of the car, and could only identify the car examined as an Erie car in the yards of the defendant company, and the same car which witness and William Edwards had examined together. We think this was enough to permit the witness to testify as to the condition of the car step thus examined. Neither do we think the examination made by Richards was so remote from the time of the accident as to justify its exclusion altogether. The injury had occurred at about 7 p. m. of the previous evening, and this inspection by Edwards and Richards occurred between 8 and 9 the following morning. The time which had elapsed between the injury and this inspection was matter for consideration in respect to the probative effect of the evidence, and was a question for the jury under proper instruction. But the inspection was not so remote as to justify its entire exclusion. The court had already, over objection, admitted the evidence of the witness Edwards, whose inspection was made at the same time; and we cannot think the very cautious trial judge could have rested his ruling upon this question of remoteness, but rather upon the supposed insufficiency of the identification of either the car examined, or of the particular step as the step in question.

3. It follows, from the error in excluding the evidence of the witness, Richards, that the court erred in directing a verdict for the defendant. Independently, however, of the excluded evidence referred to, we think there was a case for the jury. The plaintiff was an employé of a railroad corporation, and claims to have been injured in Ohio by a defective appliance upon a railroad car in use upon the

railroad of the defendant company. His case is, therefore, within the terms of the Ohio statute of April 2, 1890, being now section 3365-21, Bates' Ann. Rev. St. Ohio. This statutory provision so far changes the ordinary rule of evidence in actions governed by the act as to constitute evidence of such a defect and of an injury caused thereby to an employé "prima facie evidence of negligence on the part of such corporation." *Felton v. Bullard*, 37 C. C. A. 1-4, 94 Fed. 781; *Pennsylvania Co. v. McCann*, 54 Ohio St. 10, 42 N. E. 768, 31 L. R. A. 651, 56 Am. St. Rep. 695. The proof that plaintiff was an employé, and that he sustained an injury while in the discharge of his duty, carries with it no presumption of negligence on the part of the defendant company, either at common law or under the Ohio act, cited above, although a different rule may prevail as to a passenger. *Patton v. Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Railway Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. Under the Ohio statute it devolves upon a railroad employé suing for an injury due to a defective car, engine, or appliance to show not only an injury, but that it was caused by such a defect. The operation of the statute is at this stage of the case to relieve such employé from the further duty, which at common law would rest upon him, of going on and showing that the company had knowledge of such defect at or before the injury, or, if diligent, ought to have had knowledge. The trial judge, as we learn from his charge, was of opinion that there was no such evidence of a defective step as to justify a jury in finding the plaintiff's injury was proximately caused by such a step. We are not prepared to say that the personal testimony of the plaintiff tended sufficiently to establish a defect in the step he was endeavoring to use when he fell. The learned trial judge regarded his evidence as at most amounting to an opinion or a conjecture based upon facts not constituting more than a bare scintilla, and as not, therefore, constituting that degree of evidence legally justifying a finding that there was a defective step as surmised by the plaintiff. We are not prepared to disagree with the court below in this view of the plaintiff's personal testimony, considered apart from all other evidence circumstantial and direct. "It is not sufficient for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And when the testimony leaves the matter uncertain, and shows that any one of a half dozen things may have brought the injury, for some of which the employé is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." *Patton v. Railway Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361. But there was very direct evidence that a defective and bent step was found on the morning after the accident upon an Erie ore car standing in the ore yard at Youngstown, and that the car bore the number 47,923; and also evidence tending to show that the plaintiff had fallen from that very car. But it is said that there was no sufficient identification of the step from which plaintiff fell as the defective step found on car No.

47,923. The position of the car had been in the meantime shifted, and some 13 hours had elapsed between the injury and the examination of the car by the plaintiff's witnesses. Plaintiff tried to climb onto the front car of a string being pushed by an engine. The track on which the train was moving was an east and west track, and the train was being pushed west. The plaintiff stood on the north side, and grabbed the handhold on the front end of the first car that passed him, and attempted to place his foot in the step at the corner of the car. If, therefore, there was a defective step, which proximately contributed to his fall and injury, it must have been the step on the northwest corner of car No. 47,923 as that car stood at the time of his injury. After the accident the car was moved to the ore dump, and then back into the yard, and when examined by the witnesses Edwards and Rosevear was standing on a track running north and south. The defective step testified to by all of these witnesses was the northeast corner step as the car stood on the north and south tracks when the witnesses found it. No other step was defective. There was evidence showing that there were two routes by which the car might have been carried to the ore dump and brought back to the yard. One of these routes was over a track called the "Horn," in which event the car would be completely turned around, and the northwest step would become the southwest step; the other route was around by the office track, in which case the northwest step would be the northeast step,—the very step found injured. The defect in the case made for the plaintiff, it is said, lies in the fact that there was no testimony showing which route had been pursued by this car, and that if, in fact, the route around the "Horn" was pursued, the step nearest plaintiff when he fell would be the southwest and not the northeast step, as the car stood after being so shifted. Now, the ultimate fact to be proved by this plaintiff is that his injury was caused by a defective metal step on the corner of the car which he undertook to ascend. If the jury should believe the statement of the plaintiff himself that he grabbed a handhold on the northwest corner of a car moving west past him, and that his foot failed to secure a standing upon the step at that corner of the car because it struck something which felt like the side bar of a step bent away from him, and not hanging perpendicularly with and below the side sill of the car, it would afford a basis for at least a reasonable conjecture that the step in question was in some way defective. Conceding, however, that this conjecture, standing only upon the slender foundation found in the feeling, surmise, or opinion of the plaintiff, is not in itself such a solid fact as to be a safe basis for a judgment, we are next to inquire whether the fact that upon the next morning one of the steps upon the car in question was found to be in such a defective condition as to invite just such a catastrophe as that which occurred is not in itself a fact pointing to that step as the cause of the accident, all the other steps of that car being in sound condition. It must be admitted, of course, that it is possible that the defective step found the following morning upon the car which plaintiff was climbing might not have been the step near the plaintiff, and that the step he missed was in fact a sound step, and

his slip due to some carelessness of his own in trying to reach it. But this solution is dependent chiefly, if not altogether, upon which route of the two possible routes was in fact taken by the car after the accident in going to and coming from the ore dump. But if the car took the route around by the "Horn," so that the northwest corner of the car at the time of the accident would be the southwest corner after this shifting, it was a fact peculiarly within the knowledge of the defendant company, and a fact which, in the situation of the evidence, they were, in our opinion, called upon to show, for otherwise the conclusion might be reasonably drawn by the jury that the defective step found on the car inspected the next morning was the step nearest the plaintiff the night before.

We have deemed it necessary to present this view of the deductions of fact which may be legally drawn from the evidence actually submitted on the trial, because the evidence of the witness Richards was only corroborative of the testimony admitted from the witnesses Edwards and Rosevear. If the testimony of the witnesses named did not amount to a contradiction of the evidence of the witness Forney that all the steps of car No. 47,923 were sound, and not defective, at 11 or 12 o'clock the night before,—that the northwest step was particularly examined, and found sound,—there was in fact no such conflict as required a submission to the jury. On the other hand, if the jury should believe that the car examined by Edwards and Rosevear was the car examined by Forney, and the step found defective the step nearest plaintiff when injured, there would be a contradiction, unless the other circumstances would justify an assumption that the injury to the step described by the first-named witnesses had occurred after the accident and before those witnesses saw it. This, too, was a question for the jury. Upon the whole case we think there was something more than a bare scintilla of evidence tending to show that plaintiff's injury was caused by the defective step inspected by Edwards, Rosevear, and Richards.

Reverse, and remand for a new trial.

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### HOLMES et ux. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 694.

#### 1. PUBLIC LANDS—EXCEPTIONS FROM FOREST RESERVATION—RIGHTS OF SETTLERS ON UNSURVEYED LAND.

While the mere occupancy and improvement of public land give no right as against the United States, yet the occupancy and improvement of unsurveyed public land, in good faith, by a settler who makes it his home, with the intention of making entry of the same under the homestead or pre-emption laws when it shall have been surveyed, has always been recognized as lawful, and as giving the settler a possessory claim, which entitles him to preference when the land is opened for entry; and, in view of such recognition, such a settler must be regarded as having made a "valid settlement pursuant to law," within the meaning of the president's proclamation of December 20, 1892, setting apart, as a forest reservation, certain public lands in California, but excepting all

lands within the prescribed boundaries "which may have been prior to the date hereof embraced in any legal entry or covered by any lawful filing duly of record \* \* \* or upon which any valid settlement has been made pursuant to law;" and under the rule of the later decisions of the supreme court, that the withdrawal of lands from entry by the interior department as being within a railroad grant did not defeat the rights of subsequent settlers thereon where the withdrawal was in fact unauthorized, it is immaterial that the land of such settlers had been so withdrawn, and had never been formally restored to the public domain.

2. SAME—ACT FOR BENEFIT OF SETTLERS ON RAILROAD LANDS—EFFECT OF INCLUSION IN FOREST RESERVATION.

Under Act Jan. 13, 1881 (21 Stat. 315 [U. S. Comp. St. 1901, p. 1594]), giving all persons who have settled and made valuable and permanent improvements upon any odd-numbered section of land within a railroad withdrawal, in good faith, and with the permission or license of the railroad company, and with expectation of purchasing the same, the right to purchase not exceeding 160 acres of the same from the United States, if for any cause it shall be restored to the public domain, the right so given a settler is not defeated by the fact that after the withdrawal has been set aside the land is included within the boundaries of a forest reservation, created by proclamation of the president, before it has been surveyed so as to give the settler an opportunity to purchase.

In Error to the Circuit Court of the United States for the Southern District of California.

See 105 Fed. 41.

The United States brought an action of ejectment against the plaintiffs in error to recover the possession of the unsurveyed S. E.  $\frac{1}{4}$  of section 7, township 4 N., range 9 W.; the said land being included in a reservation made by the president of the United States on December 20, 1892, pursuant to section 24 of the act of congress approved March 3, 1891 (26 Stat. 1103 [U. S. Comp. St. 1901, p. 1537]), which provides "that the president of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the president shall, by public proclamation, declare the establishment of such reservations and the limits thereof." The proclamation excepted from the reservation "all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement had been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: \* \* \* provided that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement, or location was made." 27 Stat. 1051. The plaintiffs in error, Albert O. Holmes and Susan L. Holmes, his wife, made separate defenses; the former claiming the right to occupy the premises by reason of the following facts: That in April, 1890, he settled upon the land in controversy in good faith to obtain a home for himself, and with the intention of claiming the same under the homestead laws of the United States, said land being then and at the commencement of the action unsurveyed public land; that at the date of his settlement the land had been withdrawn from entry by the United States land department, as being within the limits of the grant made by congress to the Southern Pacific Railroad Company by the act of March 3, 1871, for which reason he was not permitted to file on the land; that within six months after his settlement he established his actual residence in a house on the land, and has since resided there with his family, and that it is his intention as soon as the land is surveyed, if permitted to do so, to file his homestead application, and to make his entry under and in pursuance of the act "for the relief of settlers on the public lands," approved

May 14, 1880 [U. S. Comp. St. 1901, p. 1392]. Susan L. Holmes relied upon the following facts: That in April, 1890, with the permission and license of the Southern Pacific Railroad Company, she settled upon and made valuable improvements on the land in controversy, in good faith and with the expectation of purchasing the land of said company, and that she has since continuously resided thereon. She claimed to be entitled to acquire the land under the act "for the relief of certain settlers on restored railroad lands," approved January 18, 1881 (21 Stat. 315 [U. S. Comp. St. 1901, p. 1594]), and the "act to provide for the adjustment of land grants made by congress," etc., approved March 3, 1887 (24 Stat. 557 [U. S. Comp. St. 1901, p. 1595]). The land in controversy had been withdrawn from entry by the land department, as being within the limits of the grant to the Southern Pacific Railroad Company of March 3, 1871, and also within the overlapping limits of the grant to the Atlantic & Pacific Railroad Company, by act of July 27, 1866. The latter company did not construct any portion of its line in California, and, in consequence of such failure, congress, by Act July 6, 1886 (24 Stat. 123), forfeited and restored the unearned lands to the public domain. The withdrawal by the land department, however, was continued in force, notwithstanding said forfeiture, upon the assumption that the lands were included in the grant of March 3, 1871, to the Southern Pacific Railroad Company. On July 8, 1891, Susan L. Holmes made application to the Southern Pacific Railroad Company to purchase the land in controversy. The company received her application, and, in writing, informed her that, "if there be two or more applications for the same tract of land, the actual settler, who in equity is best entitled to purchase, will be given the preference," but notified her that the company reserved to itself the right not to sell the land by itself, but to sell it in conjunction with other lands. Thereafter suits were brought by the United States against the Southern Pacific Railroad Company to determine the status of the lands within said overlapping limits, and the supreme court on October 18, 1897, held that the lands within the overlapping limits became, upon the passage of the forfeiture act of 1886, the property of the United States, and were thereby restored to the public domain, and that the Southern Pacific Railroad Company never acquired any interest therein. 18 Sup. Ct. 18, 42 L. Ed. 335. On September 6, 1898, by the order of the commissioner of the general land office, all lands lying within the overlapping limits of the railroad grants were restored to the public domain, with the exception of lands lying within the reservation; but, as to said lands, permission was given to all persons having claims therein, initiated prior to the creation of such reservation, to present such claims for consideration by the authorities of the United States land office. The circuit court, upon this state of the facts, held that by reason of the fact that the land was withdrawn from entry by the action of the land department at the time of the settlement thereon by the plaintiffs in error, and remained so withdrawn up to the time of the proclamation of the president on December 20, 1892, setting apart the land as a portion of a public reservation, the plaintiffs in error could acquire no right in the land which they could set up against the action of ejectment brought by the United States to recover its possession.

D. M. McDonald and Borden & Carhart, for plaintiffs in error.

L. H. Valentine, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is conceded that the land in controversy had not, prior to the date of the proclamation of the president, been embraced in any legal entry or covered by any lawful filing of record in the United States land office; but it is contended that it is land upon which a valid settlement had been made pursuant to law, and that the statutory period



within which to make entry or filing had not expired. The circuit court decided this question adversely to the plaintiff in error Albert O. Holmes, for the reason that at the time when he made his settlement the lands were withdrawn from entry and settlement; citing *Maddox v. Burnham*, 156 U. S. 544, 15 Sup. Ct. 448, 39 L. Ed. 527, and *Wood v. Beach*, 156 U. S. 548, 15 Sup. Ct. 410, 39 L. Ed. 528. In so ruling, the circuit court followed the law as it was understood, and as it had been settled by a series of decisions of the supreme court. A few months after the decision of the circuit court was rendered, however, the supreme court, in *Hewitt v. Shultz*, 180 U. S. 139, 21 Sup. Ct. 309, 45 L. Ed. 463, overruled its prior decisions, and denied the efficacy of the act of withdrawal to exclude from settlement land which was not in fact withdrawn by the operation of a present grant, and which, but for the withdrawal, would have been open to entry and settlement under the public land laws. By the decision in that case and in the subsequent case of *Railroad Co. v. Bell*, 183 U. S. 675, 22 Sup. Ct. 232, 46 L. Ed. 383, the court has held that the withdrawal of lands by the secretary of the interior for the reason that they were supposed to be within the limits of a grant to a railroad company could not injuriously affect the right of a settler upon such land, who claimed the right to enter and settle the same as public land of the United States. The question of the right of Albert O. Holmes, therefore, is to be dealt with as if there had been no withdrawal of the land. But the land was, and still is, unsurveyed land. If it had been surveyed, and Holmes had tendered a filing thereupon, or had attempted to enter it as a homestead at the local land office, his possessory right would be entitled to protection, under the authority of *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524. But in *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, it was held that no portion of the public domain is open to sale until it has been surveyed, and that a settler upon the public lands in advance of the public surveys acquires no right except the preferential right to secure the land after the survey. Of the right of such a settler, the court said:

"The United States make no promise to sell him the land, nor do they contract with him upon the subject. They simply say to him, 'If you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them.'"

Conceding that the mere occupation of public land gives no right as against the government, and that the president had the power, under the act of congress, to set apart the land in controversy in a public reservation, and that neither of the plaintiffs in error had acquired any interest therein which they could successfully set up as against that right, we come to the inquiry whether it was the intention of the act of congress and the proclamation of the president to include this land in the reservation. The exceptions expressed in the proclamation are three, —lands "embraced in a legal entry," or "covered by a lawful filing of record," and lands "upon which any valid settlement has been made pursuant to law." By the last of these exceptions it was contemplated

that there might be a valid settlement on the public lands, other than those which were embraced in legal entries or covered by lawful filings, as those terms were used in the public land laws. Does the settler upon unsurveyed land, who makes it his home with the intention, as soon as the land is surveyed, to take the necessary steps to secure and protect his entry as a homestead, and to acquire title under the homestead law, and who makes valuable and permanent improvements on the land, make a "valid settlement pursuant to law"? In *Clements v. Warner*, 24 How. 394-397, 16 L. Ed. 695, it was said:

"The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon."

In *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, it was said:

"A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase."

In *Railroad Co. v. Osborne*, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346, it was held that a settler upon public unsurveyed land, who had made improvements thereon with the intention of acquiring a title under the pre-emption laws as soon as the lands should be surveyed, had a "possessory claim," such as was protected by the act of congress in granting to a railroad company a right of way over the public lands, and conferring upon a territorial legislature power to "provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned." The court said:

"It would not be easy to suppose that congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers."

In *Railroad Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79, that doctrine was reaffirmed. It is true, there is no statutory provision which in express terms permits or protects settlement upon unsurveyed public land. We think, however, in view of the foregoing expressions of the supreme court, and the known recognition of the rights of such settlers as against all except the United States, that such a settlement, while it confers no right which the government is bound to respect, is nevertheless a valid settlement, and made pursuant to law, and that it comes within the spirit and intent of the exception contained in the proclamation of the president.

We are inclined, also, to the view, and we so hold, not without some doubt, that Susan L. Holmes had a possessory right by virtue of the act of congress of January 3, 1881 (21 Stat. 315 [U. S. Comp. St. 1901, p. 1594]), whereby it was enacted:

"That all persons who shall have settled and made valuable and permanent improvements upon any odd numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of said company the land so settled upon, which land so settled upon and improved may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or timber-culture acts of the United States, shall be permitted, at any time

within three months after such restoration, and under such rules and regulations as the commissioner of the general land office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal subdivisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor."

According to the record, Susan L. Holmes settled upon and made valuable improvements upon the land in controversy. That it is a portion of an odd-numbered section is alleged in the complaint which is filed in this action. She entered with the permission and license of the railroad company, and with the expectation of purchasing. At that time the land was withdrawn from settlement under the public land laws. Can it be said to be within the purport of the proclamation of the president in devoting a large tract of land, including the land occupied by such a settler, to a public use, to defeat the protection to bona fide settlers which was intended to be afforded by the act? We hesitate to so construe it. The land is no less a part of the public domain after having been set aside for a timber reservation. By the proclamation the lands have been restored to the public domain, and, while they have not been so restored as to become subject to entry under the homestead laws, the claim of the railroad company has nevertheless been extinguished, and the withdrawal has been set aside. The lands have thereby been taken out of the category of withdrawn lands to which the act referred. It is true that Susan L. Holmes has not, within three months after such restoration, purchased the land, but it is not her fault that she has not done so. The land has not been surveyed, and she has had no opportunity to purchase. If the act gave her the right to purchase, we think her right is not precluded until the survey shall have been made, and that until that survey is made she has a possessory right sufficient to constitute a defense against this action of ejectment, even if she has not made a "valid settlement pursuant to law," so as to come within the exception to the proclamation.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with the foregoing views.

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#### THE MARY BUHNE.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 760.

1. COLLISION—SAILING VESSELS MEETING—UNWARRANTED CHANGE OF COURSE.

One of two sailing vessels approaching each other from opposite directions in the night was sailing free on the starboard tack, while the other was closehauled on the port tack. So long as such courses were maintained, there was no danger of collision, but when a short distance apart the vessel running free twice changed her course, the last time taking a course in which she was closehauled on the starboard tack, and making a collision inevitable if both maintained their courses. Held, that in such situation the other vessel, which had previously been privileged and required to maintain her course, became the burdened vessel, and was not in fault for changing her course, although a collision resulted by reason of both changing at the same time; and that the one making the first changes, bringing about the dangerous situation without necessity, was solely in fault.

Appeal from the District Court of the United States for the Northern District of California.

For opinion below, see (D. C.) 95 Fed. 1002.

Nathan H. Frank, for appellants.

H. W. Hutton, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. On June 28, 1896, the schooner Jennie Thelin, laden with a cargo of lumber, left Eureka, Cal., bound for San Francisco, and had proceeded about 18 miles on her way, when she came into collision with the Mary Buhne at about 12:30 o'clock a. m. on June 29th. At midnight Capt. Hansen, the master of the Jennie Thelin, and a man named Jacobsen, went on watch. There was moonlight, and it was clear. The sea was smooth, with the wind southeast. The master observed that his vessel was on the port tack, running as close to the wind as she could, and making four or five miles an hour, and that her side lights were burning brightly. About 15 minutes before the collision, both Hansen and Jacobsen saw the green light of the Mary Buhne about two points on the starboard bow, and about two miles away. The evidence shows that Hansen kept his eye on the light, and that soon the Mary Buhne changed her course, and showed her two side lights to the Jennie Thelin in about the same position on the bow of the latter, and that shortly afterward the Mary Buhne again changed her course, leaving only her red light visible. According to the evidence of Hansen, the Mary Buhne, when first observed, was headed N. N. E., and was running free on the starboard tack, with maybe a couple of points in the sails free; but when she showed her red light only she was running close to the wind on the same tack. The master of the Jennie Thelin, seeing that a collision was inevitable, put his helm hard aport, but at about the same time the Mary Buhne, also to avoid the collision, put her helm hard astarboard, and ran into the Jennie Thelin on the port forward quarter. It was held by the district court that the Mary Buhne was at fault, and was responsible for the collision, and that the Jennie Thelin was free from blame. The appellants challenge the sufficiency of the evidence to sustain that finding. They say that, conceding it to be true, as shown by the evidence of the appellees, that shortly prior to the collision the vessels were in the three positions indicated, it was the duty of the Jennie Thelin at all times to hold her course, and that of the Mary Buhne to keep out of her way. They argue that in the first position, when the master of the Jennie Thelin first saw the Mary Buhne, there was no danger of a collision, and that, as the former was sailing close to the wind, and the latter running free, the former had the right of way; that in the second position, when both lights of the Mary Buhne were visible from the Jennie Thelin, the Mary Buhne was still running free before the wind, and was subject to the same law to keep out of the way; and that in the third position, when a collision became inevitable, if both vessels held their courses, it was

still the duty of the Jennie Thelin to hold her course, and that of the Mary Buhne to avoid a collision, since she was then, as before, still running free before the wind; and that she complied with the law by putting her helm hard astarboard, and would have avoided the collision, but for the act of the Jennie Thelin in departing from her course and putting her helm aport at the same time. The evidence in the case is, upon some points, conflicting. It is clear that at the first position of the vessels there was no danger of collision, and that the Jennie Thelin had the right of way, being closehauled, and that it was the duty of the Mary Buhne to keep out of her way. The evidence fairly establishes the fact, and the district court so found, that the Mary Buhne twice thereafter changed her course before the final change, which she made to avoid the collision. After the first change, it is not disputed that the Mary Buhne was still sailing free before the wind, and was under obligation to keep out of the way of the Jennie Thelin; but the court found that in the courses the vessels were then sailing there was no danger of a collision. The chief question in the case, and that upon which the responsibility of the Mary Buhne for the loss and damage depends, is whether or not, in her third position, she was sailing free before the wind. The appellant contends that she was then running free as she was within six points of the wind. To support this contention, a nautical dictionary is cited to the effect that the keel of a square rigged vessel when closehauled "actually makes an angle of six points with the line of the wind, but cutters, luggers, and other fore and aft rigged vessels will sail much nearer" (Wagner's Marine Dictionary, 91); and reference is made to the language of Mr. Justice Clifford in *Crowel v. Radama*, 6 Fed. Cas. 908 (No. 3,442), that "a schooner running six points off" the wind was running free. But as against these definitions is the direct evidence of the master of the Jennie Thelin that in the third position both vessels were by the wind, and we cannot say that the district court erred in crediting it. It is contended that this evidence is disputed by that of the master of the Mary Buhne. He was not on deck just prior to or at the time of the collision, but he came on deck immediately afterward. He testified that the position of the sails on the Mary Buhne was such as to indicate, in his opinion, that she was running free at the time of the collision, for the reason that her sails could not have been changed from a condition of being closehauled to that in which he found them in less than 10 minutes. The trial court characterized this expression of opinion as the result of a hasty observation made while the vessels were still in collision, and said that it was not sufficient, in his judgment, to overthrow the positive evidence of the two witnesses who testified to the changes of the course of the Mary Buhne. We find in the record no reason to question the correctness of that conclusion. If in the third position the Mary Buhne was closehauled on the starboard tack, she had the right of way, since a vessel closehauled on the port tack is obliged to keep out of the way of a vessel closehauled on the starboard tack; and, having the right of way, it was her duty to maintain her position, and equally the duty of the Jennie Thelin to avoid a collision, which she attempted to do by putting her helm hard aport. The Mary Buhne was re-

sponsible for the condition of danger in which the vessels were in the third position. No reason is shown in the evidence why she should not have held the course she had in the second position until she had passed the Jennie Thelin. Having made the change which brought the two vessels in converging lines, she failed to follow the rule which applied to that situation. The mate and the boy who were on watch on the Mary Buhne were not produced as witnesses. The appellants made a showing of diligence in the effort to obtain their testimony, and the trial court indulged no presumption that such evidence, if given, would have been adverse to their contention. It is unimportant that the master of the Jennie Thelin was not advised of the statute governing the movement of vessels in the position in which these vessels were just prior to the collision. His course in putting his helm apart was proper, although his reason for so doing may have been erroneous.

The decree of the district court will be affirmed

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THE IROQUOIS.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1902.)

No. 815.

1. SEAMAN—INJURY IN SERVICE—DUTY OF SHIP TO MAKE NEAREST PORT.

Where a seaman in the performance of his duty, and without fault or negligence on his part, fell and broke both bones in one of his legs below the knee, and there was no one on board competent to treat the injury, it was the positive duty of the master to take him at once to some port where proper treatment could be had, where such a port could have been reached in time, and his failure to do so, by reason of which amputation became necessary, was negligence which rendered the ship liable in damages for the injury. The master must be presumed to have known that the injury was a serious one, requiring scientific treatment, and his failure to perform his duty is not excused by his ignorance, or his belief that the leg was healing properly, nor by the fact that the seaman made no demand to be taken to a port of distress.

2. SAME—DEFENSES—INVALIDATING INSURANCE.

There is no rule of admiralty law that the departure of a ship from her course, when required to procure necessary treatment for a sick or injured seaman, invalidates her insurance on the voyage or that on her cargo.

Appeal from the District Court of the United States for the Northern District of California.

For opinion below, see 113 Fed. 964.

The appellee was an able-bodied seaman, and one of the crew of the American ship Iroquois, laden with general merchandise, on a voyage from New York to San Francisco. On February 23, 1900, while assisting in furling the main sail during a gale, he accidentally, and without fault of his own or fault of the ship, fell from the main yard to the deck, and sustained a fracture of two ribs and of both bones of his right leg below the knee. The vessel was then a few miles to the southward of Cape Horn, in latitude 56 deg. 50 min. south, longitude 67 deg. 36 min. west. The appellee was

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¶ 2. See Insurance, vol. 28, Cent. Dig. §§ 736, 737.

carried to the carpenter's room, where the master set his leg in splints. He was then removed to the forecabin, where he remained during the remainder of the voyage. The broken ribs healed, but the bones of the leg failed to unite. The vessel arrived at San Francisco on May 7, 1900. On the following day the appellee went to the sailor's home, and a week later went to the marine hospital at San Francisco. There the surgeons endeavored to cause a union of the fractured bones of his leg, but the ends of the bones were dead and would not unite. In order to save the appellee's life it became necessary to amputate the leg, and it was amputated about three inches below the knee. The master of the *Iroquois* had no skill or experience in treating fractures. All the knowledge of the subject he possessed was derived from his own experience at some time previous when he had received treatment from a surgeon for a fractured leg. It appears that he set the appellee's leg as well as he could, and bound it and placed it upon a cushion in order to elevate it above the body, and instructed the steward to give the appellee gruel, mush, and other light food. The evidence shows that the appellee made no complaint of the treatment he received, and that the master supposed that the leg was healing, and had no knowledge to the contrary until March 30th, when for the first time the splints were removed. He testified that at that time the leg seemed to be knitting, but the appellee testified that when the splints were removed he was conscious that there was no union. One of the surgeons of the hospital testified that there never had been a union. The evidence indicated that under proper treatment the bones should have been well knitted by that time, and that their failure to unite was due to want of proper surgical treatment. That there was lack of such treatment, both in permitting the appellee to remain so long on board a ship in motion and in daily moving him, as it appears was done, is clearly deducible from the evidence. The district court found and held that, under the circumstances of the case as disclosed by the evidence, it was the absolute duty of the master of the ship to deviate from the course of the voyage for the purpose of procuring surgical aid for the appellee, and that the master was guilty of negligence in failing so to do. These findings are assigned as error.

Milton Andros, for appellants.

Walter G. Holmes (Daniel T. Sullivan, of counsel), for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We entertain no doubt, in view of the evidence in the case and the law applicable thereto, that it was the duty of the master to bear away to some port of distress as soon as possible after the occurrence of the accident. There were several ports to which the appellee might have been taken for surgical treatment. The vessel could have returned to Port Stanley, the chief port of the East Falkland Island. The district court found that to have returned there would have involved a loss of time of three or four weeks, and in so finding made, we think, more than liberal allowance for probable delay and adverse winds. There were other ports accessible after rounding the Horn to which the appellee could have been taken in time to procure the necessary treatment and save his leg. The ship could have made Evangelistas Island by sailing one or two days out of her course. From that island it seems that the appellee could have been taken by steamer to Valparaiso. The *Iroquois* herself could have made the port of Valparaiso with a loss of probably not more than four or five days in her voyage. The port of Ancud or San Carlos

might have been reached with about the same loss of time. It is shown that at that port proper surgical treatment could have been had. When, on March 30th, the splints were removed, the vessel was as near to San Francisco as to Valparaiso, and there was no recourse except to proceed on her voyage. It is no excuse that the master was ignorant, or that he believed the broken leg was healing properly, and for that reason thought it unnecessary to bear away from his course. Nor is he excused by the fact that the appellee at the time made no complaint of the treatment he received, and made no demand to be taken to a port of distress. The appellee may have been ignorant of his rights and of the duty of the master in the premises, or he may have been uninformed of the proximity of accessible ports. The duty of the master to the appellee was a positive one. In *Robertson v. Baldwin*, 165 U. S. 287, 17 Sup. Ct. 326, 41 L. Ed. 715, Mr. Justice Brown, referring to the protection accorded to seamen, observed that they are treated "as needing the protection of the law in the same sense which minors and wards are entitled to the protection of their parents and guardians." The appellee had been disabled while in the service of the ship, and without any fault on his own part. By the maritime law he was entitled to be healed at the expense of the ship. *Reed v. Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641; *Harden v. Gordon*, 2 Mason, 54, Fed. Cas. No. 6,047. This obligation was imposed upon the ship in consideration of the appellee's services, and his undertaking to engage in possibly perilous voyages, and encounter hazards, if necessary, in the protection of the ship and cargo. The injury to the appellee was a serious one, and the master must be presumed to have known that it required careful and scientific treatment.

The argument is made that a deviation from the vessel's course would have invalidated the insurance on vessel and cargo. "A deviation is a voluntary departure from the course insured, without necessity or reasonable cause." *Bond v. The Cora*, 2 Wash. C. C. 80, Fed. Cas. No. 1,621. We are not aware that any court has ever held that a proper departure from the insured course for necessary treatment of a sick or wounded seaman operates to release an underwriter. The reverse has been held in *Burgess v. Insurance Co.*, 126 Mass. 70, 30 Am. Rep. 654; *Bond v. The Cora*, supra; and *Perkins v. Banking Co.*, 10 Gray, 312, 71 Am. Dec. 654.

We find no error in the conclusions of the district court. The decree will be affirmed.

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#### UNITED STATES v. NUCKOLLS.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1902.)

No. 1,739.

#### 1. CUSTOMS DUTIES—UNDERVALUATION—SUBJECTION TO ADDITIONAL DUTY.

Under section 32 of the tariff act of 1897 [U. S. Comp. St. 1901, pp. 1701, 1893], amendatory of sections 7 and 11 of the customs administrative act of 1890, which provides that if the appraised value of any article of imported merchandise subject to an ad valorem duty, "or to a duty based upon or regulated in any manner by the value thereof," shall exceed the value declared in the entry, an additional duty shall be levied



and collected, proportionate to the undervaluation, such additional duty is collectible when the question whether the goods are to pay a specific or an ad valorem duty depends upon whether they exceed a certain value, and the appraisement shows an undervaluation, even though the appraised value is not sufficient to subject them to an ad valorem duty.

2. SAME—COLLECTION BY SUIT.

The fact that a collector fails to levy an additional duty upon imported goods, to which they are subject under the statute by reason of undervaluation, does not affect the right of the United States to recover the same by suit.

In Error to the Circuit Court of the United States for the District of Colorado.

Earl M. Cranston, U. S. Atty.

John R. Dixon, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. Section 32 of the tariff act, approved July 24, 1897 (30 Stat. 212 [U. S. Comp. St. 1901, pp. 1701, 1893]), which section amended sections 7 and 11 of the act to simplify the laws in relation to the collection of the revenues, which was approved July 10, 1890, declares that "if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one percentum of the total appraised value thereof for each one percentum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued and shall be limited to fifty percentum of the appraised value of such article or articles." While this law was in force E. Nuckolls, the defendant in error, caused to be imported into the United States from Mexico certain cattle, which were actually purchased by him. A part of these cattle consisted of 119 two year old steers. Nuckolls invoiced only 118 two year old steers, and when he entered them placed a value thereon of \$9.25 per head, making the total invoiced value \$1,092. The collector of the port of El Paso, where the cattle were entered, caused an appraisement of the actual market value and the wholesale price of the cattle to be made, and found that the 118 two year old steers, which were entered by Nuckolls, were of the aggregate value of \$1,303.95, or, in other words, that the steers were worth \$11.05 per head. The appraised value, therefore, exceeded the invoiced value by about \$1.80 per head. In view of these facts the government claimed the additional duty imposed by section 32 of the act of July 24, 1897, supra, the sum claimed amounting to \$247.55, and it brought this action to recover that sum. A general demurrer to the complaint was filed, which was sustained by the circuit court on the theory, as it is said, that, inasmuch as the undervaluation did not lessen the rate of duty to be paid to the government, the additional duty claimed on account of undervaluation could not be recovered.

¶ 2. See Customs Duties, vol. 15, Cent. Dig. § 222.

Paragraph 218 of Schedule G of the tariff act of July 24, 1897 (30 Stat. 169 [U. S. Comp. St. 1901, p. 1648]), imposes a duty of \$2 per head on cattle if they are less than one year old, and declares that all other cattle if valued at not more than \$14 per head shall pay a duty of \$3.75 per head, and if valued at more than \$14 per head a duty of 27½ per cent. ad valorem. It is true, therefore, that as the cattle in question, when correctly appraised, were not worth more than \$14 per head, they did not become subject to an ad valorem duty, and that the amount of the duty payable to the government was not lessened by reason of the undervaluation. The statute, however, by its terms, imposes an additional duty of 1 per centum on account of an undervaluation, not only when the article is subject to an ad valorem duty, but also when the duty upon the article is "based upon or regulated in any manner by the value thereof." The case seems to fall, therefore, strictly within the letter and spirit of the act; for the duty on cattle, as heretofore shown, is based upon, and regulated in a measure by, the value of the animals. If cattle are more than one year old, and are valued at a sum exceeding \$14 per head, they pay an ad valorem duty; otherwise the duty payable on cattle over one year old is a specific duty of \$3.75 per head. The additional duty of 1 per centum is imposed, undoubtedly, to compel importers, when they enter merchandise, to make a truthful declaration concerning the value thereof, whenever the value of an article has a direct bearing upon the duty to be paid. The precise question which is involved in this case arose in *Pings v. U. S.*, 18 C. C. A. 557, 72 Fed. 260, wherein it was decided, in a case in all respects analogous to the one at bar, that when the question whether goods are to pay a specific or an ad valorem duty depends upon whether they exceed a certain value, and an appraisement is essential, that if the appraisement discloses that the goods have been undervalued they are subject to the additional duty of 1 per centum which is imposed by section 32 of the act of July 24, 1897 [U. S. Comp. St. 1901, pp. 1701, 1893]. This case (*Pings v. U. S.*) was before the supreme court of the United States, and the doctrine enunciated therein was upheld, in the case of *Hoeninghaus v. U. S.*, 172 U. S. 622, 629, 630, 19 Sup. Ct. 305, 43 L. Ed. 576.

Counsel for the defendant in error further contend that the additional duty is not recoverable by the United States in an action brought for that purpose, because the complaint does not allege that the additional duty of 1 per centum was levied by the collector of the port of El Paso. We are of opinion, however, that, if the additional duty ought to have been levied, collected, and paid, the amount thereof may be sued for and recovered by the United States from the importer, although there was no formal levy. The right of the United States to the sum which was due to it and ought to have been paid was not forfeited by the neglect of the collector to make a levy, even if he was guilty of such neglect. It was not within his power, by a neglect of duty, to release a tax which was due to the United States. We feel constrained to hold, for the reasons above stated, that the case was erroneously decided by the lower court.

Its judgment is therefore reversed, and the case is remanded for a new trial.

## ARNOLD v. SCHARBAUER et al.

(Circuit Court, W. D. Missouri, W. D. November 24, 1902.)

No. 2,596.

## 1. CONTRACTS—CONTEMPORANEOUS WRITTEN AND ORAL AGREEMENTS—CONFLICT IN PROVISIONS.

A written contract which purports on its face to be complete cannot be varied or added to by a prior or contemporaneous parol agreement, in the absence of fraud or mistake, and especially where the written contract contained stipulations for the performance of duties and the assumption of obligations by a party which is not bound by the alleged agreement sought to be substituted.

## 2. SAME—MODIFICATION AS TO PARTIES—CONSIDERATION.

Where a written contract purporting to be between two parties on each side failed because of the refusal of one of the parties, upon whom obligations were imposed, to execute the same, a subsequent parol agreement by the parties, who were entitled to the benefit of such obligations, that the contract should stand with such party omitted, to be binding on them must rest upon some new and independent consideration.

Action for Breach of Contract. On demurrer to amended petition.

Ward & Hadley, for plaintiff.

Lathrop, Morrow, Fox & Moore and Capps & Cantey, for defendants.

PHILIPS, District Judge. The original petition in this case counted upon the written contract set out in the amended petition. A demurrer thereto was sustained for the reasons assigned in the opinion of the court (see *Arnold v. Scharbauer* [C. C.] 116 Fed. 492), which sets out in full the written contract in question. The demurrer to that petition was sustained on the grounds, inter alia, that the Western Cattle Brokerage Company, which purported to be a party to the contract equally with Arnold, had not executed the contract, and, as it stipulated for services which were to be rendered by one or the other of them, it did not become a completed contract enforceable against the first parties at the suit of one of the parties of the second part; and for the further reason that the contract contemplated certain obligations to be assumed by said Western Cattle Brokerage Company, as well as certain liabilities for which the parties of the first part would have had a right to look to the said company in the event of a breach of the contract; and for the further reason that the contract did not express on its face any consideration to the parties of the first part for transferring their land to the corporation to be created, to represent the stock thereof to be sold by the parties of the second part. The plaintiff in his amended petition seeks to avoid the infirmities of the written contract by setting up that prior to the reduction of the contract to writing the plaintiff and defendants had an oral agreement to the effect as follows:

"That defendants should organize, as speedily as possible, a corporation under the laws of the state of Texas, to be known as the Pennsylvania &

¶ 2. See *Contracts*, vol. 11, Cent. Dig. § 1119.

Texas Oil Company, with a capital stock of one million five hundred thousand dollars (\$1,500,000.00), whose offices should be in Kansas City, Missouri, and Beaumont, Texas, and the par value of whose stock should be ten cents (10 cents) and one dollar (\$1.00) per share. It was also agreed that the defendants should furnish one representative man, in addition to themselves, as incorporators of said oil company, ten or eleven in number, at Kansas City and other eastern points, and upon the organization of said oil company defendants should convey to said oil company the lands hereinafter described, and on conveying said land to said oil company defendants were to become the owners of all the shares of capital stock of said oil company. It was further agreed that the defendants should furnish one hundred thousand dollars (\$100,000) of the capital stock of said oil company, to be disposed of among the directors and shareholders of the said oil company, and should also furnish ten thousand dollars (\$10,000.00) for newspaper and other advertisements, and the defendants should bear the expense of literature, stamps, and other necessary expenses. It was also agreed by plaintiff and defendants that said Western Cattle Brokerage Company or plaintiff should have the exclusive sale of said shares of stock, and for services in making an effort to sell said stock said Western Cattle Brokerage Company or plaintiff should receive ten (10) per cent. of the capital stock of said corporation, and for actually making sales of said stock should receive ten (10) per cent. of the proceeds of said sales, as a brokerage; and that said Western Cattle Brokerage Company or plaintiff should furnish an office in a centrally located building in Kansas City, Missouri, and should bear the expense of bookkeepers, stenographers, and assistant; and that while said brokerage company or plaintiff were engaged in trying to sell and in selling said stock said brokerage company or plaintiff were not to handle any other oil stock. It was further agreed by plaintiff and defendants that defendants might take said oil stock off the market at any time, on paying said brokerage company or plaintiff a reasonable compensation for services, and that the proceeds of sale of said defendants' stock should be deposited to the credit of said Pennsylvania & Texas Oil Company in a bank designated by defendants."

It is then alleged that on the same day plaintiff and defendants partially reduced said agreement to writing, and executed the same. The petition sets out, in *hac verba*, the written agreement as stated in the former opinion herein. This is followed by giving a description of the lands which were intended to be included, but not described, in the written agreement, with the further statement that, at the time said oral agreement was made and partially reduced to writing and executed by plaintiff and defendants, plaintiff and defendants did not know whether the directors of the said Western Cattle Brokerage Company would authorize it to become a party to said oral agreement and writing "hereinbefore set out and execute the same; that thereafter, on the ——— day of April, 1901, the directors of said company refused to authorize said company to become a party to said oral agreement and writing, or to execute the same, and that the plaintiff and defendants were advised thereof; "that thereupon and thereafter, on the ——— day of April, 1901, plaintiff and defendants, with such knowledge, agreed to adopt and did actually adopt as their agreement said oral agreement and said writing, which plaintiff and defendants had already executed; and plaintiff and defendants entered upon the performance of said terms and conditions of said oral agreement and said writing adopted by them as their agreement, and plaintiff duly performed all the conditions of said agreement to be performed by him, but defendants failed to ful-

ly perform their part of said oral agreement and writing, to the damage of plaintiff," etc.

There is no rule of law better established than that all precedent as well as contemporaneous negotiations and understandings in relation to a contract afterwards reduced to writing (in the absence of mistake, accident, or fraud, as understood in equity jurisprudence) are conclusively presumed to have been completely swallowed up, merged, and expressed in the written instrument, and that thenceforth the written instrument becomes the sole expression of the mind and agreement of the contracting parties. In other words, it is conclusively presumed that the entire engagement and the extent and manner of their undertaking were reduced to writing, and therefore evidence of any understanding and concurrence of minds of the parties in their antecedent negotiations respecting the contract resting in parol is wholly inadmissible to add to, take from, or in any wise vary the obligations of the parties as expressed in the written instrument. This rule is rigidly adhered to by the supreme court of this state. *Woodward v. McGaugh*, 8 Mo. 162; *Walker v. Engler*, 30 Mo. 130; *State v. Hoshaw*, 98 Mo. 358, 11 S. W. 759; *Morgan v. Porter*, 103 Mo. 135, 15 S. W. 289; *Tracy v. Iron Works Co.*, 104 Mo. 193, 16 S. W. 203; *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171.

It is not alleged in the petition that there was any mistake or fraud in the procurement of the written contract, nor is it sought to reform or recast it on any of the grounds recognized in equity for the reformation of written contracts. On the contrary, the action is purely one at law for the enforcement of a contract made.

It will be observed by a reference to the opinion of this court on the original demurrer that the court, speaking of the written contract, said:

"While it imposes the obligations and undertakings on the part of the parties of the second part on James H. Arnold or the Western Cattle Brokerage Company, the defendants, by its terms, are as much entitled to have the Western Cattle Brokerage Company bound as James H. Arnold. By the express terms of the contract, the obligation to put the stock on the market after the creation of the corporation, and to exploit and sell it, is imposed upon the Western Cattle Brokerage Company as much as it is on James H. Arnold. It is a reasonable inference that in agreeing to organize the corporation at their expense and trouble, and investing it with the title to their 500 acres of land, the inducement of the defendants thereto was that they should have the right to the services, influence, and responsibility of the organized body of the Western Cattle Brokerage Company as much so as that of Mr. Arnold. In other words, they were to have the personal responsibility of either, so that, in case of default on the part of the parties of the second part, they could look for indemnity to both Arnold and the brokerage company. \* \* \* The defendants never came to a compact alone with Arnold in the proposed enterprise. \* \* \* The contract stipulates that 'it is agreed and understood that the said parties of the second part are not to handle any other oil stock during the time they are handling the stock of said parties of the first part.' \* \* \* The contract, as drawn, not only entitled the defendants to the services of this brokerage company in disposing of the stock, based upon the 500 acres of land to be conveyed by them to the corporation, but the additional right and advantage of having the brokerage company refrain from handling any other oil stock during the obligated service of the parties of the second part to the defendants."

The court, further on, commenting upon the provision of the written contract allowing James H. Arnold alone a reasonable compensation in addition to the brokerage of 10 per cent. in the event the parties of the first part took the stock off the market, and that the contract might be changed or altered if acceded to alone by Arnold, said that for aught it knew these "were the reasons why the contract was not executed by the Western Cattle Brokerage Company." It is now alleged in the amended petition that the Western Cattle Brokerage Company did refuse, when the contract was presented to it, to enter into the agreement.

It is observable that the antecedent verbal agreement, set up in the amended petition, is quite different in several material respects from the written agreement. The written agreement obligated the parties of the second part—that is, John Scharbauer and John T. McElroy—"to pay ten per cent. on the capital stock as a brokerage, and ten per cent. to Jas. H. Arnold for his services"; whereas the oral agreement pleaded in the amended petition provides that the Western Cattle Brokerage Company or the plaintiff were to have "for services in making an effort to sell said stock ten per cent. of the capital stock of said corporation, and for actually making sales of said stock should receive ten per cent. of the proceeds of said sales, as a brokerage." The written contract recites that "it is agreed and understood that the said parties of the second part [that is, Arnold and the brokerage company] are not to handle any other oil stock during the time they were handling the stock of the said parties of the first part." The antecedent oral agreement, as alleged in the amended petition, is "that, while said brokerage company and the plaintiff were engaged in trying to sell and in selling said stock, said brokerage company or the plaintiff were not to handle any other oil stock"; thus showing that the oral agreement now sought to be enforced limits the obligation alternatively,—“while said brokerage company or the plaintiff were engaged in trying to sell or in selling said stock” they were not to handle any other oil stock. Quite different is the obligation expressed in the written contract that said parties of the second part are not to handle any other oil stock during the time they were handling the stock of said parties of the first part and that expressed in the antecedent oral agreement that they were not to handle any other oil stock while engaged in trying to sell and in selling said stock. The clear meaning of the written contract was that during the period of time this stock was on the market, being handled by them, they were not to have on their list any other stock for sale; whereas, the oral agreement only required them to refrain from handling any other oil stock while they were trying to sell, and in selling said stock. Under this latter arrangement, Arnold and the brokerage company, when not actually trying to sell, or engaged in selling, the stock of the oil company, could have consistently handled and sold other stock.

The written contract provided "that said Jas. H. Arnold or the Western Cattle Brokerage Company is to have the exclusive sale of said stock, but if, for any reason, the said McElroy and Scharbauer desire to take the stock off the market, they shall have the right

to do so by paying said Jas. H. Arnold a reasonable compensation for his services"; whereas, the antecedent oral agreement in this respect provided "that the defendants might take said oil stock off the market at any time on paying said brokerage company or plaintiff a reasonable compensation for services,"—thus attempting to avoid the criticism made in the opinion of the court on the written contract that it provided for paying Arnold alone for such compensation.

The learned counsel for plaintiff undertakes to escape from this dilemma by two contentions: (1) That only a part of the actual agreement between the parties was reduced to writing; and (2) that on the failure of the brokerage company to sign the written contract it was agreed between the plaintiff and defendants that they should fall back on, and go ahead with, the alleged antecedent oral agreement. It is true that, where a written contract does not purport on its face to express the entire contract, parol evidence may be admitted to supply the unexpressed parts, except in those instances where the nature or character of the contract is required by the statute of frauds to be fully expressed in writing. It will be found, on examination of the reported cases, where this rule has been applied, that it was in respect of some memorandum which on its face indicated that some essential part or detail was omitted, rendering it necessary to resort to parol to supply the necessary whole. 1 Greenl. Ev. par. 284a; Rollins v. Claybrook, 22 Mo. 407; State v. Tillery, 41 Mo. 389-391; O'Neil v. Crain, 67 Mo. 251, 252; Lash v. Parlin, 78 Mo. 391; Ringer v. Holtzclaw, 112 Mo. 523, 20 S. W. 800.

The rule has no application to the instance at bar where the written instrument on its face purports to be the deliberate expression of the whole contract between the parties. And certainly the rule does not authorize the substitution of an antecedent convention at variance with the obligations, liabilities, and responsibilities imposed by the written expression, which is between two parties on one side and two parties on the other, whereas the contract sought to be established is one between two parties on one side and only one party on the other.

As the written contract, which entitled the defendants to certain services, undertakings, and responsibilities of both Arnold and the brokerage company, as shown in the first opinion herein, failed, as the amended petition now alleges, by reason of the refusal of the brokerage company to execute it, the second contention, that thereupon an oral agreement with Arnold alone was substituted, must fail, for the obvious reason that no new consideration is alleged to support it. If it were conceded to the plaintiff that the written contract was such as could be waived by a subsequent oral agreement, such subsequent agreement being different in character and less advantageous to the defendants, and more advantageous to the plaintiff than the written one, the rule of law requiring some new consideration to support it has special application. This rule is tersely expressed by Judge Wagner, in *Bunce v. Beck*, 43 Mo. 280: "Parties may by subsequent parol agreement, upon sufficient consideration, change the mode of payment or other terms of their written contract, or they

may discard it altogether." So in *Fisher v. Stevens*, 143 Mo. 191, 44 S. W. 771, the court said: "A promissory note, like other chattels, may, by subsequent agreement by parol, be the subject-matter of contract, but any and all contracts with respect thereto, in order to be binding, must be supported by an independent consideration."

The written contract between these parties, for instance, provided that "it is the purpose of this contract and understanding that all the parties to this contract are to act in good faith, each with the other; and it is also understood that this contract cannot be changed or altered unless it is done in writing, signed by Jno. T. McElroy, Jno. Scharbaur, and Jas. H. Arnold, and attached hereto and made a part of this instrument,"—thus showing that it was in the mind of the parties when they came to consummate their agreement by reducing it to writing in order to avoid the too frequent contention of one or the other of the parties, when the contract is sought to be enforced, that it had been changed or altered by oral agreement between the parties, to cut such contention off by positively providing that unless such change or alteration should be reduced to writing and signed by the designated parties it should not avail. Most certainly when the plaintiff is now, as his amended petition alleges, seeking to rely both upon the written contract and an oral agreement, he cannot escape the just requirement of the law in seeking to omit from the transaction the brokerage company as one of the parties to whose responsibility, obligation, and liability the defendants were entitled to look for the faithful performance of the agreement in case of default of Arnold, without alleging and proving some new consideration moving from Arnold to the defendants to support the alleged substituted oral agreement. Independent of the contention of defendant's counsel that the contract sought to be enforced by the amended petition is in contravention of the statute of frauds, I am of the opinion that the demurrer is well taken.

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## MEMORANDUM DECISIONS.

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**ADAMS v. SHIRK et al.** (Circuit Court of Appeals, Seventh Circuit. October 9, 1902.) No. 911. In Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division. William Burry, for plaintiff in error. Frederic Ullmann and N. W. Hacker, for defendants in error. Dismissed on motion of counsel for plaintiff in error.

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**ALTON v. A. F. SHAPLEIGH HARDWARE CO.** (Circuit Court of Appeals, Fifth Circuit. November 25, 1902.) No. 1,132. Appeal from the District Court of the United States for the Western District of Texas. John Dowell, for appellant. Clarence H. Miller, for appellee. Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

**PER CURIAM.** The decree of the district court is affirmed.



AMERICAN STEAMSHIP CO. v. INDEMNITY MUT. MARINE ASSUR. CO., Limited. SAME v. MANNHEIM INS. CO. (Circuit Court of Appeals, Second Circuit. June 16, 1902.) Nos. 119, 137. Appeals from the District Court of the United States for the Southern District of New York. Wilhelmus Mynderse, for appellants. Harrington Putnam, for appellee. Before LA-COMBE and TOWNSEND, Circuit Judges.

PER CURIAM. Decrees (108 Fed. 421) affirmed.

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B. B. HILL MFG. CO. v. SAWYER-BOSS MFG. CO. et al. (two cases). (Circuit Court of Appeals, Second Circuit. November 17, 1902.) Nos. 24, 25. Appeals from the Circuit Court of the United States for the Eastern District of New York. W. E. Warland, for appellant. H. Albertus West, for appellee. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decrees (112 Fed. 144) affirmed, with costs, on opinion below.

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BISHOP'S ESTATE et al. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit.) No. 835. In Error to the District Court of the United States for the District of Hawaii. Kinney, Ballou & McClanahan, for plaintiffs in error. J. J. Dunne, U. S. Atty. Upon stipulation of counsel and motion of J. J. Dunne, cause dismissed.

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BRANDON et al. v. THOMASVILLE REAL ESTATE & IMPROVEMENT CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 25, 1902.) No. 1,195. Petition to Revise Proceedings in the District Court of the United States for the Southern District of Georgia, in Bankruptcy. John R. L. Smith and W. C. Snodgrass, for petitioners. Washington Dessau and Jos. Hansell Merrill, for respondents. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The petition for review herein is denied.

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In re BROWN. (Circuit Court of Appeals, Second Circuit. October 30, 1902.) Nos. 71, 76. Appeals from the District Court of the United States for the Southern District of New York. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The motion to dismiss appeals from orders of the district court of April 26, 1902, and May 17, 1902, are respectively granted, with costs.

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CITY OF SANTA CRUZ et al. v. WAITE. (Circuit Court of Appeals, Ninth Circuit. September 9, 1902.) No. 886. In Error to the Circuit Court of the United States for the Northern District of California. James G. Maguire and Lindsay & Netherson, for plaintiffs in error. Thomas & Gerstle, for defendant in error. Cause duly submitted after argument by respective counsel. Upon due consideration, etc., order entered affirming certain order of the circuit court, made on the 29th of July, 1902, which said order directed the issue of a peremptory writ of mandate out of said circuit court.

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THE CITY OF SEATTLE et al. (Circuit Court of Appeals, Ninth Circuit. September 12, 1902.) No. 850. Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington. William

Parmerlee and H. E. Snook, for appellant. Elmer E. Todd, for appellee. Motion to proceed in forma pauperis denied. Appeal dismissed for failure to print record, as required by rule 23 (31 C. C. A. cxxxvii, 90 Fed. cxxxvii).

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COLEMAN v. UNITED STATES. (Circuit Court of Appeals, Seventh Circuit. October 22, 1902.) No. 493. In Error to the Circuit Court of the United States for the Eastern District of Wisconsin. Elihu Coleman, for plaintiff in error. W. C. Phillips, for the United States. Dismissed pursuant to section 2, rule 23 (31 C. C. A. cxiv, 90 Fed. cxiv).

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CONSUMERS' CARBON CO. et al. v. ELLIPTICAL CARBON CO. (Circuit Court of Appeals, Seventh Circuit. October 8, 1902.) No. 900. Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois. Charles M. Peck, for appellant. Charles A. Brown, for appellee. Affirmed without opinion.

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C. O. OWEN & CO. v. LAW. (Circuit Court of Appeals, Seventh Circuit. August 28, 1902.) No. 922. Appeal from the District Court of the United States for the Northern District of Illinois. A. N. Eastman and Frank White, for appellant. E. O. Brown, George Packard, and W. Tudor Ap Madoc, for appellee. Dismissed on stipulation of counsel.

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DUKE v. DUPRE et al. (Circuit Court of Appeals, Fifth Circuit. December 9, 1902.) No. 1,045. Appeal from the Circuit Court of the United States for the Northern District of Texas. J. M. McCormick, for appellant. W. M. Sleeper, for appellee. Before PARDEE and SHELBY, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. We find no error in the rulings of the trial judge, nor on the face of the record, and the decree of the circuit court is affirmed.

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DUPREE v. MANSUR & TIBBETTS IMPLEMENT CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 25, 1902.) No. 1,171. Appeal from the District Court of the United States for the Northern District of Texas. W. M. Sleeper, for appellant. Geo. Clark, D. C. Bolinger, James D. Williamson, and J. M. McCormick, for appellees. Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

PER CURIAM. The transcript shows that much evidence was taken in the trial court, on which the report of the referee and the judgment of the trial judge denying the appellant a discharge were based. Without an agreed statement of facts or the production of the evidence taken in the court below, the appeal in this case cannot be considered. The judgment of the district court is affirmed.

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FEDER v. STEWART, HOWE & MAY CO. (Circuit Court of Appeals, Second Circuit. December 2, 1902.) No. 1. Appeal from a decree of the United States circuit court for the Southern district of New York holding invalid letters patent No. 29,350, granted to Harry Feder for a design for skirt binding. The opinion of the court below will be found in 105 Fed. 628. Kenyon & Kenyon and Alan D. Kenyon, for appellant. Wetmore & Jenner and Law-

rence E. Sexton, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The patent in suit, No. 29,350, was granted to the appellant for a design for a brush-edge skirt binding. In view of the large number of similar designs found in the record, it is extremely doubtful if the Feder design is sufficiently distinctive in appearance to be the subject of a patent. However this may be, it is manifest that, in any event, the patent, if upheld at all, must be restricted to the design there illustrated, and as so construed the appellee does not infringe. A purchaser of skirt binding, anxious to secure the patented design, would necessarily have to study it with reference to its minute details in order to differentiate it from the large number of similar patterns sold on the market, all having the same general features. Such a purchaser could not be deceived by the appellee's binding, where the staggered line is found at the top of the heading, instead of being placed almost directly above the brush, as in the design of the patent. The decree is affirmed.

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GORHAM v. BROAD RIVER TP. (Circuit Court of Appeals, Fourth Circuit, November 6, 1902.) No. 436. In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston. See 113 Fed. 83. J. E. Burke, for plaintiff in error. W. B. McCaw and D. E. Finley, for defendant in error. Before MORRIS, BRAWLEY, and WADDILL, District Judges.

PER CURIAM. In the foregoing findings (109 Fed. 772) the facts are clearly stated, and the conclusions of law are fully supported by the authorities cited. We adopt the opinion of the circuit judge, and do not deem it necessary to add to it. Judgment affirmed.

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GREEN et al. v. WESTERN UNION TEL. CO. (Circuit Court of Appeals, Fifth Circuit, November 25, 1902.) No. 1,148. In Error to the District Court of the United States for the Western District of Texas. William Aubrey, for plaintiffs in error. Geo. H. Fearons and J. E. Webb, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

PER CURIAM. It is very doubtful whether the record in this case presents any question for our review. See *Morris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. The plaintiff in error urges that the evidence does not support the finding that there was a contract between the parties, which precludes the right to recover on a quantum meruit. The evidence in the case is all found in the bill of exceptions, and we have examined the same. We are satisfied that the finding of the trial judge is amply supported by the evidence. The judgment of the circuit court is affirmed.

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HECKMAN et al. v. MARTIN et al. (Circuit Court of Appeals, Ninth Circuit, October 27, 1902.) No. 828. Appeal from the District Court of the United States for the First Division of the District of Alaska. Winn & Shackelford and Oscar Foote, for appellants. Elliott McAllister, for appellees. Cause dismissed for failure to print record required by rule 23 (31 C. C. A. cxxxvii, 90 Fed. cxxxvii).

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HOWELL TORPEDO CO. v. E. W. BLISS CO. (Circuit Court of Appeals, Second Circuit, December 2, 1902.) No. 32. Appeal from the Circuit Court of the United States for the Eastern District of New York. Appeal from a decree of the circuit court, Eastern district of New York (111 Fed. 906), dismissing bill for alleged infringement of United States patent No. 311,325, to

Admiral John A. Howell, January 27, 1895, for improvements in marine torpedoes. The defendant uses what is known as the "Obry Steering Gear." Ernest Wilkinson, for appellant. Arthur C. Fraser, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. We think it unnecessary to add anything to the clear and exhaustive discussion of the intricate question presented on this record, which will be found in Judge Thomas' opinion in the circuit court. We concur fully in his reasoning and his conclusions. The decree is affirmed, with costs.

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JEUNG JUEN HO v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 6, 1902.) No. 755. In Error to the District Court of the United States for the Northern District of California. Samuel M. Shortridge, Louis P. Boardman, and Denson & Schlesinger, for plaintiff in error. Marshall B. Woodworth, U. S. Atty. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The facts in this case are stronger for the government than were those in the cases of Jeung Lin Heung v. U. S. (No. 764) 116 Fed. 1020, and Lee Ah Yin v. U. S. (No. 756) 116 Fed. 614, disposed of at the last term of the court. What was then said by this court, applied to the record in the present case, necessitates an affirmance of the judgment appealed from. The judgment is affirmed.

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KELEHER v. FRANKLIN COUNTY. (Circuit Court of Appeals, Seventh Circuit. October 7, 1902.) No. 914. In Error to the Circuit Court of the United States for the Southern District of Illinois. George A. Sanders, for plaintiff in error. D. M. Browning, for defendant in error. Dismissed, for failure to file brief, pursuant to rule 24 (31 C. C. A. cxvi, 90 Fed. cxvi).

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In re KELLOGG. (Circuit Court of Appeals, Second Circuit. December 2, 1902.) No. 15. Petition to Review an Order of the District Court of the United States for the Western District of New York. This cause comes here upon petition to review a decision of the district court sustaining the claim of the Berlin Machine Works to receive specific personal property, or its value, which property was in the possession of the bankrupt under a contract of sale which specifically provided that title should not pass till payment for the same was made. No payment has been made. Frank H. Robinson, for petitioner. John Griffin, opposed. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The facts are fully set forth in the opinion of the district judge, and there is no dispute about them. He has carefully discussed the propositions of law arising thereon, and we concur in his reasoning and conclusions. It seems unnecessary, therefore, to file any additional opinion here, especially in view of the circumstance that the subject has recently been discussed by this court in *Re New York Economical Printing Co.*, 49 C. C. A. 133, 110 Fed. 514. It was held in that case that "the bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed." Inasmuch as by the New York statute a conditional sale, such as this, of property not delivered to the vendee for consumption or sale (*In re Garcewich* [C. C. A.] 115 Fed. 87), is void only as against subsequent purchasers or pledgees or mortgagees in good faith, and not against creditors, the decision in *Re New York Economical Printing Co.*, *supra*, is controlling of the case at bar. Petitioner appreciates this fact, and his argument is addressed to a reargument of the questions settled in that case. We see no reason to change the opinion therein expressed, which was

enunciated after a careful consideration of the bankrupt law. No authority conflicting with the views therein expressed is cited; for cases in which by the state law conditional sales are void as against creditors are not in conflict with such opinion. The order of the district court (112 Fed. 52) is affirmed, with costs. See 113 Fed. 120.

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**KEMP et al. v. JENNINGS.** (Circuit Court of Appeals, Eighth Circuit. September 29, 1902.) No. 1,831. In Error to the Court of Appeals of the United States for the Indian Territory. O. W. Patchell, for defendant in error. Docketed and dismissed, pursuant to rule 16 (31 C. O. A. clix, 90 Fed. clix), on motion of the defendant in error.

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**LARIMORE et al. v. WRIGHT.** (Circuit Court of Appeals, Ninth Circuit. October 6, 1902.) No. 885. In Error to the District Court of the United States for the Second Division of the District of Alaska. Ira D. Orton, F. D. Fuller, J. C. Campbell, and W. H. Metson, for plaintiffs in error. Upon motion of J. C. Campbell, Esq., counsel for plaintiffs in error, cause dismissed.

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**LOUISVILLE TRUST CO. v. LOUISVILLE, N. A. & C. RY. CO.** (Circuit Court of Appeals, Seventh Circuit. October 30, 1902.) No. 785. Appeal from the Circuit Court of the United States for the District of Indiana. St. John Boyle and Swager Sherley, for appellant. Adrian H. Joline, G. W. Kretzinger, E. C. Field, and H. B. Turner, for appellee. Dismissed on motion of counsel for appellant.

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**LOUISVILLE & N. R. CO. et al. v. MILLER GRAIN & ELEVATOR CO.** (Circuit Court of Appeals, Eighth Circuit. September 29, 1902.) No. 1,742. In Error to the Circuit Court of the United States for the Eastern District of Missouri. P. Taylor Bryan, F. W. Lehmann, and Percy Werner, for plaintiffs in error. Adiel Sherwood and Frederick H. Bacon, for defendant in error. Writ of error dismissed, at costs of plaintiffs in error, pursuant to stipulation.

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**McCLAUGHERY v. READ.** (Circuit Court of Appeals, Eighth Circuit. October 27, 1902.) No. 1,745. Appeal from the Circuit Court of the United States for the District of Kansas. John S. Dean, for appellant. John H. Atwood and William W. Hooper, for appellee. Dismissed, on motion of appellant, without costs to either party in this court.

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**NATIONAL BANK OF REPUBLIC v. CITY NAT. BANK.** (Circuit Court of Appeals, Seventh Circuit. September 24, 1902.) No. 919. In Error to the Circuit Court of the United States for the Northern District of Illinois. Jacob Newman, for plaintiff in error. Joseph H. Defrees, John G. Campbell, and William Brace, for defendant in error. Dismissed on stipulation of counsel.

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**NORTHERN PAC. RY. CO. v. CUNNINGHAM.** (Circuit Court of Appeals, Ninth Circuit. September 8, 1902.) No. 824. In Error to the Circuit Court of the United States for the Northern Division of the District of Washington. James F. McElroy and B. S. Grosscup, for plaintiff in error. Ballinger, Ronald & Battle, for defendant in error. Upon stipulation of counsel for the respective parties, cause dismissed.

**OLCOTT et al. v. CARTWRIGHT et al.** (Circuit Court of Appeals, Fifth Circuit. November 25, 1902.) No. 1,022. On Rehearing. Before PARDEE, MCCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. No one of the judges who participated in the decision of this case (115 Fed. 1020) desiring a rehearing, the application for rehearing is denied.

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**PIPER v. CASHELL et al.** (Circuit Court of Appeals, Ninth Circuit.) No. 853. In Error to the District Court of the United States for the Second Division of the District of Alaska. H. E. Shields and C. S. Hannum, for plaintiff in error. Samuel Knight, for defendants in error.

PER CURIAM. In the above-entitled cause, counsel for the defendants in error having called the attention of the court to the fact that counsel who signed the brief for the plaintiff in error therein are not members of the bar of the circuit court of appeals, thereupon the court held that briefs which were not signed by counsel whose qualifications were consistent with the requirements of rule 7 of the court (31 C. C. A. cxliv, 90 Fed. cxliv) would not be considered by the court.

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**PLATT v. WILMOT.** (Circuit Court of Appeals, Second Circuit. October 30, 1902.) No. 126. In Error to the Circuit Court of the United States for the Northern District of New York. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Counsel having conceded that the questions involved herein are essentially the same as those in the case of *Hobbs v. Bank* (heretofore decided) 41 C. C. A. 205, 101 Fed. 75, the decision of the court below is affirmed, on the authority of that case.

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**ROUTAN v. MATHIAS.** (Circuit Court of Appeals, Seventh Circuit. October 17, 1902.) No. 897. Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois. James H. Hooper, for appellant. George W. Miller, for appellee. Affirmed without opinion.

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**STATE BANK OF HUMBOLDT et al. v. NATIONAL SURETY CO. OF NEW YORK et al.** (Circuit Court of Appeals, Eighth Circuit. December 1, 1902.) No. 1,530. Appeal from the Circuit Court of the United States for the District of Nebraska. John L. Webster and Isham Reavis, for appellants. Charles J. Greene and Ralph W. Breckenridge, for appellees. Appeal dismissed, with costs.

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**STRAND v. GRIFFITH et al.** (Circuit Court of Appeals, Eighth Circuit. December 1, 1902.) No. 1,787. In Error to the Circuit Court of the United States for the District of Minnesota. Henry J. Gjertsen, for plaintiff in error. A. B. Jackson, for defendants in error. Dismissed, on motion of defendants in error, with costs, pursuant to rules 23 and 24 (31 C. C. A. clxiii, clxiv, 90 Fed. clxiii, clxiv). See 109 Fed. 597.

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**SWEENEY et al. v. HANLEY.** (Circuit Court of Appeals, Ninth Circuit. October 30, 1902.) No. 848. Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho. W. B. Heyburn,

for appellant. John R. McBride, for appellee. Appeal duly argued and submitted to the court for consideration and decision. Order of circuit court of date May 17, 1902, granting an injunction, affirmed, with costs.

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**WALMARK v. AMERICAN BRIDGE CO.** (Circuit Court of Appeals, Seventh Circuit. October 14, 1902.) No. 899. In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois. Edward Maher, for plaintiff in error. Francis Lackner, Otto C. Butz, and Amos C. Miller, for defendant in error. Affirmed without opinion.

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**WARREN FEATHERBONE CO. v. DODGE.** (Circuit Court of Appeals, First Circuit. November 14, 1902.) No. 453. Appeal from the Circuit Court of the United States for the District of Massachusetts. Seabury C. Mastick and Frederick L. Emery, for appellant. J. Steuart Rusk, for appellee. An agreement was filed, signed by counsel for both parties, for the dismissal of the appeal, without costs, and thereupon the court (COLT, Circuit Judge, sitting) ordered that the appeal be dismissed, without costs, and that mandate issue forthwith. See 117 Fed. 860.

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**WILD GOOSE MINING & TRADING CO. et al. v. WINTERS et al.** (Circuit Court of Appeals, Ninth Circuit. September 8, 1902.) No. 783. Appeal from the District Court of the United States for the Northern Division of the District of Washington. Preston, Carr & Gilman, for appellants. Greene & Griffiths, for appellees. Upon application of counsel, cause dismissed.

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**WONG AH QUIE v. UNITED STATES.** (Circuit Court of Appeals, Ninth Circuit. October 6, 1902.) No. 759. Appeal from the District Court of the United States for the Northern District of California. Denson & Schlesinger, for appellant. Marshall B. Woodworth, U. S. Atty. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. In the face of the repeated decisions of this court, we cannot say that the judgment herein, finding that appellant was born in China, was clearly against the weight of evidence. The further question presented, as to whether or not a Chinese prostitute comes within the term "Chinese laborer," as used in the acts of congress, was decided in the affirmative in the case of *Lee Ah Yin v. U. S.* (C. C. A.) 116 Fed. 614. The judgment of the district court is affirmed.

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**AMERICAN GRAPHOPHONE CO. v. UNIVERSAL TALKING MACH. MFG. CO. et al.** (Circuit Court, S. D. New York. September 5, 1902.) Motion for Preliminary Injunction. C. A. L. Massie, for the motion. Howard W. Hayes, opposed.

LACOMBE, Circuit Judge. When this motion was under advisement some weeks ago, the circumstantial evidence presented by the markings on the disks was most persuasive. It was difficult to understand how it could be possible that the effect could be produced in a substance so soft it could be pushed aside without cutting or removal. Nevertheless the sworn denials were so positive, it seemed better to leave the question to be determined until after the proofs had been taken. The evidence which has now been presented by the defendant, many questions quite crucial in their character not being answered, does not overcome the case made by the exhibits and the affidavits presented on the original motion. The motion, now renewed upon the pleadings and affidavits already on file, the exhibits heretofore presented,

the deposition of Cheney, and the affidavits submitted by defendant, is granted, and preliminary injunction as prayed will issue. Injunction not to become operative for 10 days after this decision, and if, within such time, defendants take an appeal and claim preference, an order will be made staying operation of the injunction until after decision of court of appeals.

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**BRY v. LUPTON et al.** (Circuit Court, S. D. New York. September 6, 1902.) In Equity. Horwitz & Samuels, for complainant. Charles O. Brewster (Wallace Macfarlane, of counsel), for defendants.

HAZEL, District Judge. The allegations of fraud contained in the bill are not sustained by the proofs. The balance sheets presented to complainant, in view of the mistakes pointed out by his expert accountant, did not become an account stated. The complainant objected to each account when presented, giving as his reason that the balance sheet did not contain a true statement of the business. There was very little ground to the objection. A few errors were discovered, however, and I do not think the statements were conclusive. The bill also alleges that the unsettled accounts between the parties are numerous and complicated. It is therefore deemed best to take jurisdiction of the subject-matter in equity. The complainant had no interest in the wheels, bobbins, molds, or office fixtures at the termination of the contract. The agreement to share in net profits expressly provided that "tools and other necessary requisites for starting a new business shall be put down as expenses." I think the articles mentioned come within the classification. The allegations of undervaluation of merchandise and the claims to profits arising out of the insurance received by defendants are only sustainable on the ground of defendants' fraud. As no substantial proofs are before me upon which to base an adjudication, either that the acts of the defendants were fraudulent or that complainant had any interest in the machinery or property of the defendants, these items are not allowed. Defendant Edward A. Lupton's charge of \$225 for expenses in going to England is objected to by complainant. The charge is attempted to be justified by defendant Edward A. Lupton, who says that his trip to Europe concerned the complainant as one interested in their business; it being for the benefit of the enterprise. As Watson, one of the defendants, was in England at the time, it is not clear that Lupton's visit was necessary. Furthermore, Lupton stated to complainant, before leaving, that his object in going to England was to visit relatives. The complainant should not be forced to contribute to this expense. The answer admits an indebtedness to complainant on account of the contract amounting to \$419.15. This entitles complainant to a decree for the amount offered, together with \$56.25, his proportion of the \$225 item disallowed, making in all \$475.40. The action having been originally brought in the state court, where costs would be allowed, the recovery here is with costs. *Kreager v. Judd* (C. C.) 5 Fed. 27. Let a decree be entered accordingly.

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**CIMIOTTI UNHAIRING CO. et al. v. NEARSEAL UNHAIRING CO.** (Circuit Court, S. D. New York. November 24, 1902.) Final Hearing on Pleadings and Proofs. Louis C. Raegener, for complainants. Wm. A. Redding and Wm. B. Greeley, for defendant.

LACOMBE, Circuit Judge. It is not perceived that the record here presented is materially different from that which was before the circuit court of appeals (115 Fed. 507) on appeal from the order for preliminary injunction. No additional prior patent or publication is introduced. No additional prior machine is shown. The experts' testimony in response to question and cross-question is fuller than it was when presented on affidavits merely, and the prior decision is, of course, discussed by them and criticised for supposed errors of assumption or reasoning; but the entire argument of defendant is in reality a plea for reconsideration of the former opinion on substantially the same state of facts. That plea should be addressed properly to the court



of appeals. This court will follow the construction already placed upon the eighth claim of the Sutton patent, although that construction was not by a unanimous court. The machines asserted to be infringements are the identical machines already held to be within the eighth claim, and the decree here should be in accordance with the decision of the appellate tribunal. Complainants may take the usual decree, with costs.

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**CORTELYOU et al. v. CARTER'S INK CO.** (Circuit Court, S. D. New York. August 23, 1902.) Sam'l O. Edmonds, for the motion. Henry W. Taft, opposed.

**LACOMBE**, Circuit Judge. Complainant may take a restraining order in the general form of the injunction in the Lowe Case, i. e. closely restricted to sales advertisements calculated to induce persons who bought Neostyle machines under contract as to the kind of ink to be used to violate their contract. The papers seem to indicate that the statements of defendant's selling agent were not suggested by defendant or its officers; but it is, of course, responsible for the statements, as well as the sale, to the extent, at least, that complainant may protect itself by injunction against the acts of some further over-zealous agent. Order to be settled on notice.

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**FOWLER et al. v. JARVIS-CONKLIN MORTGAGE TRUST CO.** (Circuit Court, S. D. New York. August 23, 1902.) Petition of Ezra Lippincott. Steele, De Friese & Frothingham, for petitioner.

**LACOMBE**, Circuit Judge. It is not perceived that the additional affidavits materially change the situation from what it was in April, 1900, when a like application was denied. It is sought to obtain an order turning over the entire balance of the fund, which was kept to meet belated claims of similar character, to the petitioner. There is no assurance but what, the next month after that is done, some one else will appear to claim a part of it, with better excuses for delay. The motion is denied, on the ground of laches, with leave to renew at the expiration of 10 years from the final decree. If no other claims shall have been presented before that time entitled to share the proceeds, with Mr. Lippincott, it may be quite appropriate to turn over the balance then remaining, after expenses of storage and commissions, to him.

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**LOAIZA et al. v. UNITED STATES.** (Circuit Court, S. D. New York. August 23, 1902.) Frank C. Avery, for importers. Henry L. Burnett, for the United States.

**LACOMBE**, Circuit Judge. The decision of the board of general appraisers is affirmed. The record discloses no evidence to support the allegations of the petition on which appellants rely.

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**MOVIUS et al. v. UNITED STATES.** (Circuit Court, S. D. New York. November 6, 1902.) No. 67. Appeal by the Importers from a Decision of the Board of General Appraisers Which Affirmed the Classification by the Collector of the Importation in Question. Hartley & Coleman, for importers. Charles D. Baker, Asst. U. S. Atty.

**TOWNSEND**, District Judge. The merchandise in question was assessed for duty as a coal tar color or dye, under paragraph 82, Tariff Act 1883, and was claimed to be free as an acid used for medicinal purposes, under paragraph 394 of said act. This question has already been decided by the circuit court of appeals in *Matheson & Co. v. U. S.*, 18 C. C. A. 143, 71 Fed. 394; and, following the ruling there laid down, the decision of the board of appraisers is reversed.

**SELCHOW et al. v. CHAFFEE & SELCHOW MFG. CO.** (Circuit Court, S. D. New York. September 22, 1902.) Motion for preliminary injunction. Arthur v. Briesen, for the motion. A. Bell Malcomson, opposed.

LACOMBE, Circuit Judge. Most of the questions presented should be reserved till final hearing. Defendant, however, until then, should refrain from marking games of "Parchesi" with, and from selling or offering to sell or advertising said games under, the name "Selchow," either singly or in combination with other words. The operation of this injunction is suspended for five days after entry of order to enable defendant to change the labels on goods already manufactured.

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**WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN ENGINEERING CO.** (Circuit Court, S. D. New York. October 18, 1902.) For former opinions, see 103 Fed. 491, and 113 Fed. 594. Wm. A. Jenner, for the motion. Fred'k H. Betts, opposed.

LACOMBE, Circuit Judge. Defendant may have 10 days from to-day in which to examine not more than two witnesses to testify that the two valves made by complainants and subjected to experiment are not made in accordance with the Holleman patent. In all other respects the motion is denied. The taking of this surrebuttal testimony shall not operate to change the position of the cause on the equity calendar.

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**WESTON ELECTRICAL INSTRUMENT CO. v. STEVENS et al.** (Circuit Court, S. D. New York. October 3, 1902.) In Equity. Suit for infringement of patents. On motion for leave to take testimony in surrebuttal. Guthrie, Cravath & Henderson, for the motion. Kenyon & Kenyon, opposed.

LACOMBE, Circuit Judge. Defendants may call not more than two witnesses to testify that an instrument constructed in accordance with drawing of December, 1888, would in their opinion be inoperative, briefly stating their reasons for entertaining such opinion, or not more than two witnesses to testify that they have tried to operate an instrument made in conformity to such drawing and have failed to succeed. (2) The motion to take surrebuttal with regard to publication in the London Electrician September 2 and 16, 1882, is denied. (3) As to each of the new publications put in in rebuttal, and referred to in paragraph 3 of the motion, defendants may call one witness to testify what he understands such publication to disclose. (4) Professor Anthony's statement in cross-question 223 is stricken out. The motion for surrebuttal as to split-spool denied. Ten days' time allowed to take this surrebuttal.

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**WHEATON v. DAILY TEL. CO.** (Circuit Court, S. D. New York. August 25, 1902.) Motion to Compel a Bank of Deposit to Turn Over Balance to Receiver. Gould & Wilkie, for the motion. Kneeland Moore, opposed.

LACOMBE, Circuit Judge. The bank should pay over to the receiver the balance of \$1,982.86, with interest from the date when receiver demanded it. That date is not disclosed by the papers. It may be shown by affidavit on settlement of order. This is without prejudice to whatever claim to a preference the bank may be advised to urge touching so much as it claims as creditor.